TAB 3

2014 ONCA 696
Ontario Court of Appeal

Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.

2014 CarswellOnt 14131, 2014 ONCA 696, 246 A.C.W.S. (3d) 207, 325 O.A.C. 231, 377 D.L.R. (4th) 369, 47 R.P.R. (5th) 15

Toronto Standard Condominium Corporation No. 1908 also known as Toronto Condominium Corporation No. 1908, Applicant (Appellant) and Stefco Plumbing & Mechanical Contracting Inc., Respondent (Respondent)

R.A. Blair, S.E. Pepall, C.W. Hourigan JJ.A.

Heard: August 22, 2014
Judgment: October 10, 2014
Docket: CA C58192

Proceedings: affirming *Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.* (2013), 2013 ONSC 7709, 2013 CarswellOnt 17594, 39 R.P.R. (5th) 320, Low J. (Ont. S.C.J.); additional reasons at *Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.* (2014), 2014 ONSC 160, 2014 CarswellOnt 85, Low J. (Ont. S.C.J.)

Counsel: Jonathan H. Fine, Yadvinder S. Toor, for Appellant
No one for Respondent, Stefco Plumbing & Mechanical Contracting Inc.
Doug A. Bourassa, for Intervening party, Business Development Bank of Canada

Subject: Civil Practice and Procedure; Corporate and Commercial; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Real property --- Condominiums — Common expenses

Respondent owned two units in condominium — Respondent was ordered to pay common expense arrears, plus interest, to applicant condominium corporation — Application judge declared that respondent's failure to pay such expenses did not constitute damages to applicant — Claim of bank, as mortgagee, therefore stood in priorty to claim of applicant — Applicant appealed — Appeal dismissed — Interpretation of s. 134 of Condominium Act, 1998 urged by applicant was contrary to legislative purpose of Act, scheme of Act, and was not consistent with wording of s. 134 of Act — Section 86 of Act granted applicant powerful tool by creating priority for collection of common expenses — However, use of that tool was conditional on applicant fulfilling its obligation to register its lien and provide notice to encumbrancers.

Real property --- Mortgages — Priorities — Between types of creditors — Mortgagee and lienholder

Respondent owned two units in condominium — Respondent was ordered to pay common expense arrears, plus interest, to applicant condominium corporation — Application judge declared that respondent's failure to pay such expenses did not constitute damages to applicant — Claim of bank, as mortgagee, therefore stood in priorty to claim of applicant — Applicant appealed — Appeal dismissed — Interpretation of s. 134 of Condominium Act, 1998 urged by applicant was contrary to legislative purpose of Act, scheme of Act, and was not consistent with wording of s. 134 of Act — Section 86 of Act granted applicant powerful tool by creating priority for collection of common expenses — However, use of that tool was conditional on applicant fulfilling its obligation to register its lien and provide notice to encumbrancers.

Table of Authorities

Cases considered by *C.W. Hourigan J.A.*:

Chapters Inc. v. Davies, Ward & Beck LLP (2001), 10 B.L.R. (3d) 104, 52 O.R. (3d) 566, 2001 CarswellOnt 178, 141 O.A.C. 380 (Ont. C.A.) — referred to

Gordon v. York Region Condominium Corp. No. 818 (2014), 2014 ONCA 549, 2014 CarswellOnt 9910 (Ont. C.A.) — referred to

Metropolitan Toronto Condominium Corp. No. 545 v. Stein (2006), 2006 CarswellOnt 3768, 53 C.L.R. (3d) 155, 212 O.A.C. 100, 46 R.P.R. (4th) 186 (Ont. C.A.) — referred to

Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc. (2005), 2005 CarswellOnt 1576, 253 D.L.R. (4th) 656, 31 R.P.R. (4th) 169, 197 O.A.C. 145 (Ont. C.A.) — followed

Mohawks of the Bay of Quinte v. Brant (2014), 2014 ONCA 565, 2014 CarswellOnt 10306 (Ont. C.A.) — considered

Montreal (Ville) v. 2952-1366 Québec inc. (2005), (sub nom. *Montréal (City) v. 2952-1366 Québec Inc.)* 134 C.R.R. (2d) 196, [2005] 3 S.C.R. 141, 201 C.C.C. (3d) 161, 32 Admin. L.R. (4th) 159, 15 M.P.L.R. (4th) 1, 36 C.R. (6th) 78, 2005 CarswellQue 9633, 2005 CarswellQue 9634, 2005 SCC 62, 258 D.L.R. (4th) 595, (sub nom. *Montreal (City) v. 2952-1366 Québec Inc.)* 340 N.R. 305, 18 C.E.L.R. (3d) 1, 33 C.R. (6th) 78 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33.C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 36 O.R. (3d) 418 (note), 36 O.R. (3d) 418 (S.C.C.) — referred to

Wasauksing First Nation v. Wasausink Lands Inc. (2004), 184 O.A.C. 84, [2004] 2 C.N.L.R. 355, 43 B.L.R. (3d) 244, 2004 CarswellOnt 936 (Ont. C.A.) — referred to

York Condominium Corp. No. 482 v. Christiansen (2003), 7 R.P.R. (4th) 139, 64 O.R. (3d) 65, 2003 CarswellOnt 6533, [2003] O.T.C. 76 (Ont. S.C.J.) — followed

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19
Generally — referred to

s. 84 — considered

s. 84(1) — considered

s. 85 — considered

s. 85(1) — considered

s. 85(2) — considered

s. 86 — considered

s. 86(1) — considered

s. 88 — considered

s. 92(4) — referred to

s. 98(4) — referred to

s. 105(2) — referred to

s. 134 — considered

s. 134(1) — considered

s. 134(3) — considered

s. 134(3)(b)(i) — referred to

s. 134(3)(b)(ii) — referred to

s. 134(5) — considered

s. 162(6) — referred to

s. 163(4) — referred to

Authorities considered:

Marriott and Dunn: Practice in Mortgage Remedies in Ontario, 5th ed., Amanda Jackson et al., eds. (Toronto: Carswell, 1991) (looseleaf)

APPEAL by applicant from judgment reported at *Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.* (2013), 2013 ONSC 7709, 2013 CarswellOnt 17594, 39 R.P.R. (5th) 320 (Ont. S.C.J.), finding that claim of bank stood in priority to claim of applicant.

C.W. Hourigan J.A.:

1 The appellant, Toronto Standard Condominium Corporation No. 1908 ("Toronto Standard"), commenced an application, wherein it sought, *inter alia*, an order that the respondent, Stefco Plumbing and Mechanical Contracting Inc. ("Stefco"), the owner of two condominium units, pay the full arrears of its outstanding condominium common expenses, plus interest and collection costs.

2 Stefco did not dispute that its common expenses were in arrears and did not participate in the application below or on this appeal. The central issue, both on the application and on this appeal, is the question of the priority between the claim of the Business Development Bank of Canada ("BDC") as mortgagee of Stefco's condominium units and the claim of Toronto Standard for common expenses.

3 The application judge granted an order that Stefco pay common expense arrears plus interest, but declared that Stefco's failure to pay such expenses did not constitute damages to Toronto Standard. The effect of that finding is that the claim of BDC, as mortgagee, stands in priority to the claim of Toronto Standard.

4 Toronto Standard appeals the decision, arguing that the application judge failed to properly interpret and apply the provisions of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), and that its claim has priority, pursuant to ss. 86(1) and 134(3).

5 For the reasons that follow, I would dismiss the appeal.

Facts

6 Toronto Standard is a non-profit corporation created under the Act by registration of a declaration on January 21, 2008 by 1288124 Ontario Inc. (the "Declarant").

7 On January 7, 2009, the Declarant transferred units 18 and 27, Level 1 to Stefco. On August 10, 2010, BDC registered first mortgages against the Stefco units.

8 Under the Act, the Declarant was obliged to hold a turn-over meeting transferring control of Toronto Standard to a new board of directors elected by the unit owners within 21 days of the transfer of a majority of units. It was also obliged to provide financial information and documentation to the new board. As of January 7, 2009, title to the majority of the units had been transferred from the Declarant to unit purchasers, but the turn-over meeting did not occur within the prescribed time limits and the Declarant did not produce any financial documents or accounting details.

9 On September 7, 2011, the unit owners took the initiative of holding their own turn-over meeting, at which they elected a new board. The Declarant did not recognize the new board as valid. Consequently, an application was commenced in the Superior Court by various unit owners regarding the validity of both the turn-over meeting and the new board.

10 As a result of **Stefco's** default under its mortgages, BDC commenced enforcement proceedings on December 9, 2011. **Stefco** was subsequently noted in default and BDC obtained default judgment for in excess of $1 million.

11 Judgment was delivered in the application bought by the unit owners on January 5, 2012. The court validated the elected board and ordered production of, *inter alia*, an accounting of all payments received to date by Toronto Standard on account of common expenses. The Declarant failed to comply with that order.

12 The new board of Toronto Standard eventually determined, through an examination of bank records, that there was no record of **Stefco** having paid any common expenses since the inception of the condominium. It is not disputed that **Stefco** owed common expense arrears totaling $49,790.84 as of June 30, 2012.

13 Pursuant to s. 84 of the Act, unit owners are obliged to contribute to the common expenses in the proportions specified in the declaration. The legislation also provides, in s. 85, that if an owner defaults in its obligation to contribute to common expenses, a lien arises in favour of the condominium corporation against the owner's unit for such expenses, plus interest, and reasonable legal and other costs incurred in the collection or attempted collection of the unpaid amount.

14 The lien expires three months after the default that gave rise to the lien occurred, unless the condominium corporation registers a certificate of lien. The condominium corporation is required, on or before the day that the certificate of lien is registered, to give written notice of its lien to every encumbrancer whose encumbrance is registered against title to the unit. Pursuant to s. 86 of the Act, the amounts subject to the lien have priority over all registered encumbrances, regardless of when they were registered.

15 It is not disputed that Toronto Standard did not register a certificate of lien with respect to **Stefco's** units until September 20, 2012. This lien only covers arrears from July, 2012 onward because the lien for the earlier common expenses had expired.

16 BDC proceeded by power of sale proceedings. The units were sold and BDC suffered a deficit of several hundred thousand dollars on the sale. This deficit gives rise to the priority dispute between BDC and Toronto Standard.

The Application

17 In May, 2012, Toronto Standard commenced an application seeking:

(i) A declaration that **Stefco** was in breach of its s. 84 obligation to pay common expenses since January, 2009;

(ii) An order pursuant to s. 134(1) of the Act, requiring **Stefco** to comply with its obligations under the Act, more particularly, an order requiring **Stefco** to comply with s. 84 of the Act;

(iii) An order pursuant to s. 134(3)(b)(i) of the Act that **Stefco** pay Toronto Standard the full amount of common expense arrears plus interest at a rate of 18%;

(iv) An order pursuant to s. 134(3)(b)(ii) of the Act that **Stefco** pay Toronto Standard its full costs of the application, and all costs associated with the collection and attempted collection of the sum claimed; and

(v) An order pursuant to s. 134(3)(b)(ii) of the Act that all damages and costs awarded be added to the common expenses payable in respect of **Stefco's** units.

18 Under s. 134(1) of the Act, an interested party (e.g. a condominium corporation, a unit owner, or a mortgagee of a unit) may make an application to the Superior Court of Justice for an order enforcing compliance with, *inter alia*, the Act, a declaration or by-laws. The court has the power to grant such relief as is fair and equitable in the circumstances, including an award of damages and costs. Pursuant to s. 134(5), if a condominium corporation obtains an award of damages or costs against an owner or occupier of a unit, the damages or costs, together with any additional actual costs of enforcement, shall be added to the common expenses for the unit.

19 In its application, Toronto Standard attempted to utilize the procedure in s. 134 of the Act to claim the arrears in common expenses as damages and have the damages added to the common expenses payable by **Stefco**. If successful, Toronto Standard could then register a lien for the full amount of the arrears, plus interest and collection costs. Pursuant to s. 86 of the Act, the lien would stand in priority to all other encumbrances, including the mortgage held by BDC, notwithstanding the fact that Toronto Standard had failed to register a certificate of lien within the time limits in s. 85.

20 The application judge characterized Toronto Standard's application as an attempt to "revive" lien rights previously lost. She observed that this revival strategy had been the subject of negative commentary in G. William Dunn & Wayne S. Gray, *Marriott and Dunn: Practice in Mortgage Remedies in Ontario*, 5th ed. (Scarborough: Carswell, 1995) at 56-8.2. The application judge also noted that the case law cited by Toronto Standard in which the revival strategy had been successfully employed, involved situations where no mortgagee was named as a party. Moreover, these cases did not provide any reasons for the decision to permit the revival of lien rights.

21 The application judge recognized that s. 134 grants the court a broad discretion to fashion an appropriate remedy, having regard to the equities of the case.She also found that "a central feature to the priority regime [in the Act] is that the lien loses priority if notice is not given" (at para. 51). She concluded that the equities favoured the mortgagee, as the failure of Toronto Standard to comply with the Act was prejudicial to the rights of the encumbrancers, including BDC.

22 The application judge declined to make a declaration that the common expense arrears constituted damages to Toronto Standard, stating at para. 54:

> I do not consider that the failure to pay common expenses by **Stefco** results in damages to the condominium corporation. The condominium corporation is a statutory conduit. Damages, if any, accrue to the unit owners who have borne the consequences of under-contribution to common expenses. In my view, it would not be fair and equitable to declare the product of this litigation a basis for a new lien right and thus in effect revive lien rights that the applicant has long ago allowed to expire. Accordingly, I do not make a declaration that the common expense arrears constitute damages to the condominium corporation.

23 The application was granted only to the extent that an order was made that **Stefco** pay common expenses arrears commencing January 1, 2009, with interest accruing from the date upon which each such payment came due. The application was otherwise dismissed. The effect of this order is that Toronto Standard's claim to common expense arrears arising before July 2012 is subject to the priority of BDC's mortgage.

Positions of the Parties

24 Toronto Standard submits the application judge made a "critical error" in finding that damages awarded under s. 134 for unpaid common expenses were not damages suffered by the condominium corporation, but by the individual unit owners.

25 In coming to this erroneous conclusion, the application judge is said to have failed to appreciate the inherent risk that a mortgagee of a condominium unit takes as a result of the provisions of the Act that permit a condominium corporation to add certain amounts to the common expenses of a unit. The application judge is also alleged to have erred in failing to recognize that the Act provides various methods for a condominium corporation to collect common expenses, not just the lien procedure in ss. 85 and 86.

26 In addition, Toronto Standard submits that the application judge failed to appreciate that the Act is consumer protection legislation, which favours the rights of unit owners over mortgagees and, thus, the application judge's conclusion that the equities favoured the mortgagee was in error.

27 BDC submits that the decision of the application judge under s. 134 of the Act was discretionary in nature and therefore, is entitled to a high degree of deference on appeal. Its position is that the application judge properly exercised her discretion by granting an order for the payment of arrears by **Stefco** and by refusing to allow the arrears to be collected by use of a priority lien.

28 BDC argues that the application judge did not err in concluding that damages in the nature of unpaid common expenses were not damages suffered by Toronto Standard. Rather, the application judge correctly recognized that the actual economic loss will be borne by the unit holders, as they will be obliged to contribute more money to cover the costs of the unpaid common expenses.

Issues

29 The appeal raises the following issues:

(i) What is the standard of review of the application judge's decision?

(ii) Can a condominium corporation's claim for common expenses constitute a claim for damages under s. 134 of the Act?

Analysis

(i) Relevant Sections of the Act

30 In order to consider these issues, it is necessary to have regard to the following sections of the Act:

> 84. (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.
>
> . . . . .
>
> 85. (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

. . . . .

86. (1) Subject to subsection (2), a lien mentioned in subsection 85 (1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose ...

. . . . .

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this *Act*, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

. . . . .

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

. . . . .

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

(ii) Standard of Review

31 The granting of a remedy under s. 134(3) of the Act is within the discretion of the application judge, who is obliged to consider what is fair and equitable in the circumstances of the case: *Metropolitan Toronto Condominium Corp. No. 545 v. Stein* (2006), 212 O.A.C. 100 (Ont. C.A.), at para. 37; *Gordon v. York Region Condominium Corp. No. 818*, 2014 ONCA 549 (Ont. C.A.), at para. 8.

32 The jurisdiction of an appellate court to review the exercise of a judicial discretion is very limited. An appellate court generally will not interfere unless it is clearly demonstrated that the judge applied the wrong legal standard or based his or her conclusions on irrelevant factors, or on factors to which he or she attached inappropriate weight: *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] 2 C.N.L.R. 355 (Ont. C.A.) at para. 82; *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566 (Ont. C.A.) at para. 43.

33 BDC submits that the application judge based her decision on a consideration of the fairness and equity of the situation. Therefore, the decision should attract considerable deference, and should not be subject to reversal on the facts of the case.

34 Toronto Standard accepts the limited jurisdiction of this court to interfere with the exercise of the discretion by the application judge, but submits that the application judge erred in law in finding that damages suffered as a consequence of unpaid common expenses are not damages suffered by the condominium corporation, but by the individual unit owners. Given

this legal error, it submits that this court has jurisdiction to reverse the finding of the application judge and award it damages under s. 134.

35 In my view, the application judge made a legal error in her implicit finding that unpaid common expenses can constitute damages under s. 134 of the Act. The application judge approached the issue by reviewing the scheme of the Act and then determined that the revival strategy was not fair and equitable in the circumstances of the case. The correct approach was to first determine whether a claim for common expenses as damages could be made under s. 134. If the answer to that question is no, there is no necessity to consider whether it is fair and equitable for Toronto Standard to be permitted to revive its expired lien.

36 This legal error adversely impacted on the application judge's exercise of discretion and consequently, appellate interference is warranted. It falls to this court to undertake the analysis on the critical issue of whether common expenses can constitute damages under s. 134 of the Act.

(iii) Common Expenses as s. 134 Damages

37 Whether unpaid common expenses can constitute damages under s. 134 is a matter of statutory interpretation. As LaForme J.A. recently stated in *Mohawks of the Bay of Quinte v. Brant*, 2014 ONCA 565 (Ont. C.A.), at para. 51, statutory interpretation cannot be founded on the wording of the legislation alone; strict construction of statutes has given way to purposive and contextual interpretation. The Supreme Court of Canada has described the court's role in the modern approach to statutory interpretation as engaging in a consideration of the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at paras. 9-12, citing *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21.

38 For the reasons that follow, I find that the interpretation of s. 134 urged by Toronto Standard is contrary to the legislative purpose of the Act, the scheme of the Act, and is not consistent with the wording of s.134.

39 The first part of the analysis involves a consideration of the legislative purpose behind the enactment of the sections of the Act dealing with the collection of common expenses. Toronto Standard describes the Act as being consumer protection legislation, which demonstrates a clear preference for the rights of a condominium corporation to collect common expenses over the rights of a mortgagee to enforce payment obligations under a mortgage.

40 That statement is accurate only to a point. In recognition of the special significance of common expenses in the on-going operation of a condominium building, s. 86 grants the condominium corporation a powerful tool by creating a priority for the collection of common expenses. However, the use of that tool is conditional on the condominium corporation fulfilling its obligation to register its lien and provide notice to encumbrancers.

41 In my view, this part of the Act is designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of the various stakeholders. Lane J. was correct in *York Condominium Corp. No. 482 v. Christiansen* (2003), 64 O.R. (3d) 65 (Ont. S.C.J.) when he observed, at para 5: "[A] principal object of the Act is to achieve fairness among the parties — owners, their tenants, their mortgagees, the corporation itself — in raising the money to keep the common enterprise solvent."

42 In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common expenses against the right of a mortgagee to have notice of a default in the payment of common expenses. This right of notice is of significant benefit to a mortgagee. It allows a mortgagee to determine if it should take steps to protect its interests under s. 88, by paying the common expenses, treating the failure to pay as a default under the mortgage, and commencing enforcement proceedings. The proposed revival strategy ignores the fair balance the legislature has struck between the rights of mortgagees and condominium corporations.

43 With respect to the purpose of s. 134 (5) of the Act, we have the guidance of this Court in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CarswellOnt 1576 (Ont. C.A.), at para. 40:

> [T]he section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

44 In the *Skyline* case, the issue was not whether common expenses could be classified as damages under s. 134. However, the court's interpretation of the purpose of the subsection is instructive. The court considered it to be a tool available to the condominium corporation to ensure that the costs of obtaining compliance orders were not borne by all of the unit owners. Such an additional tool is not necessary for the collection of common expenses because ss. 85 and 86 provide the condominium corporation with the process to collect such costs.

45 In summary, I am of the view that the revival scheme proposed by Toronto Standard is inconsistent with the purpose of the Act and the intention of the legislature. This interpretation of the Act upsets the balancing of the rights of stakeholders, by granting an unfettered right to a priority to condominium corporations, to the detriment of mortgagees.

46 Toronto Standard's position is also inconsistent with the scheme of the Act. If its interpretation were accepted, and a priority could be revived utilizing the s. 134 procedure for an expired lien right, s. 85(2) would be rendered meaningless. A condominium corporation could ignore its obligation to register a lien under that sub-section, safe in the knowledge that it could always assert its lien rights later and still claim priority. Thus, Toronto Standard's interpretation would result in a statute that is internally inconsistent.

47 Toronto Standard submits that the Act permits a condominium corporation to add to the common expenses on an unlimited basis in circumstances where the condominium corporation has carried out repair or restorative work, or constructed an addition to the building (e.g. ss. 92(4), 98(4), 105(2), 162(6) and 163(4)). It argues that mortgage lenders willingly accept the risk that the value of their security can be diminished or eliminated, if such costs are added to a unit owner's common expenses account. Therefore, it submits, that adding common expenses as damages under s. 134 is entirely consistent with the scheme of the Act.

48 The difficulty with this argument is threefold. First, the examples cited involve situations where the costs incurred are added to common expenses. However, in the present case, we are being invited to add common expenses to common expenses, through the artifice of briefly labelling them as damages. Second, although the sections cited permit a condominium corporation to increase a unit owner's common expenses, contrary to the submission of Toronto Standard, they do not provide a new mechanism for the enforcement of existing common expense claims. Third, while a mortgagee must recognize that it runs the risk of having its security imperiled by an increase in common expenses, it does so based on the understanding that such a priority is limited to expenses incurred in the three months prior to the registration of a lien.

49 In my view, therefore, Toronto Standard's proposed interpretation of s. 134 is inconsistent with the scheme of the Act.

50 Finally, the lien revival scheme is also inconsistent with the language of s. 134. Subsection 134(5) states that "damages or costs" awarded to a condominium corporation are to be "added to the common expenses". Clearly, on the plain language of the subsection, a distinction is drawn between damages and common expenses.

51 There is nothing in the language of s.134 that evidences any intention on the part of the legislature to permit common expenses to be classified as damages so that they can then be reclassified back to being common expenses. This circular statutory interpretation argument is simply not borne out by the wording of the section.

Disposition

52 I would dismiss the appeal.

53 As agreed between the parties, BDC, as the successful party, is entitled to its costs payable by Toronto Standard, fixed in the amount of $5,000, all inclusive.

R.A. Blair J.A.:

I agree

S.E. Pepall J.A.:

I agree

Appeal dismissed.

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TAB 4

2005 CarswellOnt 741
Ontario Superior Court of Justice

Talbot v. Pawelzik

2005 CarswellOnt 741, [2005] O.J. No. 748, 137 A.C.W.S. (3d) 645, 29 R.P.R. (4th) 56

JOAN EDITH TALBOT (Applicant) and SISI PAWELZIK and THE CORPORATION OF THE TOWNSHIP OF WEST GREY (Respondents)

Mossip J.

Heard: February 3, 2005
Judgment: February 25, 2005
Docket: 02-105

Counsel: Daniel R. Pust for Applicant
Peter E. Loucks for Respondent, Sisi Pawelzik
D.R. Greenfield for Respondent, The Corporation of the Township of West Grey

Subject: Public; Tax — Miscellaneous; Property; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Municipal law --- Tax sales — Requirements — Arrears — Certificate of arrears

P helped friend, S, by paying off $17,701.77 in realty tax arrears so that township would not sell S's house pursuant to Municipal Tax Sales Act, 1984 — P alleged that S agreed to give P first mortgage on his property, to secure amount she had advanced to township — S subsequently refused to sign draft mortgage, or any document which could stand as security for money P advanced — Township initially registered Tax Arrears Cancellation Certificate — Certificate set out that cancellation price was paid by person not entitled to receive notice under s. 4(1) of Act, and that accordingly there was no lien on land described in document in respect of such payment — P attended township office and was told lien could be registered in her favour — Township registered Amended Tax Arrears Cancellation Certificate, setting out the P had lien on property — S died, and his estate sold property to applicant — Applicant sought declaration that registration of Amended Tax Arrears Cancellation Certificate did not create lien or any other interest in land, and that it was to be vacated from title to property — Application dismissed as premature — There was no dispute that Act did not provide for issuing by treasurer of municipality of Amended Cancellation Certificate — Document accepted by registry office was "invalid" document and was inaccurate on its face, as P, in circumstances of payment by her of tax arrears, was clearly person who was not entitled to lien by virtue of provisions of Act — Certificate met definition of "instrument" — Registration of that instrument was clear notice to world that P claimed lien in her favour in amount of $17,701.77 on property in question — No statutory lien was created under Act, and it would not have been proper for court to create equitable lien when statute has occupied field of when lien will be created — Issue of what equitable claim P had would have to be determined in separate application by P.

Municipal law --- Tax collection and enforcement — Remedies available to municipality — Tax liens — General

Table of Authorities

Cases considered by *Mossip J.*:

Anton v. Enrich Maaser Construction Ltd. (1978), 19 O.R. (2d) 537, 3 R.P.R. 319, 86 D.L.R. (3d) 320, 1978 CarswellOnt 536 (Ont. C.A.) — considered

Finlay v. Weren Brothers Co. (1979), 1979 CarswellOnt 1424, 22 O.R. (2d) 667, 93 D.L.R. (3d) 693 (Ont. H.C.) — considered

Sutherland, Re (1967), [1967] 1 O.R. 611, 62 D.L.R. (2d) 11, 1967 CarswellOnt 244 (Ont. C.A.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — referred to

Municipal Tax Sales Act, 1984, S.O. 1984, c. 48
Generally — considered

s. 4(1) — referred to

Registry Act, R.S.O. 1980, c. 445
s. 73 — referred to

APPLICATION by purchaser for declaration that registration of Amended Tax Arrears Cancellation Certificate did not create lien or any other interest in land, and that it was to be vacated from title to property.

***Mossip J.*:**

1 Sisi Pawelzik helped a friend out, the late Kurt Stennull, by paying off approximately $17,000 in realty tax arrears, so the Township of Glenelg, now the Township of West Grey, (hereinafter called the Township), would not sell his house pursuant to the *Municipal Tax Sales Act, 1984*.

2 Ms. Pawelzik's evidence both in her Affidavit, and under oath on an examination for discovery, was that Mr. Stennull had agreed, both before and immediately after the arrears were paid, to give her a first mortgage on his property, to secure the $17,701.77 she had advanced to the Township on his behalf to pay off the tax arrears.

3 There is no dispute that Ms. Pawelzik advanced the money to pay off the tax arrears on November 8, 1995, two days before the property was to be sold by public tender.

4 There is also no dispute that Mr. Stennull subsequently refused to sign the draft mortgage prepared by Ms. Pawelzik's lawyer. In fact, he refused to sign any document which could stand as security for the money Ms. Pawelzik had advanced.

5 The Township initially registered a Tax Arrears Cancellation Certificate on December 13, 1995 as Instrument Number 364234. That Certificate set out that the cancellation price was paid by a person "not entitled to receive notice under subsection 4(1) of the *Act* and accordingly there is no lien on the land described in this document in respect of such payment."

6 Subsequently, when she could not obtain the co-operation of Mr. Stennull with respect to security, she attended at the office of the Township and was told a lien in her favour could be registered on the property.

7 On July 5, 1995, the Township solicitor registered an "Amended Tax Arrears Cancellation Certificate", as instrument number 371075, setting out that Ms. Pawelzik had a lien on the subject property in the amount of $17,701.77.

8 Mr. Stennull died on July 9 th , 2001. His estate sold the subject property to the Applicant, Joan Edith Talbot for consideration on July 27, 2001.

9 The applicant seeks a declaration that the registration of the Amended Tax Arrears Cancellation Certificate did not create a lien, nor any other interest in land, and that it is to be vacated from title to the subject property.

Decision

10 For the reasons that follow the relief sought in the application is not granted, and the Application is dismissed.

Analysis

11 There is no dispute that the *Municipal Sales Act* does not provide for the issuing by the Treasurer of a Municipality of an "Amended" Cancellation Certificate. Indeed, counsel for the Township submitted that upon the Registration by the Township of the first Cancellation Certificate, which set out that Ms. Pawelzik was not entitled to a lien on the property, the Township was *functus*. In other words, they had no business issuing and registering the "Amended" Certificate, which purported to give a lien on the property to Ms. Pawelzik. Several years later, an employee of the Township wrote to Ms. Pawelzik suggesting that she check with a lawyer as to the validity of her "lien".

12 Therefore, the document accepted by the Registry Office was an "invalid" document and it was inaccurate on its face, as Ms. Pawelzik was clearly a person who, in the circumstances of the payment by her of the tax arrears, was not entitled to a lien by virtue of the provisions of the *Municipal Sales Act.*

13 The Solicitor for the Applicant did not suggest that the document was not revealed on a search of title prior to closing. I do not know whether it was or it was not. I do not know if the Applicant's solicitor requisitioned its removal from title, or if an explanation as to the validity of the document was requested, what answer was given.

14 Obviously, the Applicant's solicitor's decision that this document did not create a valid lien, or his decision to accept an answer by the vendor's solicitor to a requisition about the lien, would not in and of itself answer this thorny question.

15 The legal issue on this Application therefore is this: did this invalid document, accepted by the Registry Office, "shelter" an equitable claim of Ms. Pawelzik, which was notice to the world that she was claiming some interest in the subject property, which claim had to be determined and dealt with, prior to a good and marketable title passing to the Applicant.

16 There is case law which supports the position of Ms. Pawelzik that registration of a defective instrument is notice to all persons of a claim to an interest in land. See for example, *Anton v. Enrich Maaser Construction Ltd.* (1978), 19 O.R. (2d) 537 (Ont. C.A.), wherein Mr. Justice Jessup dealt with the registration of a defective instrument. He found that by virtue of s. 73 of the *Registry Act*, now s. 74, that registration of the instrument constituted notice of it. In the case before Mr. Justice Jessup, the instruments were Agreements of Purchase and Sale. They were found to take priority over the subsequently registered mortgage, notwithstanding the deficiencies in the proofs for registration of the Agreements. See also *Finlay v. Weren Brothers Co.* (1979), 22 O.R. (2d) 667 (Ont. H.C.), which held that the registration of a document, which ought not to have been accepted by the Land Registrar for registration, still constituted notice of the interest set out in that instrument, in that case a co-tenancy agreement.

17 In the case of *Sutherland, Re*, [1967] 1 O.R. 611 (Ont. C.A.) Mr. Justice Bora Laskin, as he then was, wrote at p. 619 of that decision:

> Clearly, the present case is vastly different; it does profess to deal with an interest in the subject land, and to do so in a fashion connecting the claim with a transaction to which the titleholders were parties.
>
> ... but, equally, the Registry Act may also provide a deserved shelter in such situations for equitable or other interests, in themselves unregistrable, which are properly assertable against title holders whose names are on the abstract or who are claiming through persons whose names are on it.

18 The Amended Tax Arrears Cancellation Certificate, although an invalid document itself, fits Justice Laskin's definition of an "instrument", which he elaborates on at pp. 617-18 of *Sutherland, Re, supra*, as follows:

> ... this definition [under s. 1(d) of the *Registry Act*, will be met] so long as the instrument satisfies such formal requirements as identifiable parties, identifiable subject-matter which is directly or referentially dealt with on the face of the document, and gives an indication therein of the source of the interest dealt with so that it may be related to the history of the title on the particular abstract.

19 On the evidence before me, the Certificate in question meets the above definition of an instrument. The registration of that Instrument is clear notice to the world that Ms. Pawelzik claims a lien in her favour in the amount of $17,701.77, on the subject property.

20 I do not have to determine on this Application what the nature of Ms. Pawelzik claimed interest is, nor whether it is an interest that is enforceable against the Applicant or any other person dealing with title to the subject property. The thrust of the submissions of the applicant and the respondent Township were that there was no lien, nor other interest created by the registration of the Amended Tax Arrears Cancellation Certificate under the *Municipal Sales Act*. I agree. No statutory lien was created under that *Act*, and it would not be proper, according to case law under similar statutes, for example, the *Construction Lien Act*, for the court to create an equitable lien when a statute has occupied the field of when a lien will be created.

21 The respondent, Ms. Pawelzik, submitted that this Certificate "sheltered" an equitable claim of Ms. Pawelzik against any person who dealt with the subject property, including an arm's length purchaser. There was no counter-application by Ms. Pawelzik, seeking a determination of what, if any, equitable claim she has against the applicant or anyone else for that matter. That issue will have to be determined in a separate application by Ms. Pawelzik. That application will be based on the evidence adduced at the hearing on that issue, as it is applicable to the law on equitable liens, mortgages, or other such interests in land.

22 The application before me simply sought a declaration that the Amended Tax Arrears Cancellation Certificate created no lien or any other interest in land. For the reasons set out above, I dismiss that application as being premature. Ms. Pawelzik will have to proceed to court herself for a determination of what interest she has in the subject property which was sheltered by the registration of the above Certificate.

23 All parties may make brief written submissions to me on the issue of costs within 20 days of today's date, if they are unable to agree on that issue among themselves.

Application dismissed.

TAB 5

2005 CarswellOnt 7519
Ontario Superior Court of Justice

Rafat General Contractor Inc. v. 1015734 Ontario Ltd.

2005 CarswellOnt 7519, [2005] O.J. No. 5526, 144 A.C.W.S. (3d) 565, 52 C.L.R. (3d) 63, 81 O.R. (3d) 798

RAFAT GENERAL CONTRACTOR INC. (Plaintiff) v. 1015734 ONTARIO LTD., BONVIEW ONTARIO LTD., DOMENIC CIPRIANI and ANTHONY CIPRIANI (Defendants)

Sproat J.

Judgment: December 22, 2005
Docket: CV-05-007103-00

Counsel: Marco Drudi for Plaintiff
Edward Weidberg for Defendants

Subject: Contracts; Corporate and Commercial; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Construction law --- Construction and builders' liens — Procedure to obtain lien — Registering claim — General principles

Preserving lien — Plaintiff contractor supplied labour and materials for construction project and rendered its last invoice on March 30, 2005 — Contractor did not register claim for lien — Contractor brought action on July 14, 2005 and brought motion for certificate of pending litigation against lands of owner, being same lands against which it could have registered claim for lien — Motion dismissed — Construction Lien Act provides comprehensive code as to how liens are to be preserved — By supplying labour and material, lien arose in favour of contractor pursuant to Act — Section 31(1) of Act states that liens not preserved under Act expire, and thus contractor had interest in land which had expired — Having had lien in subject property created by Act, that it did not preserve, contractor could not then look to trust provisions in Act to later assert interest in same land — Scheme of Act, and fact that trust provisions give rise to personal rights only, led to conclusion that contractor had no tenable claim in interest in land.

Real property --- Certificate of pending litigation (lis pendens) — Right to register — Interest in land

Preserving lien — Plaintiff contractor supplied labour and materials for construction project and rendered its last invoice on March 30, 2005 — Contractor did not register claim for lien — Contractor brought action on July 14, 2005 and brought motion for certificate of pending litigation against lands of owner, being same lands against which it could have registered claim for lien — Motion dismissed — Construction Lien Act provides comprehensive code as to how liens are to be preserved — By supplying labour and material, lien arose in favour of contractor pursuant to Act — Section 31(1) of Act states that liens not preserved under Act expire, and thus contractor had interest in land which had expired — Having had lien in subject property created by Act, that it did not preserve, contractor could not then look to trust provisions in Act to later assert interest in same land — Scheme of Act, and fact that trust provisions give rise to personal rights only, led to conclusion that contractor had no tenable claim in interest in land.

Table of Authorities

Cases considered by *Sproat J.*:

Firenze Exteriors Inc. v. Westwing Construction Group Inc. (2005), 2005 CarswellOnt 917, 42 C.L.R. (3d) 129, 29 R.P.R. (4th) 179 (Ont. Master) — distinguished

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — considered

s. 31(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 103 — considered

MOTION by plaintiff contractor for certificate of pending litigation against lands of owner, being same lands against which contractor could have but did not register claim for lien.

***Sproat J.*:**

1 The Plaintiff supplied labour and materials for a construction project and it rendered its last invoice March 30, 2005. The Plaintiff did not register a claim for lien.

2 The Plaintiff commenced this action on July 14, 2005 and on this motion asked for a Certificate of Pending Litigation against the lands of the owner — being the same lands against which it could have registered a claim for lien.

3 In my opinion this motion must fail. The scheme of the *Construction Lien Act* ("the Act") is that it provides a comprehensive code as to how liens are to be preserved. It would subvert the statutory requirements as to how and when a claim for lien must be registered to allow contractors to ignore the time limits, lose their statutory lien and then assert an interest in the land and obtain a Certificate of Pending Litigation. Further, a claim based on the trust provisions of the *Act* does not give rise to a tenable claim to an interest in the subject land.

4 I quote from *Construction and Mechanics' Liens in Canada* (Macklem and Bristow) as follows:

> In *Clarkson Co. v. Ace Lbr. Ltd.*, [1963] S.C.R. 110, reversing [1962] O.R. 748, Ritchie J. stated that, in his opinion, the proper approach to the interpretation of the Mechanics' Lien Act had been expressed in the dissenting judgment of Kelly J.A. in the Court below, where he said at page 757:
>
> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

5 Pursuant to the *Construction Lien Act*, however, by supplying labour and material a lien arose in favour of the Plaintiff. As stated by Macklem and Bristow (supra):

> [...] the lien itself arises by virtue of the doing of work or the furnishing of material or services, but is kept alive or "preserved" by the registration of a claim for lien pursuant to the provisions of the statute. McDonald J., in *Curtis v. Richardson* (1990), 18 Man. R. 519 at 520 (K.B.), stated the position thus: "The lien is created as the work is done and not after its completion, and the filing of a lien is only a means of preserving and enforcing it." (at p. 6-1)

6 S. 31(1) of the *Act* states that liens not preserved under the *Act* expire. Thus, the Plaintiffs had an interest in land which has expired.

7 The question then is whether, having had a lien in the subject property created by the *Act*, that it did not preserve, the Plaintiff can then look to the trust provisions in the *Act*, to later assert an interest in the same land. Turning to the trust provisions of the *Act*, Macklem and Bristow (supra) state:

> Where the trust remedy is included in the Act, it provides added protection to the suppliers of work, materials, and service, beyond that afforded by the remedy of the lien. The action to enforce a claim against such a trust fund is a personal action, in the sense that it does not bind the project lands and does not depend upon registration or notice for its preservation or validity.

8 The provisions of the *Act* lead to the conclusion:

> (a) that when labour and materials are supplied an interest in land arises;
>
> (b) the lien expires if certain conditions are not met; and
>
> (c) the trust provisions are not intended to create any interest in land and give rise only to a personal right.

9 To obtain a Certificate of Pending Litigation a party must have a reasonable claim to an interest in land (*Courts of Justice Act*, s. 103). The scheme of the *Act*, and the fact that the trust provisions give rise to personal rights only, lead me to conclude that the plaintiff now has no tenable claim to an interest in the land.

10 I do not need to decide if *Firenze Exteriors Inc. v. Westwing Construction Group Inc.*, [2005] O.J. No. 934 (Ont. Master) (Master Albert) was correctly decided. That case is distinguishable in that it concerned an alleged breach of trust and diversion of funds from a construction project to construct a personal residence. With one exception all of the plaintiffs had worked only on the construction project and so had no lien rights under the *Act* against the personal residence. That is not, therefore, a case in which lien rights arose, were allowed to expire, and then an interest in the same land was later asserted.

11 This motion is, therefore, dismissed. The Defendants shall make written costs submissions by January 5, 2006, Plaintiff's submissions by January 13, 2006; and reply, if any, by January 18, 2006.

Motion dismissed.

TAB 6

2014 ONCA 261
Ontario Court of Appeal

909403 Ontario Ltd. v. DiMichele

2014 CarswellOnt 4064, 2014 ONCA 261, 241 A.C.W.S. (3d) 216, 319 O.A.C. 72, 42 R.P.R. (5th) 171, 95 E.T.R. (3d) 169

In the Matter of the Partition Act, R.S.O. 1990, c. P.4, ss. 2 and 3

And In the Matter of the Mortgages Act, R.S.O. 1990, c. M.40, s. 24

And In the Matter of the Trustee Act, R.S.O. 1990, c. T.23, ss. 5(1), 16(1) and 16(2)

And In the Matter of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 14.05(c), (d) and (e)

Roberto Di Michele, Applicant (Appellant/Respondent by way of cross-appeal) and Antonio Di Michele, Estate Trustee of the Estate of Adalgisa Di Michele, deceased, Antonio Di Michele, Michele Di Michele, 909403 Ontario Limited, Marsica Investments Limited, Cesidio Ranieri, Gilberto Olivieri, Alberto Ramelli, Capital One Bank and Avrum Slodovnick, and The Director of Titles, party pursuant to s. 57(14) of the Land Titles Act, Respondents (Respondents/Appellants by way of cross-appeal)

909403 Ontario Limited, Marsica Investments Ltd., Cesidio Ranieri and Alberto Ramelli, Applicants (Respondents/Appellants by way of cross-appeal) and Antonio Di Michele also known as Tony Di Michele, Michele Di Michele also known as Michael Di Michele, and Roberto Di Michele also known as Robert Di Michele, Respondents (Appellant/Respondent by way of cross-appeal)

J.C. MacPherson, E.A. Cronk, E.E. Gillese JJ.A.

Heard: February 24, 2014
Judgment: April 3, 2014
Docket: CA C56711, C56712

Proceedings: reversing in part *909403 Ontario Ltd. v. DiMichele* (2013), 2013 CarswellOnt 2287, 2013 ONSC 870, 30 R.P.R. (5th) 131, 86 E.T.R. (3d) 178, Allen J. (Ont. S.C.J.)

Counsel: D. Loucks, for Appellant / Respondent by way of cross-appeal
Mark Ross, for Respondents / Appellants by way of cross-appeal

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Estates and trusts --- Trustees — Powers and duties of trustees — Dealings with trust property — Power to mortgage — General principles

A, who was estate trustee, registered transmission by personal representative to take title of family home that deceased mother had owned and lived in until her death — Thereafter, applicants obtained default judgment against A in amount of $1.5 million — Looking to satisfy judgment, applicants brought application for writ of seizure and sale against title to property in which A and his two brothers, M and R, were beneficiaries under their mother's will — R lived with his parents on property for many years prior to their deaths and continued to live on property — R brought counter-application,

disputing right to sell property and asserting sole entitlement — Application was allowed and counter-application was dismissed — Trial judge found that property vested in A, R and M equal in one-third shares, declared mortgage to be valid and ordered partition and/or sale of property — R appealed and applicants cross-appealed — Appeal allowed in part; cross-appeal allowed — Mortgage was valid — A had legal right to grant mortgage as property was vested in him, as estate trustee, on his mother's death — A was entitled to be registered as owner of property in his mother's stead under s. 120 of Land Titles Act — A was in same position as if he had become registered owner of property under transfer for valuable consideration.

Estates and trusts — Estates — Legacies and devises — Vested or contingent gifts — Nature of interest — Contingent interests (conditions precedent)

A, who was estate trustee, registered transmission by personal representative to take title of family home that deceased mother had owned and lived in until her death — Thereafter, applicants obtained default judgment against A in amount of $1.5 million — Looking to satisfy judgment, applicants brought application for writ of seizure and sale against title to property in which A and his two brothers, M and R, were beneficiaries under their mother's will — R lived with his parents on property for many years prior to their deaths and continued to live on property — R brought counter-application, disputing right to sell property and asserting sole entitlement — Application was allowed and counter-application was dismissed — Trial judge found that although mortgage was valid, it was binding only on one-third share that she found A was entitled to receive as beneficiary under will — R appealed and applicants cross-appealed — Appeal allowed in part; cross-appeal allowed — First, s. 9 of Estates Administration Act did not apply in circumstances of this case, as s. 9 was not enacted to limit powers given to estate trustee under will — Second, beneficiaries' entitlement under will did not amount to property interests in property, as will did not give beneficiaries specific bequest of property, but, rather, it gave contingent interest in residue of estate — Third, pursuant to s. 93(3) of Land Titles Act, mortgage was registered free from any unregistered interest of beneficiaries; thus, even if beneficiaries had interest in property that pre-existed granting of mortgage, that interest was unregistered and therefore trumped by registered mortgage.

Real property — Registration of real property — Registration of land — Land titles — Fraud — Effect on title

A, who was estate trustee, registered transmission by personal representative to take title of family home that deceased mother had owned and lived in until her death — Thereafter, applicants obtained default judgment against A in amount of $1.5 million — Looking to satisfy judgment, applicants brought application for writ of seizure and sale against title to property in which A and his two brothers, M and R, were beneficiaries under their mother's will — R lived with his parents on property for many years prior to their deaths and continued to live on property — R brought counter-application, disputing right to sell property and asserting sole entitlement — Application was allowed and counter-application was dismissed — R appealed and applicants cross-appealed — Appeal allowed in part; cross-appeal allowed — Fact that A's lawyer offered mortgage as security eliminated any question of lack of bona fide purchasers because applicants were entitled to operate on assumption that A was acting lawfully in granting mortgage — R confused notion of fraudulent transaction with valid transaction, which might have amounted to breach of trust — Former might have invalidated transaction, but latter did not, as it gave rise to action by beneficiaries against trustees instead — While R and M might have had recourse against A for what appeared to be breach of his obligations as estate trustee, that did not mean that mortgage was granted fraudulently, nor did it render mortgage invalid.

Real property — Interests in real property — Co-ownership — Termination of co-tenancy — Partition — Court-ordered partition and sale

A, who was estate trustee, registered transmission by personal representative to take title of family home that deceased mother had owned and lived in until her death — Thereafter, applicants obtained default judgment against A in amount of $1.5 million — Looking to satisfy judgment, applicants brought application for writ of seizure and sale against title to property in which A and his two brothers, M and R, were beneficiaries under their mother's will — R lived with his parents on property for many years prior to their deaths and continued to live on property — R brought counter-application, disputing right to sell property and asserting sole entitlement — Application was allowed and counter-application was dismissed — Trial judge found that property vested in A, R and M equal in one-third shares, declared mortgage to be valid

and ordered partition and/or sale of property — R appealed and applicants cross-appealed — Appeal allowed in part; cross-appeal allowed — Applicants were not entitled to remedy under Partition Act — Law was clear that only persons entitled to immediate possession of estate in property were able to bring action or make application for its partition or sale — Because applicants were not entitled to immediate possession of estate in property, they were not entitled to remedy under Act.

Table of Authorities

Cases considered by *E.E. Gillese J.A.*:

Bathgate v. National Hockey League Pension Society (1994), 1994 CarswellOnt 643, 16 O.R. (3d) 761, 1 C.C.P.B. 209, 69 O.A.C. 269, 2 C.C.E.L. (2d) 94, 110 D.L.R. (4th) 609, 2 E.T.R. (2d) 1 (Ont. C.A.) — referred to

Bennett v. Burgis (1846), 67 E.R. 925, 5 Hare 295 (Eng. V.-C.) — referred to

Ferrier v. Civiero (2001), 42 R.P.R. (3d) 12, 147 O.A.C. 196, 2001 CarswellOnt 1717 (Ont. C.A.) — referred to

Leblanc, Re (1978), 2 E.T.R. 62, 83 D.L.R. (3d) 151, 1978 CarswellOnt 512, 18 O.R. (2d) 507 (Ont. C.A.) — referred to

Letterstedt v. Broers (1884), (1883-84) L.R. 9 App. Cas. 371, [1881-85] All E.R. Rep. 882, [1884] UKPC 1 (South Africa P.C.) — referred to

Moorhouse, Re (1946), [1946] O.W.N. 789, [1946] 4 D.L.R. 542, 1946 CarswellOnt 301 (Ont. H.C.) — referred to

Morrison v. Morrison (1917), 39 O.L.R. 163, 1917 CarswellOnt 199, 34 D.L.R. 677 (Ont. C.A.) — referred to

Parsons, Re (1940), [1940] Ch. 973 (Eng. Ch. Div.) — referred to

Proudfoot Estate, Re (1994), 3 E.T.R. (2d) 283, 1994 CarswellOnt 655 (Ont. Gen. Div.) — referred to

Proudfoot Estate, Re (1997), 19 E.T.R. (2d) 150, 1997 CarswellOnt 2298 (Ont. C.A.) — referred to

Spencer v. Riesberry (2012), 2012 CarswellOnt 7589, 2012 ONCA 418, 114 O.R. (3d) 375, 17 R.F.L. (7th) 94, 293 O.A.C. 52 (Ont. C.A.) — referred to

Spencer v. Salo (2013), 303 O.A.C. 374, 29 R.P.R. (5th) 1, (sub nom. *MacIsaac v. Salo)* 114 O.R. (3d) 226, 2013 ONCA 98, 2013 CarswellOnt 1606 (Ont. C.A.) — referred to

Stadelmier v. Hoffman (1986), 25 E.T.R. 174, 1986 CarswellOnt 667, (sub nom. *Becker, Re)* 57 O.R. (2d) 495 (Ont. Surr. Ct.) — referred to

Weil, Re (1961), [1961] O.R. 888, 30 D.L.R. (2d) 91, 1961 CarswellOnt 152 (Ont. C.A.) — referred to

719083 Ontario Ltd. v. 2174112 Ontario Inc. (2013), 28 R.P.R. (5th) 1, 2013 ONCA 11, 2013 CarswellOnt 250 (Ont. C.A.) — referred to

Statutes considered:

Estates Administration Act, R.S.O. 1990, c. E.22
s. 2(1) — considered

s. 9 — considered

s. 10 — considered

Land Titles Act, R.S.O. 1990, c. L.5
Generally — referred to

s. 1 "property" — considered

s. 62(2) — considered

s. 63 — considered

s. 93(1) — referred to

s. 93(3) — considered

s. 120 — considered

Partition Act, R.S.O. 1990, c. P.4
Generally — referred to

s. 3(1) — considered

Trustee Act, R.S.O. 1990, c. T.23
s. 1 — considered

s. 37(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 74.01 — considered

APPEAL by R and CROSS-APPEAL by applicants from judgment reported at *909403 Ontario Ltd. v. DiMichele* (2013), 2013 ONSC 870, 2013 CarswellOnt 2287, 86 E.T.R. (3d) 178, 30 R.P.R. (5th) 131 (Ont. S.C.J.).

***E.E. Gillese J.A.*:**

1 This appeal raises significant questions about the scope of an estate trustee's power to mortgage property governed by the *Land Titles Act*, R.S.O. 1990, c. L.5.

Overview

2 Adalgisa Di Michele died on September 5, 1996, leaving behind her three sons: Roberto, Michele and Antonio. Under Mrs. Di Michele's will (the "Will"), Antonio was named the estate trustee. Because the three brothers have the same last names, I will refer to each of them by their first names.

3 The Will provided that after all debts had been paid, Mrs. Di Michele's estate was to go, in equal shares, to those of her "issue alive at the date of distribution".

4 On March 21, 2002, in his capacity as estate trustee, Antonio registered a Transmission by Personal Representative to take title to the family home that his mother had owned and lived in until her death. The home was located at 269 Angelene Street, Mississauga, Ontario (the "Property") and is within the land titles system. By that point, all the estate debts had been paid and it was ready for distribution.

5 Roberto and Michele never registered on title any interest in, or claim to, the Property.

6 Starting in 2002, Antonio was embroiled in personal litigation with 909403 Ontario Limited, Marsica Investments Ltd., Cesidio Ranieri and Alberto Ramelli (collectively "Marsica" or the "respondents").

7 In June 2008, Antonio put up the Property as security in favour of Marsica by means of a mortgage (the "Mortgage").

8 In 2010, Marsica obtained judgment for $1.5 million against Antonio.

9 In 2011, Marsica brought an application in which it sought to have the Property sold.

10 Roberto (the "appellant") lived with his parents on the Property for many years prior to their deaths. He and his wife have continued to live on the Property until the present time. He says that he and his brothers agreed that after their mother's death, the Property would be his.

11 Roberto brought a counter-application, disputing Marsica's right to sell the Property and asserting sole entitlement to it.

12 By judgment dated February 6, 2013 [2013 CarswellOnt 2287 (Ont. S.C.J.)] (the "Judgment"), among other things, the trial judge:

1. declared that the Property vested in Antonio, Roberto and Michele on March 21, 2002, in equal one-third shares;

2. declared the Mortgage to be valid;

3. ordered the partition and/or sale of the Property "in accordance with the interests of the parties entitled to share in it"; and

4. dismissed Roberto's counter-application.

13 Roberto appeals. He asks this court to set aside the Mortgage and that part of the Judgment giving relief under the *Partition Act*, R.S.O. 1990, c. P.4, and order that he replace Antonio as the estate trustee.

14 Marsica cross-appeals, arguing that the trial judge erred in finding that the Mortgage binds only Antonio's one-third interest in the Property.

15 For the reasons that follow, I would allow the appeal in part and allow the cross-appeal.

Background

The Will

16 The key provisions in Mrs. Di Michele's Will are set out below. As will become evident, the breadth of the power to postpone sale given to the estate trustee is significant to the resolution of this appeal.

> I GIVE, DEVISE AND BEQUEATH all of my estate, both real and personal, ... unto my Trustee upon the following trusts, namely:

a) To pay all my just debts, funeral expenses and testamentary expenses ...;

b) To pay out of the residue of my estate all [duties and taxes];

c) ***To deliver all the rest and residue of my estate then remaining to my issue alive at the date of distribution in equal shares per stirpes.***

IN ORDER TO CARRY OUT the provisions of this my Will, ***I give my Trustee power to sell,*** call in ***and convert into money, all of my estate at such time or times, in such manner and upon such terms as my Trustee in his discretion may decide upon, with power and discretion to postpone such conversion*** of such estate or any part or parts thereof, ***for such length of time as he may think best,*** and I hereby declare that ***my Trustee may retain any portion of my estate in the form in which it may be at my death ... for such length of time as my Trustee in his discretion may deem advisable,*** without responsibility for loss, to the intent that investments or assets so retained shall be deemed to be authorized investments for all purposes of this my Will.

[Emphasis added.]

Antonio Acts as Estate Trustee

17 On December 16, 1997, Antonio obtained a Certificate of Appointment of Estate Trustee with a Will. The estate's only asset was the Property.

18 On March 21, 2002, the Property was transferred to Antonio by Transmission by Personal Representative.

19 The Property had been the Di Michele family home for several decades. The parents of the Di Michele brothers lived on the Property until their deaths. The father died in 1987 and the mother in 1996. The mother gained title to the Property on her husband's death.

20 At the time of the Property transfer to Antonio, he signed a certificate confirming that all the estate debts had been paid.

The 2002 action against Antonio

21 In 2002, Marsica commenced an action against Antonio in connection with a failed real estate investment scheme (the "2002 action").

22 A trial date was scheduled for March 31, 2008. In the weeks leading up to trial, it appeared that the matter would settle on the basis of a payment over time secured by a mortgage from Antonio over his cottage property in Bala, Ontario.

23 Antonio's lawyer, Avrum Slodovnick ("Slodovnick") told Marsica's lawyer Simon Schonblum ("Schonblum") that the settlement was 99% completed and that Antonio was just waiting for the blessing of his financial advisor.

24 The estimated length of the trial was 10 days. On the basis that the parties were so close to a settlement, counsel agreed to vacate the trial date.

25 Shortly after the trial date was vacated, Schonblum searched title for the Bala cottage property and found that Antonio had registered a $350,000.00 mortgage against it on April 4, 2008, thereby exhausting the remaining equity in the property.

Antonio seeks adjournment of 2002 action and grants the Mortgage

26 On June 4, 2008, a pre-trial conference was held in relation to the 2002 action. At that point, the trial was scheduled to proceed on June 16, 2008. Antonio sought an adjournment of the trial because he did not have his financial evidence in order.

27 Faced with yet another possible delay in the trial and in light of Antonio having encumbered the Bala cottage property after having offered it to Marsica as security, Marsica was concerned about securing funds for a possible judgment in the 2002 action.

28 A suggestion was made that Antonio might provide mortgage security in exchange for an adjournment so that Antonio could provide further documents and obtain a forensic accounting.

29 The parties were caucusing separately. At one point, Slodovnick pulled Schonblum out of his room and said that Antonio had given him instructions to mortgage the Property as security for any judgment that might follow trial. In exchange, Marsica was to consent to an adjournment to allow Antonio to obtain a forensic accounting.

30 Slodovnick then showed Schonblum a parcel register for the Property. On the face of the parcel register, under "Owners' Names", it said Antonio Di Michele. Under "Capacity" were the initials "TWW", which stand for "Trustee With a Will".

31 The parties ultimately reached an agreement, under the terms of which: Marsica agreed to adjourn the trial; Antonio granted security for any judgment that might arise in relation to the 2002 action by means of a blanket mortgage of $350,000.00 on the Bala cottage property and the Property; and the parties agreed to jointly retain a forensic accountant and split the cost of a review of further productions from Antonio of the books and records relating to the real estate investment (the "Agreement"). The parties were to return for a further pre-trial conference in November 2008.

32 On June 6, 2008, in his capacity as Antonio's lawyer, Slodovnick registered the mortgage against the Property.

Antonio's defence struck and judgment obtained in 2002 action

33 On April 1, 2010, Antonio's defence was struck by order of Master Dash. On June 22, 2010, Antonio's appeal of Master Dash's order was dismissed.

34 On October 11, 2010, the trial proceeded as an undefended trial before Stinson J.

35 By judgment dated October 14, 2010, Stinson J. awarded Marsica damages against Antonio in the sum of approximately $1.5 million.

Attempted enforcement of judgment in 2002 action

36 Acting on the judgment obtained in the 2002 action, the respondents obtained a writ of seizure and sale. They filed the writ against the Property with the Sheriff in the Peel region.

37 The Sheriff posted a notice at the Property that there would be a sheriff's sale. Roberto and his wife were living in the house. Roberto had lived at the Property while his parents were alive and continued living there after their deaths. By the time of trial, he had lived on the Property for some 50 years. He claimed that after his mother's death, he and his brothers had agreed that the Property would be his.

38 Roberto's lawyer wrote to counsel and the Sheriff to advise that he would be bringing an application to assert his interest in the Property.

The Application and Counter-Application

39 The respondents brought an application in which they sought, among other things, the sale of the Property. Roberto brought a counter-application in which he asserted sole ownership of the Property. He sought, among other things, an order directing Antonio to transfer the Property to him and appointing him in Antonio's stead as the estate trustee.

40 The two matters were converted into trials and heard together.

41 At trial, Michele took no position and filed no documents. Antonio appeared on his own behalf. He denied knowledge of the Will, his appointment as the estate trustee, and that the Property had been transmitted to him.

The Trial Decision

42 The trial judge rejected Antonio's evidence, stating that he was a "most unreliable and deceptive witness". She rejected his claim that someone else applied for the Certificate of Estate Trustee with a Will in his name and then registered the transmission of the Property to him as estate trustee without his knowledge. She found that Antonio was aware of the Will, of his appointment as estate trustee, and that the Property had been registered in his name as estate trustee.

43 The trial judge set out the parties' positions on the many issues that had been raised.

44 She then analysed and rejected Roberto's arguments that the Mortgage was fraudulent and invalid because Antonio had given it and he had no interest in the Property. She concluded that while Antonio was not forthright about the nature of his interest in the Property - that he held title only as estate trustee and that he shared beneficial interest in the Property with his two brothers - this alone did not place him within the bounds of fraud as defined in s. 1 of the *Land Titles Act*. Antonio was the registered owner of the property, he was not posing as a fictitious person, and there was no forgery.

45 The trial judge also rejected Roberto's argument that Antonio had no property interest in the Property when he gave the Mortgage, though she did not conclude that Antonio owned the whole Property. In her view, the Property automatically vested in the estate's beneficiaries (the three brothers), three years after Mrs. Di Michele's death, pursuant to s. 9 of the *Estates Administration Act*, R.S.O. 1990, c. E. 22. As a result, rather than owning the whole Property as estate trustee, Antonio owned only the third of the property to which he was beneficially entitled under the Will. The trial judge took note of s. 10 of the *Estates Administration Act*, which provides that nothing in s. 9 derogates from a power granted to an estate trustee in a will. She concluded that although the Will gave the estate trustee the power to sell the Property and to postpone such sale for such length of time as he deems advisable, this did not evidence a clear intent to oust s. 9 and delay the vesting of the estate.

46 The trial judge concluded that the Mortgage was valid. However, because she found that the brothers' beneficial interests in the Property had vested by the time that Antonio granted the Mortgage in 2008, she concluded that Antonio could only have granted a mortgage against his interest in the Property.

47 The trial judge further found that because the 2002 action was against Antonio personally, and not in his capacity as the estate trustee, he could only give as security that which he owned in his personal capacity.

48 Accordingly, the trial judge found the Mortgage to be enforceable only against Antonio's one-third interest in the Property.

49 She then ordered partition or sale of the Property in accordance with the interests of the parties entitled to share in it.

The Issues

50 The appellant raises a number of issues that can be summarized as follows. Did the motion judge err in:

1. finding that the Mortgage was valid;

2. finding that the respondents were entitled to a remedy under the *Partition Act*; and

3. failing to appoint Roberto as the estate trustee?

51 The respondents raise one issue by way of cross-appeal. Did the motion judge err in:

4. failing to find that the Mortgage bound the entire Property?

Analysis

1. Was the Mortgage valid?

52 The appellant makes three arguments going to the validity of the Mortgage. First, he submits that Antonio had no interest in the Property, either personally or in his capacity as estate trustee, over which he could grant a mortgage. Second, he argues that the respondents were not *bona fide* purchasers for value without notice. Third, he says that the lawyers involved at the time that the Mortgage was granted were unaware that Antonio was not the legal owner of the Property. Consequently, he contends, the Mortgage was a product of Antonio's fraudulent representation that he was the owner of the Property and, therefore, is a nullity.

53 I would not accept any of these submissions.

(a) Did Antonio have an interest in the Property?

54 The appellant's first submission - that Antonio had no interest in the Property - cannot stand in light of the relevant statutory provisions.

55 Section 2(1) of the *Estates Administration Act* provides that upon a person's death, all of that person's property vests in the estate trustee:

> ***All real and personal property that is vested in a person*** without a right in any other person to take by survivorship, ***on the person's death***, whether testate or intestate and despite any testamentary disposition, ***devolves to and becomes vested in his or her personal representative*** from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.
>
> [Emphasis added.]

56 Pursuant to s. 120 of the *Land Titles Act*, on Mrs. Di Michele's death, the land registrar was entitled, upon receiving an application from the estate trustee, to register the estate trustee as owner in place of the deceased:

> ***On the death of the sole registered owner*** or of the survivor of several joint registered owners ***of freehold land, such person shall be registered as owner*** in the place of the deceased owner or owners ***as may***, on the application of any person interested in the land, ***be appointed by the land registrar, regard being had*** to the rights of the several persons interested in the land and ***in particular to the selection of any such person as for the time being appears to the land registrar to be entitled according to law to be so appointed***, subject to an appeal to the Divisional Court in the prescribed manner by any person aggrieved by an order of the land registrar under this section.
>
> [Emphasis added.]

57 Section 63 of the *Land Titles Act* provides that in respect of registered dealings with land, the person registered in the place of a deceased owner is in the same position as if that person had taken the land under a transfer for valuable consideration:

> ***Any person registered in the place of a deceased owner*** or to whom a patent is issued as executor[,] administrator or estate trustee or in any representative capacity shall hold the land or charge, in respect of which the person is registered, upon the trusts and for the purposes to which the same is applicable by law and subject to any unregistered estates, rights, interests or equities subject to which the deceased owner held the same, but otherwise in all respects, ***and in particular as respects any registered dealings with such land or charge, the person shall be in the same position as if the person had taken the land or charge under a transfer for valuable consideration.***
>
> [Emphasis added.] [1]

58 As a result of these provisions, it is clear that Antonio had the legal right to grant the Mortgage. The Property vested in him, as the estate trustee, on his mother's death: *Estates Administration Act*, s. 2(1). He was entitled to be registered as owner

of the Property in his mother's stead: *Land Titles Act*, s. 120. He had the Property transferred into his name. He was thereafter the person registered in the place of his mother, the deceased owner: *Land Titles Act*, s. 63. The Mortgage was a registered dealing with the Property. Antonio was in the same position as if he had become the registered owner of the Property under a transfer for valuable consideration: *Land Titles Act*, s. 63. A registered owner has the right to grant a mortgage over his or her land: *Land Titles Act*, s. 93(1). [2]

59 Accordingly, it cannot be said that Antonio had no interest in the Property that entitled him to grant the Mortgage.

(b) Were the respondents bona fide purchasers for value without notice?

60 With respect to this submission, I begin by noting that the questions of value and consideration were not raised before the trial judge. Issues ought not to be raised for the first time on appeal. In any event, however, the contention that the respondents were not *bona fide* purchasers for value without notice must fail.

61 The first question is whether the respondents were *bona fides* when they took the Mortgage. In my view, the fact that Antonio's lawyer offered the mortgage as security eliminates any question of a lack of *bona fides*. Because Antonio's lawyer offered the Property as security, the respondents were entitled to operate on the assumption that Antonio was acting lawfully in granting the Mortgage. They were not obliged to go behind that implicit representation.

62 The next question is whether the respondents gave value for the Mortgage. This, too, is easily disposed of.

63 The Mortgage was granted as part of the Agreement. In exchange for the Mortgage, the respondents agreed to adjourn the trial and share the cost of the forensic accountant that Antonio required. Even if the adjournment alone does not constitute value within the meaning of the term "*bona fide* purchaser for value without notice", the cost of the forensic accountant borne by the respondents clearly does.

64 I turn next to the question of notice.

65 The appellant points to the fact that the Property register shows Antonio as holding the Property in the capacity of "TWW", meaning "Trustee With a Will". He says that this shows that the respondents had actual notice of the Will. Accordingly, he says, the respondents could not have simply accepted the Mortgage as security - they had to first inquire into whether Antonio could lawfully mortgage the Property.

66 I would reject this argument. In my view, s. 62(2) of the *Land Titles Act* provides a complete answer to it.

67 It is correct that when the parties entered into the Agreement, they were aware that Antonio held the Property as estate trustee. As the appellant points out, the lawyers for both parties had the parcel register in hand at that time and the parcel register showed Antonio as owner but in the capacity of "TWW" (Trustee With a Will).

68 However, s. 62(2) of the *Land Titles Act* provides that: (1) describing the owner of land as a trustee shall be deemed *not* to constitute notice of a trust, and (2) the description (of the owner as trustee) does *not* impose a duty on the person dealing with the owner to make inquiry as to the power of the owner in respect of the property. Section 62(2) reads as follows:

> ***Describing the owner of*** freehold or leasehold ***land*** or of a charge ***as a trustee***, whether the beneficiary or object of the trust is or is not mentioned, ***shall be deemed not to be a notice of a trust*** within the meaning of this section, ***nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge*** or the money secured by the charge, or otherwise, ***but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted.***
>
> [Emphasis added.]

69 Thus, Antonio's description as "TWW" (Trustee With a Will) is deemed not to be notice of a trust and it imposed no duty on the respondents to make any inquiry as to his power as owner to charge the Property.

70 Further, s. 62(2) provides that the owner may deal with the land as if the description as a trustee had not been inserted. This is subject to the registration of any caution or inhibition. However, in the present case, no caution or inhibition had been registered on the title to the Property.

71 Accordingly, I would reject the appellant's contention that the respondents were not *bona fide* purchasers for value without notice.

(c) Were the Lawyers operating under a misapprehension that Antonio was the owner?

72 In light of the evidence about the parcel register, the appellant's contention that the parties were all labouring under a misapprehension that Antonio was the owner of the Property must fail and with it, his argument that the Mortgage was obtained by fraud on Antonio's part. In this regard, the appellant has confused the notion of a fraudulent transaction with a valid transaction that might amount to a breach of trust. The former may invalidate the transaction. The latter does not. Rather, it gives rise to an action by the beneficiaries against the trustee.

73 While Roberto and Michele may have recourse against Antonio for what appears to be a breach of his obligations as the estate trustee, that does not mean that the Mortgage was granted fraudulently nor does it render the Mortgage invalid.

(d) Conclusion

74 For these reasons, I would dismiss this ground of appeal.

2. Were the respondents entitled to a remedy under the Partition Act?

75 The appellant contends that even if the Mortgage were valid, an order under the *Partition Act* could not be made because Marsica does not have a crystallized right of possession.

76 Marsica concedes this point. However, it contends that the end result of enforcement of the Mortgage will be such an order and the relief ordered pursuant to the *Partition Act* was an attempt by the trial judge to save the parties the cost and trouble of going through the intermediate steps relating to foreclosure.

77 Marsica is likely correct about the trial judge's motivation in ordering partition and sale. However, the law is clear: only persons entitled to the immediate possession of an estate in property may bring an action or make an application for its partition or sale.

78 Section 3(1) of the *Partition Act* reads as follows:

> ***Any person interested in land*** in Ontario, or the guardian of a minor ***entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition*** of such land ***or for the sale thereof*** under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.
>
> [Emphasis added.]

79 This court has interpreted s. 3(1) and its predecessors as permitting only those entitled to immediate possession of the property to apply for partition: see *Morrison v. Morrison* (1917), 39 O.L.R. 163 (Ont. C.A.), at pp. 168 and 171-72; and *Ferrier v. Civiero* (2001), 147 O.A.C. 196 (Ont. C.A.), at paras. 6 and 8.

80 Because the respondents were not entitled to immediate possession of an estate in the Property, they were not entitled to a remedy under the *Partition Act.*

81 Accordingly, I would allow this ground of appeal.

3. Should Roberto be appointed Estate Trustee in Antonio's stead?

82 In his counter-application, Roberto asked to be appointed as the estate trustee in Antonio's stead. The trial judge did not address this aspect of his counter-application. Roberto renews his request in this court, saying that Antonio and Michele "do not claim any interest in the estate" and "have shown that they have no interest in receiving a share of the estate". Roberto also states that Antonio "gifted" his share of the estate to him.

83 Section 37(1) of the *Trustee Act*, R.S.O. 1990, c. T.23, empowers the court to remove a personal representative (which is another term for an estate trustee) [3] and appoint "some other proper person". Section 37(1) reads as follows:

> The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

84 The court will remove an estate trustee only if doing so is clearly necessary to ensure the proper management of the trust: *Weil, Re*, [1961] O.R. 888 (Ont. C.A.), at p. 889. Situations in which removal may be justified include where the estate trustee has acted in a way that has endangered the trust property or otherwise shown a lack of honesty, proper capacity, or reasonable fidelity: *Letterstedt v. Broers* (1884), L.R. 9 App. Cas. 371 (South Africa P.C.), at pp. 385-86; *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (Ont. C.A.), at p. 778.

85 Thus, on the record, it appears that there may be good reason to remove Antonio as the estate trustee.

86 However, in my view, Roberto is not a "proper" person to serve as his replacement. I say this because Roberto's personal interests would seriously conflict with the obligations he would undertake as the estate trustee.

87 As a general rule, a person will not be appointed as a trustee if that person's duties as trustee would conflict with either his or her personal interests or duties which that person has undertaken apart from as trustee: see *Parsons, Re*, [1940] Ch. 973 (Eng. Ch. Div.), at p. 983; *Moorhouse, Re*, [1946] 4 D.L.R. 542 (Ont. H.C.), at p. 544; and *Stadelmier v. Hoffman* (1986), 57 O.R. (2d) 495 (Ont. Surr. Ct.), at pp. 498-99.

88 Two examples illustrate why Roberto's appointment as replacement estate trustee would run afoul of the general rule precluding those in a conflict position from being named estate trustee.

89 The first example flows from the estate trustee's overriding obligation to duly administer the estate. As the legal owner of the Property, the estate trustee will have to comply with the court orders flowing from these proceedings, including those relating to the Mortgage. However, the record makes it plain that Roberto claims the Property as his own and that he plans on appropriating the Property for himself. Rather than respecting and implementing the court orders in respect of the Property, it seems likely that he will resist all actions associated with enforcement of the Mortgage. In any event, his personal interests would be in conflict with his duties as the estate trustee in this regard.

90 The second example flows from the successor estate trustee's obligation to take steps to recover, for the estate, any losses caused by the prior estate trustee's defaults: see *Bennett v. Burgis* (1846), 5 Hare 295 (Eng. V.-C.), at p. 297. This would require Roberto, if he were appointed the successor estate trustee, to consider taking action against Antonio for any losses that Antonio may have caused the estate in his capacity as the initial estate trustee. But, it will be recalled, Roberto claims that Antonio made a gift to him of his interest in the estate. So, if Roberto *qua* estate trustee found that he ought to pursue Antonio, would he have to consider attacking the gift? It is self-evident that in such a situation, Roberto's obligation if he were the estate trustee would conflict with his personal interests.

91 I would add that the foregoing examples stand apart from the respondents' contention that the alleged gift from Antonio to Roberto of his interest in the estate was for the purpose of defeating, hindering or avoiding a creditor. By virtue of accepting the "gift" of Antonio's interest, Roberto would be complicit in such an act. Thus, this allegation also raises serious questions about whether Roberto is a proper person to serve as estate trustee.

92 Accordingly, I would dismiss this ground of appeal.

The Cross-Appeal

4. Did the Mortgage bind the entire Property?

93 The trial judge concluded that although the Mortgage was valid, it was binding only on the one-third share that she found Antonio was entitled to receive as a beneficiary under the Will. In reaching this conclusion, the trial judge relied on s. 9 of the *Estates Administration Act*.

94 Section 9 of the *Estates Administration Act* reads as follows:

> ***Real property not*** disposed of, conveyed to, divided or ***distributed among the persons beneficially entitled thereto*** under section 17 by the personal representative ***within three years after the death of the deceased is ... thenceforth vested in the persons beneficially entitled thereto under the will*** ... unless such personal representative, if any, has signed and registered, in the proper land registry office, a caution in Form 1 ...
>
> [Emphasis added.]

95 The trial judge saw that the Will gave Antonio, as estate trustee, an unqualified power to postpone sale of the Property. Nonetheless, in her view, "there is no clear intention in the Will that ... Anthony have discretion beyond three years" to distribute the estate.

96 As a result, pursuant to s. 9 of the *Estates Administration Act*, the trial judge found that the Property vested in the beneficiaries three years after Mrs. Di Michele's death, in the same manner as if the estate trustee had conveyed it to them. On this view, the vesting occurred before the Mortgage was granted. Therefore, the Mortgage could attach only to Antonio's one-third beneficial interest in the Property.

97 With respect, I do not agree. In my view, the Mortgage is binding on the whole of the Property. I reach this conclusion for three reasons.

98 First, s. 9 of the *Estates Administration Act* does not apply in the circumstances of this case. Section 9 (and its predecessors) was not enacted to limit the powers given to an estate trustee under a will. Rather, it was intended to give estate trustees additional powers, but only to the extent that the additional powers do not conflict with the provisions of the will. The intention of the deceased, as expressed in his or her will, is always paramount: *Leblanc, Re* (1978), 18 O.R. (2d) 507 (Ont. C.A.), at pp. 513-15.

99 This can be seen from s. 10 of the *Estates Administration Act*, which provides that nothing in s. 9 derogates from any right possessed by a trustee under the will. Section 10 reads as follows:

> Nothing in section 9 derogates from any right possessed by an executor or administrator with the will annexed under a will or under the Trustee Act or from any right possessed by a trustee under a will.

100 The paramountcy of the testator's intention is confirmed in the jurisprudence. Where a will gives the estate trustee a power to sell property at such times and in such manner as the estate trustee sees fit, s. 9 of the *Estates Administration Act* will not limit the scope of that power by requiring that the property vest after a specific period of time: *Proudfoot Estate, Re* (1994), 3 E.T.R. (2d) 283 (Ont. Gen. Div.), at paras. 8 and 11-12, var'd on other grounds (1997), 19 E.T.R. (2d) 150 (Ont. C.A.). See also *Leblanc, Re*, at p. 515.

101 It will be recalled that the Will gave Antonio, as estate trustee, the power to sell the Property "at such time or times, in such manner and upon such terms as my Trustee in his discretion may decide upon". It went on to expressly provide that the estate trustee could postpone sale:

> for such length of time as he may think best, and I hereby declare that my Trustee may retain any portion of my estate in the form in which it may be at my death ... for such length of time as my Trustee in his discretion may deem advisable...

102 On a plain reading of these provisions in the Will, the estate trustee was given the power to postpone sale of the Property for whatever length of time he deemed advisable. Thus, in my view, the trial judge erred in finding that the Will contained no clear intention that Antonio had the discretion to delay selling the Property beyond the three year limit in s. 9 of the *Estates Administration Act*. Consequently, s. 9 did not apply and the Property did not vest in the beneficiaries.

103 Second, the beneficiaries' entitlement under the Will did not amount to a property interest in the Property. The Will does not give the beneficiaries a specific bequest of the Property. Rather, it gives them a contingent interest in the residue of the estate. In this regard it will be recalled that the Will provided that the residue of the estate was to go to Mrs. Di Michele's "issue alive at the date of distribution". Accordingly, to become entitled, a beneficiary had to be alive on the date of distribution. Until distribution, the beneficiaries had only a contingent beneficial interest in the residue of the estate, as well as the personal right to compel the estate trustee to duly administer the estate.

104 A contingent beneficial interest in an estate does not give rise to a property interest in any specific asset of the estate, prior to or absent an appropriation of such asset to the beneficiary by the trustee: *Spencer v. Riesberry*, 2012 ONCA 418, 114 O.R. (3d) 375 (Ont. C.A.), at para. 37.

105 The estate had not been distributed at the time that the Mortgage was granted. Therefore, the beneficiaries' contingent interests in the residue had not vested. Hence, Antonio did not have a one-third interest in the Property at the time of the Mortgage.

106 Third, pursuant to s. 93(3) of the *Land Titles Act*, the Mortgage was registered free from any unregistered interest of the beneficiaries. Section 93(3) reads as follows:

> The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

107 Under Ontario's land titles system, the rights of a *bona fide* purchaser (which includes a mortgagee) for value who has registered its interest in the property trump any prior unregistered interests in the property: *719083 Ontario Ltd. v. 2174112 Ontario Inc.*, 2013 ONCA 11, 28 R.P.R. (5th) 1 (Ont. C.A.), at para. 12; *Spencer v. Salo*, 2013 ONCA 98, 114 O.R. (3d) 226 (Ont. C.A.), at para. 39.

108 In the present case, as I have already explained, the respondents were *bona fide* purchasers for value without notice. They registered their interest (the Mortgage) in the Property. Their interest would trump those with a prior unregistered interest in it. Therefore, even if the beneficiaries had an interest in the Property that pre-existed the granting of the Mortgage, that interest was unregistered and therefore was trumped by the registered Mortgage.

109 Accordingly, the Mortgage binds the entire Property.

110 Thus, I would allow the cross-appeal.

Disposition

111 Accordingly, I would allow the appeal in part and delete the references in the Judgment to relief under the *Partition Act*. I would allow the cross-appeal and, therefore, delete para. 2 of the Judgment.

112 The appellant succeeded only in respect of the second issue, which the respondents had conceded and which occupied a very small part of the appeal. In all other respects, the respondents were successful. Accordingly, I would order costs in favour of the respondents, fixed at $13,500, all inclusive.

J.C. MacPherson J.A.:

I agree.

E.A. Cronk J.A.:

I agree.

Appeal allowed in part; cross-appeal allowed.

Footnotes

1 I have quoted this provision of the *Land Titles Act* as it exists today, rather than as it existed at the time of Mrs. Di Michele's death in 1996. In 1998, the Ontario legislature amended this provision to include a reference to estate trustees (the previous versions of s. 63 had referred only to executors and administrators, which are categories of estate trustees): S.O. 1998, c. 18, Sched. E, s. 126. This amendment has no bearing on the issues raised in this appeal.

2 Section 93(1) reads as follows: "A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale."

3 A "personal representative" and an "estate trustee" are both defined as an executor, administrator, or administrator with the will annexed. Under s. 1 of the *Trustee Act* personal representative is defined as "an executor, an administrator, and an administrator with the will annexed") and under rule 74.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, estate trustee is defined as "an executor, administrator or administrator with the will annexed".

TAB 7

1985 CarswellOnt 3839
Ontario Supreme Court, High Court of Justice

Scherer v. Price Waterhouse Ltd.

1985 CarswellOnt 3839, [1985] O.J. No. 881, 32 A.C.W.S. (2d) 259

BETWEEN: BERNARD SCHERER Applicant - and PRICE WATERHOUSE LIMITED Trustee - and NATHAN TESSIS A Creditor

Sutherland J

Judgment: August 16, 1985
Docket: None given.

Counsel: B.H Kellock Q. C. and Linda D. Robinson for the Applicant
R.J. Morris for the Trustee
Igor Ellyn for Nathan Tessis

Subject: Civil Practice and Procedure; Property; Estates and Trusts

SUTHERLAND J.:

1 This is an application under the *Bankruptcy Act*, R.S.C. 1970, c.B-3, for an order declaring that Nathan Tessis is a secured creditor of the bankrupt, Agil Holdings Limited (hereinafter sometimes referred to as "Agil"), or in the alternative is the beneficiary of certain monies held in trust by Price Waterhouse Limited, the trustee of the bankruptcy estate of Agil. (Price Waterhouse Limited is hereinafter sometimes referred to as the "trustee"). The application, which also seeks appropriate directions, is brought on behalf of Bernard Scherer, who acted as solicitor for Nathan. Tessis with respect to a purported realty mortgage loan made by the latter to Agil.

2 Bernard Scherer (hereinafter sometimes referred to as "Scherer" and sometimes as "the applicant") was recognized by me as having standing to bring this application under the provisions of s.19 of the *Bankruptcy Act*, which section states as follows:

> 19. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

3 In 1977 Scherer acted for Nathan Tessis when the latter loaned $635,000 to Agil pursuant to a loan agreement (the "loan agreement") dated September 28, 1977, which called for Agil to collaterally secure the loan by a realty mortgage of premises known municipally as 1305-1309 Dundas Street West in Toronto, and which provided for the guarantee of the mortgage by Manuel Rodrigues, the president and principal shareholder of Agil. A mortgage document, containing such a guarantee, was executed and delivered and was registered against the title to the property on October 17, 1977, as Instrument CT259616 for the Registry Division of Toronto (No.63). The mortgage went into default and Scherer was instructed to commnce proceedings to enforce it.

4 It became apparent that, contrary to the statement made by Manuel Rodrigues in an affidavit attached to the mortgage to the effect that Agil did not own any abutting lands, Agil did in fact own abutting lands. Other counsel commenced to act for Tessis in seeking to enforce the mortgage. An action for possession and for judgment on the covenant to pay in the mortgage came on before Parker A.C.J.H.C., resulting in a judgment on the covenant, on consent, for $1,051,722.11, and in the dismissal of the claim for possession. In his oral reasons for judgment, delivered on September 15, 1981, Parker A.C.J.H.C., after noting the existence of the abutting lands and the absence of a consent under the *Planning Act* (now R.S.O. 1980, c.379) to the mortgage

in favour of Tessis, stated that "no legal interest in the lands passed to the mortgagee". The subsections of the *Planning Act* there referred to were s-ss. (4) and (7) of s.29, R.S.O. 1970, c.349, as amended, (now s-ss.29(5) and 29(18) of the *Planning Act*, R.S.O. 1980, c.379). The mortgage itself was found to contravene s.-s 29(4) (now s.-s.29(5) of the *Planning Act*, which provides that no person shall convey, mortgage or charge any part of any block of land if he retains the fee or equity of redemption in any abutting land unless a consent to the conveyance, mortgage or charge has been given by the committee of adjustment or other body or person authorized to give such consent. Subsection 29(7) (now s-s.29(18)) states as follows:

> An agreement, conveyance or mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

5 Subsequent to the trial Scerer was added as a party defendant to enable him to appeal the decision. On November 19, 1981, i.e. before the appeal came on for hearing, Agil made an assignment in bankruptcy, and the guarantor also became bankrupt. The trustee of the bankrupt estate of Agil was added as a party defendant and was represented by counsel on the appeal.

6 The following succinct statement of the background facts is taken from the judgment of MacKinnon A.C.J.O. for the Court of Appeal, reported at (1982) 39 O.R. (2d) 149, commencing at p.150:

> There is no dispute on the facts and a recital of the history of events will be helpful. On February 1, 1973, Agil Holdings Ltd. became the registered owner of a commercial property known municipally as 1305-1309 Dundas Street West in Toronto. The registration was pursuant to the provisions of the *Registry Act*, R.S.O. 1970, c.409 [now R.S.O. 1980, c.445].
>
> On March 5th of the same year Agil became the owner of the commercial property immediately adjacent or abutting to the west of 1305-1309, known municipally as 1315-1317 Dundas Street West. The registration of these lands was pursuant to the provisions of the *Land Titles Act*, R.S.O. 1970, 234 [now R.S.O. 1980, c:230]. From this time to the date of trial Agil was the registered owner of both properties save for a brief period in 1975 which is of no moment to the issues in this appeal.
>
> On October 17, 1977, Agil granted a first mortgage over 1305-1309 Dundas Street West to the plaintiff Tessis. The mortgage was guaranteed by Rodrigues, the mortgage being collateral to a promissory note between Agil and Rodrigues on the one hand and Tessis on the other.
>
> The search of title made by the appellant Scherer did not include a search of the adjoining lands registered in the land titles registry. Rodrigues as President of Agil, had sworn an affidavit to the mortgage in issue, stating as follows:
>
> > I am the President and Director of Agil Holdings Limited; the mortgagor and this crporation does not own any adjoining or abutting lands to that being mortgaged herein.
>
> This statement was, of course, false.
>
> The appellant's position is that he searched the title to the land being mortgaged but relied on Rodrigues' affidavit we have just quoted, and had no knowledge of Agil's interest in the abutting lands nor was he advised of any such interest by the solicitor acting for Agil and Rodrigues.
>
> It appears from the title that earlier mortgages or charges (four in all) had been granted by Agil on each of its respective properties which mortgages did not cover the adjoining lands owned by it.
>
> The mortgage to Tessis went into default and on May 9, 1979, Tessis commenced the action for payment and for possession of the mortgaged premises.
>
> On August 29, 1979, the committee of adjustment for the City of Toronto granted the application of Agil for a consent to permit the separate conveyance or mortgaging of 1305-1309 Dundas Street West and 1315-1317 Dundas Street West on condition that prior to the consent being issued the applicant was to file with the committee a letter from the commissioner

of public works certifying that all requirements with respect to municipal services have been satisfied. Agil was unable to deliver the required letter from the commissioner of public works as it was involved in the present litigation and had not proceeded with the construction referred to in its application documents.

Agil made a further application and by decision dated July 2, 1980, the committee of adjustment granted a consent to allow 1315-1317 Dundas Street West to be mortgaged separately from 1305-1309 Dundas Street West. Finally, on July 3, 1980, Tessis gave notice of his intention to exercise his power of sale under the mortgage unless the principal, interest and costs payable under it, as calculated, were paid by August 11, 1980.

The learned trial judge held that because of the failure to secure the required consent under the *Plannig Act* no legal interest in the lands passed to the mortgagee. Accordingly, while giving judgment, on consent, on the promissory note, he refused to grant an order of possession of the mortgaged lands to Tessis.

7 The Court of Appeal upheld the refusal of Parker A.C.J.H.C. to make an order for possession under the mortgage, and rejected the alternative argument that, even if the mortgage did not convey any interest in land, the provisions of the mortgage purporting to give the mortgagee a power of sale should be regarded as intact and as entitling the mortgagee to cause the sale of the property after the appropriate *Planning Act* consents to such sale had been obtained. MacKinnon A.C.J.O. held that the Act was breached when the mortgage was given without the required *Planning Act* consent and, in effect, that it was not open to the mortgagee to go to the committee of adjustment after the event to seek a consent that, if granted, would permit a sale that would result in the lands being acquired by a third party.

8 In his oral reasons Parker A.C.J.H.C. stated that under the purported mortgage "no *legal* interest in the lands passed to the mortgagee". (Emphasis added)

9 Before this application was made the Trustee had sold to a single buyer both the lands purported to have been mortgaged to Tessis and the abutting lands, for an aggregate price of $740,000, of which $560,000 was attributed to the lands purported to have been mortgaged to Tessis. Also before this application, Tessis filed a proof of claim in the Agil bankruptcy, as an unsecured creditor. It should also be noted that before the application came on Tessis had commenced an action against Scherer and against the solicitor for Agil, claiming damages against Scherer for breach of contract and for negligence in the performance of his duties as solicitor for Tessis, and damages in tort against the solicitors for Agil.

10 In the statement of fact and law submitted on behalf of Scherer this appliation was stated to raise two issues, therein described as follows:

(a) Whether Tessis is a secured creditor of Agil. It is the position of the Applicant that Tessis is the holder of an equitable mortgage or lien upon the mortgaged lands giving rise to a secured interest in the proceeds of sale of the mortgaged property now held by the Trustee.

(b) Whether Tessis is the beneficiary of a trust. It is the position of the Applicant that in the circumstances Agil, and now the Trustee in its place, holds the funds advanced by Tessis to Agil upon a constructive trust for Tessis.

11 As argued, the application involves difficult questions with respect to *res judicata* or, more properly, issue estoppel, predicated upon the difference between an action and a cause of action. The applicant contends that the action commenced by Tessis was for judgment on the covenant to pay set forth in the mortgage document, and for possession under the mortgage, and that the resulting judgment and the decision on the appeal therefrom were similarly confined and did not deal with the equitable claims now put forward based not on the mortgage but on the loan agreement. According to the applicant the claims put forward on this application constitute a different cause of action and so, even though the parties or their privies are the same as on appeal, there is no *res judicata* in the sense of cause of action estoppel, and there is no issue estoppel, because the issues on this application that are fundamental to it are different from any issues decided in the mortgage action that were fundamental to the decision in that action.

12 For the respondent it is submitted that it has been decided *in rem* and as between these parties that the mortgage passes or creates no interest in land, and it is further submitted that under the extended meaning given to *res judicata* in the landmark decision in *Henderson v. Henderson*, 3 Hare 100at p.103 where it was stated by Wigam V.C. that:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the same time ....

Scherer is estopped from raising the question of whether the debt of Agil to Tessis is secured upon any basis. It was also submitted by the respondent that the loan agreement was before the Court on the appeal, where Scherer was a party, and that arguments based upon the loan agreement therefore could and should have been made at that time, and that the applicant therefore cannot raise such arguments in these proceedings. Counsel for Tessis supports these contentions of the respondent. The latter argument raises the difficult question of the extent to which the extended meaning of *res judicata*, clearly applicable to cases cause of action estoppel, is or ought to be applicable to issue estoppel. Although there are strong policy reasons favouring an end to litigation, it was noted by Morden J.A. in *Hennig v. Northern Heights (Sault) Ltd. et al.* (1980), 30 O.R. (2d) 346, at p.355, that *Cross on Evidence*, 5th Ed. (1979), questions Lord Denning's suggestion (in *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4) that the extended form of *res judicata* (as in *Henderson*, *supra*,) may apply to issue estoppel. Thus, at p.333 of the last-mentioned work, the following statement appears:

> The second kind of estoppel by record *inter parties* is often called "issue stoppel". may be regarded as an extension of the first for, to quote Lord DENNING, M.R.: "within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been rased and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again." Although Lord DENNING went on to use words suggesting that the principle mentioned by WIGRAM, V.C., in connection with cause of action estoppel might apply to issue estoppel, it may be better to regard the latter as restricted to issues actually determined in the former litigation for there may be many reasons why a litigant did not raise a particular issue, and it would be unjust to prevent him from raising it in later proceedings.

With respect to the last sentence in the above quotation, there is a footnote reference to the reasons for judgment of Lords Reid and Upjohn in *Carl Zeiss Stiftung v. Rayne and Keeler, Ltd.*, [1966] 2 All E.R.

13 Although I shall have to return to issue estoppel and I recognize that a finding in that regard in favour of the respondent would make my remarks about the merits of certain claims *obiter*, I find it more convenient to continue by dealing upon their merits with the arguments of the applicant with respect to the first question, i.e. whether Tessis is a secured creditor in the bankruptcy.

Mortgage

14 As stated, Parker A.C.J.H.C. held that no legal interest in the lands passed to the mortgagee. Lest there be any suggestion that the mortgage itself may have passed an equitable, if not a legal, interest in the lands, I note that on the appeal MacKinnon A.C.J.O. states in *Tessis v. Scherer et al.*, *supra*, that:

> The *Planning Act* is clear that if the Act is breached *no* interest in the land is transferred by the mortgage.
>
> [Emphasis added]

The above quoted s-s.29(7) (now s-s.29(18) of the *Planning Act*) states that a mortgage made in contravention of that Act "does not create or convey *any* interest in land". (Emphasis added). In my opinion it is quite clear that by virtue of that subsectionthe mortgage does not create any legal or equitable interest in the land.

Loan Agreement

15 There is dispute as to whether the loan agreement comes within the requirements of s-s.29(7) (now s-s.29(18)) as:

> ... an agreement entered into subject to the express condition contained therein, that such agreement is to be effective only if the provisions of this section are complied with.

It was provided in the loan agreement that it was a condition to the obligation of Tessis to make the loan thereunder:

> 6. That all municipal and provincial by-laws, acts, statutes and regulations have been complied with and without limiting the generality of the foregoing this shall include building, zoning, health, fire, air pollution, plumbing and development;
>
> [Emphasis added]

16 The applicant argues that that provision amounts to an "express condition" as referred to in s-s.19(7) of the *Planning Act*. The respondent, not surprisingly, argues that it is not such an express condition. It was held in *Re Davmark Developments and Tripp* (1974), 5 O.R. (2d) 17, 49 D.L.R. (3d) 331, that to qualify as an "express condition", the wording in the agreement need not be identical to that contained in the *Planning Act* but must be such as to be satisfied only if there has been full compliance with s.29 of that Act. In *Small v. Van der Wee* r (1977), 17 O.R. (2d) 480, 80 D.L.R. (3d) 704, a condition that "vendor will comply with the provisions of the *Planning Act*" was held to be clearly acceptable although it made no specific reference to s.29 of the Act. The respondent cites the decision of Haines J. in *Rogers v. Leonard* (1973), 1 O.R. (3d) 57, 39 D.L.R. (3d) 349, holding that a mere statement of intent in an informal agreement, made between laymen with regard to the purchase and sale of a summer cottage, that all official papers required were to be drawn up and that all formalities were to be complie with, did not constitute an "express condition" within the meaning of s-s.29(7). In the last-mentioned case there was no ground for a belief that the parties to the agreement were even aware of the prohibitions of s.29 of the Act. By contrast, in the present case it may be inferred that the parties or at least their lawyers were aware of the existence of the *Planning Act*, and aware of the prohibitions of selling part of abutting lands without the required consent. In my opinion the above-quoted condition of the loan agreement is an "express condition" within the meaning of the subsection being sufficiently clear in its references to "zoning" and "development" to bring itself within the reasoning in *Davmark and Small, supra*. It is therefore unnecessary to consider the submissions made by the applicant as to rectification of the loan agreement to make it more clearly reflect the intent of Tessis that the agreement be subject to such an "express condition".

17 What then are or were the effects of that provision of the loan agreement? Firstly, as between the parties to the loan agreement, it meant that Tessis was not obligated to make the loan unless the condition had been satisfied. Tessis could not have been sued for damages if he had refused to make the loan when any consent required under s.29 of the *Planning Act* had not been obtained. Secondly, if the required *Planning Act* consents (and any other requirements referred to in condition 6 of the loan agreement) had been obtained or satisfied neither party would be prevented from enforcing the agreement, or from obtaining damages for its breach, by the fact that when the agreement was entered into the required *Planning Act* consents had not yet been obtained. In the case of an agreement of purchase and sale of lands abutting other lands of the vendor that are not covered by the agreement, the existence in the agreement of an "express condition" that the required consents be obtained under s.29 f the *Planning Act* would mean that when the consents were obtained the purchaser could, other things being equal, succeed in an action for specific performance, notwithstanding that at the time the conditional agreement was entered into the required consents had not yet been obtained. With respect to the last-mentioned effect, the situation is not quite so clear in the case of an agreement for a mortgage loan, because, of course, it is unlikely that such an agreement would be specifically enforceable, but even with regard to mortgage loan agreements the second effect of the exception would be to remove an impediment to an action for damages if the transaction was not proceeded with after the required consents were obtained.

18 But does the subsection protect the rights of parties who, having entered into an agreement containing the required "express condition" proceed to close their transaction without the required consents having been obtained? It was the position of the applicant that where the parties have entered into an agreement containing the required express condition the agreement survives and confers rights in the property or its proceeds, notwithstanding that a mortgage was purported to be granted where the required consents had not been obtained. On this approach, once the inclusion of the "express condition" in the agreement

has shown the lender to be pure in heart, the subsequent illegal transaction, although passing no interest in the land, itself, would not prevent the intended mortgagee from asserting a property right, if not in the land then in its proceeds. On that theory the loan agreement, containing the required "express condition", is not spent or exhausted when that condition is not complied with before the closing. The assertion is made on behalf of the applicant that the applicable law is the law relating to innocent mistake (which in the circumstance would have to be a mistake of *fact*, because were it mistake of law it would undermine the assumption of knowldge of the law upon which the finding of the "express condition" was based).

19 One difficulty with the applicant's position in this regard is that we are not dealing with a criminal law or other penal provision; innocence has virtually nothing to do with the issue. We are dealing with a public policy that is so strongly put forward as to be enforced by making non-conforming transactions nullities. That is surely one of the most invasive procedures open to the Legislature. Where simple parties, innocent of the prohibitions of s.29, purport to convey land contrary to its provisions their purported transaction is a nullity, so, the argument runs, why should a person who started off on the right foot by including an "express condition" but then proceeded to close his transaction in a way that, if done without such an agreement, would have resulted in the transfer of no interest in land now be able to claim an interest in either the land or its proceeds? The applicant does not assert in these proceedings that the mortgage itself transfers any legal or equitable interest in the land. Rather, the applicant's argument is based upon the loan agreement and the fact that it contains an "express condition" which manifests the intent of the lender to comply with the *Planning Act* and, combined with reliance upon the false affidavit in the mortgage, means that the loan was advanced on the basis of a mistake of fact. The applicant asserts that Tessis is entitled to an equitable mortgage,. a subject I shall deal with below, and also asserts an equitable lien or charge upon the proceeds of the sale of the lands. It was held by the Court of Appeal, in the above-quoted judgment delivered by MacKinnon A.C.J.O., that the mortgage passed no interest, legal or equitable, in the lands. It was also specifically held that Tessis was not a *bona fide* purchaser for value and without notice. That finding may not be directly counter to submissions now being made on behalf of the applicant, but it is of relevance whre the equitable jurisdiction of the Court is sought to be invoked. The applicant contends, in effect, that the loan agreement is not spent, exhausted or merged when, by mistake, a loan is made and a purported mortgage is accepted in breach of the provisions of the *Planning Act*. Although the loan agreement formed part of the record before the Court of Appeal, it was not referred to in the judgment of MacKinnon A.C.J.O. for the Court. That judgment focused on the mortgage itself, and it was noted by MacKinnon A.C.J.O., *supra*, at p.152 that:

> There was of course no such condition, express or otherwise, in the mortgage document with which we are concerned.

That statement suggests that the loan agreement was not considered by the Court of Appeal in this connection. It also suggests that the matter was not argued, a matter to be considered below in relation to issue estoppel. I will proceed initially on the assumption that the applicant is not precluded by issue estoppel from making claims based upon the loan agreement where the purported mortgage was executed and delivered, and accepted, in purported compliance with the loan agreement, and will consider in turn substantive claims made by the applicant.

Equitable Mortgage

20 In one part of his submissions the applicant claimed to be an equitable mortgagee, citing, among other things, the following passage from *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p.16:

> Equitable mortgages of the property of legal owners ... are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.

In *Falconbridge, Law of Mortgages*, 4th ed., at p.80, the following statement is made about equitable mortgages:

> An equitable mortgage therefore is a contract which creates in equity a chargeon property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.

5.2 *How an Equitable Mortgage is Created*

The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the ?act the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it never so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by deposit of title deeds.

It is clear that neither (1) nor (3) above have any application to the facts of this matter and that we need be concerned only with (2) above. In the same publication there appears, at p.83, under the heading "Mortgage by Instrument not Sufficient to Convey the Legal Estate", the following passage:

(1) *Conveyance defective in form*

If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate, it is an equitable mortgage.

An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.

(2) *Agreement to give a Mortgage*

An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

In this case there is no issue or question as to a want of formality with respect to the mortgage that was execued and delivered. It failed to pass an interest in the land not because of any defect in the form or execution, but because its execution and delivery contravened the *Planning Act* and accordingly by reason of express statutory provisions it passed no interest in the land. The many authorities cited by the applicant that dealt with want of formalities, or inadvertent omissions in documents, or refusals to carry out the terms of agreements to give deeds or mortgages are, therefore, not applicable. When we leave the mortgage and consider the loan agreement as an agreement to give a mortgage we encounter first the difficulty that the intended mortgagor did not refuse or fail to give to the intended mortgagee a mortgage in the form expected by the mortgagee. The difficulty is the absence of consent under the *Planning Act*. Without such a consent no interest in the land may be created except that the former s-s.29(7) (now s-s.29(18)) provided that s.29:

... does not affect an agreement subject to the express condition contained therein that such agreement is to be effective only if the provisions of the section are complied with.

The provisions of the section were not complied with. By its own terms therefore the agreement is not effective. Furthermore, it would be a most anomalous result under the statute if an agreement that is excepted from the annulling effect of s-s.29(7) only because it contains an express condition that it is to be effective only if the provisions of the section (as to obtaining the required consents) are complied with were to be held to create an equitable interest in the land where the required consents had not been obtained before the agreement was purported to be carried out. The exception provided in s-s.29(7) (now s-s.29(18)) reasonably construed has the limited purposes discussed above and does not in my opinion create a situation in which the prospective mortgagee having proceeded without the required consents, to close the transaction can "try agin" on the basis of the loan agreement and, ignoring the mortgage, proceed to obtain the required consent before entering into, or being deemed to have entered into, a new mortgage, or with the result that the Court in the exercise of its equity jurisdiction (conferred or confirmed by s-s.153(1) of the *Bankruptcy Act*) will, in effect, deem an equitable mortgage to have come into existence *nunc pro tunc*.

21 In the decision of the Court of Appeal in *Tessis v. Scherer et al., supra*, MacKinnon A.C.J.O., dealt with a submission that, although the mortgage did not pass an interest in the land, the power of sale in the mortgage should be regarded as subsisting so as to permit a sale by the mortgage and a further submission that s-s.29(4d) (now s-s.29(9)) of the *Planning Act* would permit

such a sale, in either case after the required consent from the committee of adjustment had been obtained. Those submissions were rejected. With regard to the second submission MacKinnon A.C.J.O., at p.153, stated as follows:

> Whatever may be the purpose of the subsection it is not for the purpose of permitting a party, in the circumstances of this case, to go to the committee of adjustment long after the mortgage has been placed and the Act breached. Such a procedure would obviate so far as mortgages are concerned, the necessity for or effect of the first part of s.29(7) in the 1979 *Planning Act* which subsection covers mortgages.

And with respect to the first submission his Lordship further stated at p.153 as follows:

> A mortgage is given as security for debt. The Planning Act is clear that if the Act is breached no interest in the land is transferred by the mortgage. It would defeat the principle of the legislation and be a perversion of the statutory language if the Court were to hold that the power of sale stands independently of the mortgage and is a legal basis for granting possession of the lands to the mortgage. This is so despitethe argument that the mortgagee would then go to the committee of adjustment for the required consent to sever and sell. A procedure which, as we have said, in our view, is not contemplated by the Act.

22 I set forth those two passages because of their stress on the fact that a breach of the provisions of the Act had taken place, and because of the disfavour expressed with regard to a proposal that the committee of adjustment be approached long after the mortgage has been placed and the Act breached. It was argued before me that all the submissions dealt with by the Court of Appeal related to the mortgage itself, and not to the loan agreement, and were concerned with possession. It must be acknowledged that there is no reference to the loan agreement as such in the reasons of the Court of Appeal. However, the loan agreement was referred to in the statement of claim in the action and it was among the documents before the Court of Appeal. It is really most unlikely that the Court of Appeal was not aware of the loan agreement or believed that a loan of $635,000 on a commercial property would be made without there being a written loan agreement, however brief. The last-quoted passages reveal the attitude of the Court of Appeal to submissions that would involve the obtaining of the required planning or severance consents long after the mortgage had been given in breach of the Act. No equitable mortgage could be obtained by Tessis without the required planning consent, and any consents so given would necessarily have to be given long after the execution and delivery of a mortgage found and acknowledged by the applicant to have been in contravention of the Act. Quite apart from issue estoppel the Court of Appeal appears to have laid it down as a matter of law that where there has been a mortgage in contravention of s.29 of the *Planning Act*, the Court will not undercut the objectives of the Act by making available an extraordinary remedy so that one of the parties to the breach, albeit the less culpableof the two, can try again.

23 An equitable mortgage is an equitable interest in land. The following statement, which I adopt, is taken from *Marriott and Dunn: Practice in Mortgage Actions in Ontario*, 4th ed., Carswell (Toronto) 1981, at p.18:

> An equitable title to a mortgage is just as good as a legal one: *Ex parte, Wright* (1812), 19 Ves. 255 at 257, and may be enforced by foreclosure, judicial sale or by the judicial appointment of a receiver: Waldock above, p.55.

A foreclosure would constitute, and a judicial sale would bring about, a change in ownership of the land without the required planning consent. That is contrary to s.29 of the *Planning Act*. The highest interest in the land that can have been conferred on Tessis by the loan agreement is the right to an equitable mortgage after the required planning consent had been obtained. In no true sense of the term can Tessis be said to have had an equitable mortgage before that consent was obtained. This is not a case of want of formalities in the mortgage document or a case of the refusal by the borrower to execute a mortgage. Although there undoubtedly was a mistake the usual equitable remedies are not available if to purport to make them available would be to contravene the statute. No equitable mortgage arises upon the entry into the loan agreement. To put the matter another way, in the absence of the required consent the loan agreement does not create an equitable mortgage any more than a legal mortgage document, correct in all its documentary formalities, creates a legal mortgage. At the material times, Tessis was not an equitable mortgagee.

Equitable Charge

24 For parallel reasons Tessis was not at the material times the holder of an equitable charge, quite apart from questions of issue estoppel. With respect to equitable charges or liens the following is stated in *Marriott and Dunn, supra*, at pp.18 and 19:

> It is sometimes diffiult to determine whether a security is an equitable mortgage or equitable charge; as to the distinction see Waldock *Law of Mortgages*, 2nd ed. (1950) pp.44-45. No debt is implied in the case of the latter but the property is expressly or constructively made liable or specially appropriated to the discharge of a burden, *and a right of realization by judicial sale is conferred.* Put another way, the right to foreclose depends upon a proprietary interest either legal or equitable: *Re Lloyd*, [1903] 1 Ch.385 (C.A.). Since a person holding an equitable charge (unless a legal mortgage is implied therein) or lien has no right to foreclose *but may realize his security by judicial sale*: *Tennant v. Trenchard* (1869), L.R. 4 Ch.537.
>
> [Emphasis added]

Here there clearly is a debt, and the loan agreement did call for a legal mortgage, and so it may well be that an equitable charge is not appropriate or available in any event. I do not decide that question. The holder of an equitable charge may not foreclose but may realize his security by judicial sale. He thus has an enforceable interest in the property. To put the matter in its brutal simplicity, Tessis cannot have been at the material times a holder of an equitable charge because an equitable charge is an interest, an equitable interest, in the land, and it is provided by s.29 of the *Planning Act* that in the case of abutting parcels owned by the same person the sale of one parcel without the other is not to take place, and *cannot* take place, without there having been first obtained the required consent under the Act.

25 For the applicant, Mr. Kellock also referred a floating charge but did not seem to me to press the argument that Tessis was entitled to one on the assets of Agil, which is just as well because the loan agreement makes no reference to a floating charge on the undertaking or any assets of Agil and, with respect to the only asset dealt with clearly, as argued on ehalf of the applicant in this very application, intended the creation of a valid and enforceable *specific* mortgage. But if a floating charge had been sought to be created it would have run into essentially the same difficulties as the claimed equitable mortgage and the claimed fixed or specific (as opposed to floating) equitable charge: it would have constituted, from the time of its creation, a purported equitable interest in the land, carrying the right, after its crystallization, to a judicial sale and differing from the fixed or specific equitable charge (and so offending the *Planning Act* even more) because it would also carry a right to foreclose on the property that is subject to its specific lien when it is crystallized.

Charge on the Proceeds of the Sale of the Land?

26 In the foregoing I have more than once used the phrase "at the material times". I did that so as not to lose sight of the importance of the sequence of events. The applicant's submissions in support of the contention that Tessis is, or was, the beneficiary of an equitable mortgage or equitable charge, which contentions are based in part on mistake and might in the absence of s.29 of the *Planning Act* have had some success, were, I believe, seen to be not sustainable in the face of the annulling provisions of s-s.29(7) (now s-s.29(18)). Tessis, under the last-mentioned statutory provisions simply could not acquire any interest, legal or equitable, in the land until the required *Planning Act* consents had been obtained, excepting only the limited interest, described above, under a contract subject to an "express condition" as discussed above. As no *Planning Act* consent had been obtained by the effective date of the bankruptcy Tessis had no security interest in the land by that critical date and so was not a "secured creditor" as that term is defined in s.2 of the *Bankruptcy Act*, R.S.C. 1970, c.B-3. In so far as the claim of Tessis to the proceeds of he sale of the lands is based upon the assertion of an equitable interest in the lands themselves, it must fail. Tessis acquired no interest legal or equitable in the lands or, more accurately, no legal interest whatsoever and no equitable interest that survived the act of the purported creation of a legal mortgage. in so far as the claim of Tessis may be based upon the law of unjust enrichment it will be dealt with below after discussion of the other arguments in which the applicant asserted Tessis has the status of a secured creditor of Agil.

Equitable Execution

27 It is submitted on behalf of the applicant that Tessis, who advanced his loan under the loan agreement which clearly showed the intention of the parties that he was to be a secured creditor of Agil, and who subsequently obtained a judgment on the covenant against Agil, is entitled to obtain the proceeds of the sale of the lands by way of equitable execution. In my opinion those submissions cannot be maintained in the face of s-s.51(1) of the *Bankruptcy Act* which states as follows:

> 50(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

28 The following statements are taken from *17 Halsbury* (4th ed.) under the general heading "Execution" in the subdivision entitled "Equitable Execution". In para.574, at p.358, are found the following statements:

> Equitable execution originated in the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a court of ordinary jurisdiction by entertaining an application for the appointment of a recever of such interests in the judgment debtor's property as could not, owing to their nature, be taken under a common law writ of execution.
>
> Equitable execution is not, strictly speaking, execution at all, but is a mode of equitable relief.

And from para.576 (at p.359):

> Except in the case of land and interests in land, the former practice continues and equitable execution will only issue where there is no remedy by execution at law or such remedy is likely to be ineffective owing to the particular nature of the property which it is sought to make available. There must be some legal impediment to the issue of execution in the ordinary course of law, whether by means of fieri facias, or by means of garnishee proceedings or charging orders.
>
> ... as a general rule a receiver will not be appointed if a method of legal execution is available.

And from para.584 of the same volume of *Halsbury* (at p.365):

> The appointment of a receiver of personal estate does not interfere with the possession of the trustees or other persons in whom the property is vested; it simply puts the receiver in the place of the judgment debtor to receive the money. It does not create a charge on property, nor does notice of appointment confer any priority, but the order has the effect of an injunction and prevents the judgment debtor from receiving the property or from dealing with it to the prejudice of the judgment creditor.

29 The foregoing quotations from *Halsbury*, while hardly exhaustive of the law relating to equitable execution, do disclose enough about the nature of the remedy to establish beyond doubt that, even if the remedy were available in accordance with its own limitations, it would be among the "executions or other process against the property of the bankrupt" that are subordinated by the provisions of s-s.50(1) of the *Bankruptcy Act* to any receiving order or assignment made under that Act, except where the executions or other process n question "have been completely executed by payment to the creditor or his agent", and excepting also the rights of secured creditors. Subsection 50(1) removes any possibility that Tessis could avail himself of equitable execution in any form to collect his debt or any part thereof after the date of the bankruptcy. Equitable execution cannot arise before judgment, and unless his judgment is fully executed by payment to the judgment creditor before the bankruptcy his judgment creates no rights to preference over the ordinary creditors in the bankruptcy.

Conclusion on the Merits on the Issue of Whether Tessis is a Secured Creditor of Agil

30 It is my conclusion that, even on the basis that the loan agreement was made subject to an "express condition" as described in s-s.29(7), now s-s.29(18) of the *Planning Act*, and without regard to the defences of *res judicata* or issue estoppel, Tessis is not to be regarded as a secured creditor of Agil. The claims based on the assertion of an equitable mortgage or an the assertion of an equitable charge, fixed or floating, fail because they cannot prevail against the provisions of s.29 of the *Planning Act* prohibiting

severances without consent and providing that purported severances without the required consents are without effect. Claims based on equitable execution are defeated by the provisions of s-s.50(1) of the *Bankruptcy Act*.

Issue Estoppel

31 The foregoing discussion and negative conclusions on the merits of the applicant's contention that Tessis is a secured creditor in the bankruptcy of Agil are *obiter dicta* if the applicants' various assertions in that regard are barred by the defence of issue estoppel. The question of issue estoppel was strenuously argued and, accordingly, I considered it prudent to set forth my conclusions on the merits and the reasons therefor. These matters were dealt with first because their discussion established the background facts rquired for the discussion of issue estoppel.

32 It is common ground that the question of whether the mortgage, as such, passed any legal interest in the land to Tessis has been decided adversely to Tessis and to the applicant and its *res judicata*. I also find that in *Tessis v. Scherer et al, supra*, the Court of Appeal clearly found that the mortgage itself passed no equitable interest in the lands to Tessis. However, in this application the claims of the applicant are based upon the loan agreement and not upon the mortgage itself.

33 The applicant argues that the prior action was an action upon the mortgage alone, for possession and for judgment on the covenant, and that Scherer, when granted status to prosecute the appeal from the judgment of Parker. A. C. J. H. C. was similarly circumscribed and confined to arguments based upon the mortgage itself. It is noted that the Honourable Mr. Justice Goodman of the Court of Appeal, (acting as an *ex officio* member of the High Court) in his unreported reasons released February 9, 1982, with respect to his decision to allow Scherer to be added as a party defendant in the prior action so that he could prosecute the appeal, dealt with the matter as a question of whether the mortgage conferred upon Tessis an interest in the land and considered the judgment of Parker, A.C.J.H.C. to be a judgment *in rem*. There is nothing in the reasons of Goodman, J.A. to suggest that there was any mention before him of any claims equitable or otherwise, based upon the loan agreement as distinct from the mortgage. Of course, the real question is not whether such rights were in fact asserted and adjudicated upon, but whether the applicant is precluded from asserting them now because he could, and therefore should, have asserted them on the appeal. The matter is complicated by the fact that Scherer was added as a party on the appeal and not on the original trial, and so unless he could have obtained permission to supplement them he may well have been constrained by the pleadings in the action. Against that it must be noted that counsel for Scherer did make, and persuade the Court of Appeal to deal with, albeit unfavourably to him, arguments going beyond the simple question of whether the mortgage created any interest in the land. It is certainly arguable and indeed it is probable that the Court of Appeal would likewise have entertained an argument for an equitable interest in the land based on the provisions of the loan agreement.

34 The claims of the applicant to be a secured creditor are not really based upon the mortgage itself but upon the loan agreement which, because of the "express condition" is said to escape the annulling effects of s.29(7).

35 With regard to claims based upon the loan agreement and in the alternative as to a constructive trust the applicant submits that such claims are not barred by *res judicata* or by issue estoppel. The applicant stresses to difference between an action and a cause of action, pointing out that Rule 69 of the (former) Rules of Practice provided that a plaintiff could unite in one action several causes of action and stressing the narrowness of what the courts were called upon to decide in the prior action, namely, claims for possession, payment and interest founded upon the purported mortgage itself. The applicant submits that in the prior action no equitable cause of action of any kind was alleged and accordingly that *res judicata* does not now arise because the claims put forth in this application are all based on equity and so are necessarily different causes of action. The position of the applicant is predicated upon the traditional and formalistic view that the matter or subject of the prior litigation must be seen to consist of one or more causes of action expressly asserted as such. While there is abundant authority supporting such a formulation, there appear to be important unresolved difficulties with respect to the applicability of the inclusive rulearticulated in the well-known dictum of Wigram V.C. in *Henderson v. Henderson* to issue estoppel as opposed to what has traditionally been thought of as cause of action estoppel. These difficulties raise the question of whether Canadian law, although still using the cause of action as the formal criterion, has not been evolving in the direction of a more holistic view of the issues in dispute between the parties in the prior litigation i.e. toward a less formal view of what constituted the 'matter' or 'substance' of the prior litigation. I shall return to that question after discussing the submissions of the parties.

36 Three cases stressed by the applicant were relatively old and more concerned with *res judicata* in the sense of cause of action estoppel than with issue estoppel. Thus the applicant's first reference in this area was to *16 Halsbury*4th ed., para.1528, a paragraph devoted to setting out the essentials of *res judicata* (conceived as cause of action estoppel), as follows:

> In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had the opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must either show actual merger, or that the same point has been actually decided between the parties. Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged might have been put in issue or that the relief sought might have been claimed. It is necessary to show that it actually was put in issue or claimed.

37 The applicant further asserts that no estoppel arises as to matters not in issue in the first action even if decided by implication. The authorities selected by the applicant from among those cited in *16 Halsbury* in relaton to the above statements were *Hadley v. Green* (1832), 2 Cr. & J. 374, *Bake v. French*, [1907] 1 cl. 478and *Saminathan v. Palaniappa*, 1914 A.C. 618.

38 In *Hadley v. Green, supra*, a landlord sued a tenant for rent and for money had and received. At trial the plaintiff recovered only for the rent. He later commenced a second action for damages against the defendant for quarrying and carrying away the stone the removal of which by the tenant had been the subject matter of the prior claim for money had and received. The second action was for the same amount as had been claimed as money had and received, and the particulars of claim in the second action were found to correspond verbatim with those delivered in the prior proceedings. It appears that, having pleaded it, the plaintiff decided not to proceed with the claim for money had and received, for it is clear from the report that one or two days before the first trial the declaration in the second action was delivered. The report is rather sketchy but it would appear that the defendant in the second action objected on the ground that the plaintiff, having not proceeded with its claim for money had and received, and having taken a general verdict, could not later pursue a second action for the same recovery. The court refused to strike out the second action, saying in effect that full compensation could not have been obtained by the count for money had and received and so the second action was for something additional and the situation could be distinguished from the cases in which a plaintiff having a right to full recovery and having pleaded the appropriate count elected not to proceed with that count and later sought to bring a second action seeking the same recovery. The term *res judicata* did not appear in the report, and needless to say there was no reference to issue estoppel. The decision appears to stand for the proposition that a plaintiff need not combine in one action all of his causs of action against a defendant and where he has pleaded a cause of action and not proceeded with it the plaintiff will not be precluded from bringing a second action with the same objective if it can be shown:

> (i) that the first cause of action would at best have been only partially successful, and
>
> (ii) that the second action was started before the first action went to trial.

The case was decided over one hundred and fifty years ago when the forms of action had not been reduced to ruling us from their graves and when the common law and equity jurisdictions had not been combined. Nothing was brought forward on this application on the question of whether or not, over one hundred and fifty years ago, difficulties in amending pleadings may have made it more practical to commence a second action and to do so before the prior action came to trial. Nor have I researched that question. Nor was there any material brought forth on this application, other than two footnote references in *Halsbury*, to show the application of *Hadley v. Green* in modern cases, let alone Canadian cases.

39 In *Bake v. French, supra*, Mrs. French was indebted to her solicitor, Bake, and had given him six charges secured on her interest in an estate. Bake sued and obtained judgment and an order for foreclosure nisi on five of those charges, having lost or forgotten about the sixth charge. He later brought an amended action on the six charges and was met with a defence of estoppel by *res judicata* based on the above-quoted by Wigram, V.C. in *Henderson v. Henderson* to the effect that the law requires a party to bring forth the whole of his case. The plaintiff did not in the second action ask for a declaration based on the sixth charge alone but for a declaration that he was entitled to a lien based on six charges including the five charges as to which he had received a declaration in the first action. The plaintiff was successful The Court held, not surprisingly, that the first action

was about five charges and that in the second action the addition of the sixth charge meant that there was not the same subject of litigation or a "point which properly belonged to the subject of litigation in the first action".

40 The thing that I find the most outstanding about *Bake v. French* is the apparent foolishness of the defence. It is difficult to generate a strong precedent in a decision that had only to overcome such a weak case. In modern terms the plaintiff held something roughly equivalent to debentures issued in series and equally or proportionately entitled to the benefit of a charge on the same security. The relief sought was a declaration and foreclosure and the plaintiff had obtained an order for foreclosure nisi on the five charges. His attempt to amend the foreclosure proceedings to include the sixth charge was denied and so he brought the second action on all six charges and obtained an order for foreclosure nisi on all six charges, a resolution which doubtless had the advantage of making it more difficult for the debtor to redeem. At the least, the case stands for the proposition that the doctrine of *Henderson v. Henderson* does not mean that all causes of action have to be combined in the same action even where they represent claims on the same property if the claims are based upon distinctive choses in action and are therefore not the same subject matter. It is important to remember that the sixth charge represented a sixth item of indebtedness i.e. more debt albeit secured on the same property. The reasons for judgment reflect that the plaintiff had sought unsuccessfully to amend his pleadings in the first action.

Saminathan v. Palaniappa, supra, is a decision of the Privy Council, reported in 1914 and involving the interpretation of a statute of Ceylon which was submitted to have codified a version of the law as to *res judicata.* In summary, the facts were that nder what may be regarded as a settlement agreement two promissory notes were issued by the defendant to the plaintiff and, probably by error, omitted to make any provision for interest. The notes were wrongfully altered to include a provision for interest. The defendant failed to pay on the due dates and the plaintiff began an action based on the notes. The action was dismissed because of the material alteration to the notes and the plaintiff then began a second action based upon the settlement agreement, for the consideration for which the notes had been issued. The trial judge accepted the defendant's argument that the action was barred by s.34 of the Ceylon Civil Procedure Code which stated as follows:

> Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action: but a plaintiff may relinquish any portion of his claim to bring the action within the jurisdiction of any Court.
>
> If the plaintiff omits to sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the court obtained before the hearing) to sue for any such remedies, he shall not afterwards sue for the remedy so omitted.
>
> For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

41 The Privy Council in reviewing the trial judge said of the above-quoted section that:

> It is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even although they come from the same transactions.

42 Their Lordships found the action on the notes and the action on the underlying agreement to be inconsistent and mutually exclusive causes of action and pointed out that so long as the notes were regarded a outstanding there was no right of action otherwise than upon the notes, and so it was impossible that the two claims constituted the same cause of action. Their Lordships also expressed the view that, but for the last paragraph of the section, an obligation and a collateral security for its performance would constitute two independent causes of action.

43 Thus in *Hadley v. Green* the second action had been commenced (in the days before the commencement of an action was accomplished by a simple writ of summons) before the relevant count in the prior action had been abandoned; and in *Bake v. French* a further evidence of indebtedness and charge, not before the court in the first action, was the basis for the second action, and so it is hardly surprising that neither action was said to involve *res judicata. Hadley v. Green* was decided before *Henderson v. Henderson*, and it, like *Bake v. French* was a case of *res judicata*, not issue estoppel; *Saminathan v. Palaniappa* was concerned with the interpretation of a statutory provision in the laws of Ceylon. It also turned in part on the fact that under

laws applicable to negotiable instruments the action on the agreement could not have been proceeded with while the action on the promissory notes had not been shown to be doomed to failure. *Saminathan* too was a case where the defence of *res judicata*, not issue estoppel was asserted.

44 The applicant also cited the well-known Ontario decision of *Utterson Lumber Co. v. H. W. Petrie Ltd.* (1908), 17 O.L.R. 570, where machinery was sold on a conditional agreement calling for payment of the purchase price in instalments and providing that title was to remain in the vendor until payment in full and that in the event of default in payment the vendor could seize and sell the machinery without thereby eliminating the vendor's right to recover any remaining balance from the purchaser. The conditional purchser installed the machinery in his mill, fell into default in his payments and then sold the mill and the machinery to a third party who resold to the plaintiff. The conditional vendor obtained a judgment against the conditional purchaser and then seized the machinery. The Divisional Court decided in favour of the conditional vendor, noting that his position was protected from the negative effects of the Conditional Sales Act, R.S.O. 1897, c.49, by the affixing on the machinery of an appropriate name plate and holding,

> (i) that the original indebtedness was not merged in the judgment so far as the "security" was concerned and that the conditional vendor was entitled to retain title until he was paid in full, and
>
> (ii) that by suing for the balance of the price the conditional vendor had not elected to treat the transaction as an absolute sale, so as to waive his claim to title in the machinery. The applicant quoted the following statement of Mulock, C.J., found at p.574:
>
> > Recovery of judgment is not payment of indebtedness. Its simple contract character has disappeared and it has become a debt of record. To that extent only has there been merger, but the original indebtedness still exists and until payment the defendant is entitled to retain his collateral security.

45 A reading of the reasons for judgment makes it clear that on the question of election - the plaintiffs having argued that the conditional vendor could not take a judgment for the unpaid purchase price and at the same time assert a property interest in the machinery - the decision turned on the language of the contract, which expressly provided that the vendor could sue for his money without title passing until he was paid in full. The decision sets some limitations on the doctrine of merger and shows that the parties can contract out of what might otherwise be held to be mandatory election between one remedy and another. There is no specific reference to *res judicata* as such but th doctrine under which a cause of action is merged into a judgment and so disappears is really a form of *res judicata*.

46 Tessis having been awarded judgment on the covenant and the applicant striving to have Tessis treated as a secured creditor in the bankruptcy of Agil, the *Utterson Lumber* decision may be put forth as an authority for the proposition that the taking of judgment on the covenant in the mortgage has not precluded the assertion that under the loan agreement Tessis is entitled to security or alternatively to a constructive trust. To arrive at such conclusions would be to stretch unwarrantedly the meaning of the decision in *Utterson Lumber*, a decision that was expressly based upon the provisions of the agreement there in question.

47 The only statement in the applicant's factum on the subject of issue estoppel, as distinct from traditional cause of action estoppel was taken from 16 *Halsbury* (4th ed.) para. 1530 which is set out in full below:

> *1530 Issue estoppel.* An estoppel which has come to be known as "issue estoppel" may arise where a plea of res judicata could not be established because the causes of action are not the same.
>
> A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proeedings; (2) the judicial decision said to create the estoppel was

final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. Where one party has raised an issue which his opponent alleges is barred by issue estoppel the opponent can either plead the estoppel and leave the matter to be dealt with at the trial, or he can attempt to have the offending plea struck out.

To be distinguished, however, is the rule that where a plaintiff, having two inconsistent claims, elects to abandon one and pursues the other, he cannot afterwards choose to return to the former and sue on it.

(Footnote references omitted]

48 With respect to the second paragraph of the foregoing I find that Tessis, in obtaining judgment on the covenant and in filing in the bankruptcy as an unsecured creditor, has not elected in such a way as to preclude Scherer from proceeding to assent that Tessis has a secured claim based upon the loan agreement or a claim based upon constructive trust. Whatever way be the impact of *Henderson v. Henderson*, *supra*, and the Canadian authorities that are said to have applied it with respect to issue estoppel, Scherer has not elected one course in such a way as to evidence an intention to abandon the other courses pursued by him on this application. See *Rosental v. Newman*, [1953] 2 All E.R. 885 at p.887.

49 The footnotes to the above-quoted para.1530 of 16 *Halsbury* (4th ed.) refer to many of the leading English and Privy Council decisions on issue estoppel and to the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544, at pp.555-6. Thus, reference was made to the *Duchess of Kingston*'s Case (1776), 2 Smith L.C. (13th ed.) 644 (sometimes said to be the fountainhead of the English law of issue estoppel) and to *R. v. Hartington Middle Quarter Inhabitant* (1855), 4 Ex B 780(which the learned editor of *Spencer Bower and Turner*: *Doctrine of Res Judicata* (2nd ed.) 1969 states, at p.152, is in point of lucidity and precision a preferable exposition and guide) and to *Re Koenigsberg, Public Trustee v. Koenisberg*, [1949] 1 All E.R. (C.A.), *Thoday v. Thoday*, [1964] All E.R. 341 at p.352 C.A. per Diplock L.J., *Spens v. I.R.C.*, [1970] 3 All E.R. 295 at p.301 (Megarry J.) and *Carl Zeiss Stifting v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p.935; [1966] 2 All E.R. 536 (per Lord Guest).

50 I found it curious that in an application where so much stress was put on the question of issue estoppel there was no reference by any party to *Spencer Bower and Turner*: *Doctrine of Res Judicata* which is widely regarded as a leading work on the subject.

51 For his part, counsel for the respondent, supported at least initially by counsel for Tessis, took a position on issue estoppel that I believe with respect can be inelegantly but not entirely inaccurately summarized as "He (Scherer) had his chance and he cannot now raise the issues and assert claims that he did not raise in the prior action". The respondent relied upon the extended form of estoppel reflected in the above quotation from the judgment of Wigram V.C. in *Henderson v. Henderson* and also upon the decision of the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346. In the latter case on granting a decree nisi of divorce Schroeder J., after questioning the wisdom of the consent arrangement, included in his judgment an order for the payment of a modest lump sum to the petitioning wife in lieu of all alimony or maintenance for the wife and for a son until he attained the age of sixteen. Schroeder J. was assured by counsel for the both parties that they fully understood and both wanted that provision, and so he made the provision on consent. Somehow there were added to the formal udgment "or until this Court doth otherwise order". Those words had formed no part of the endorsement by Schroeder J. Prior to the decree absolute the wife commenced an action in the High Court, alleging that the agreement given effect to in the judgment of Schroeder J. had been induced by fraudulent misrepresentations, and consequently that no enquiry had been made as to the financial position of the respondent husband or as to his ability to pay alimony or maintenance, and claiming damages or in the alternative an order setting aside those provisions of the judgment giving effect to the alleged agreement to accept the lump sum payment in lieu of alimony. The action also included a claim for arrears of alimony payments provided for in the original written separation agreement or in the alternative such alimony as might be ordered by the court. That action came on before Mackay J. who dismissed it, finding against the allegation of fraud and misrepresentation and finding that the agreement as to the lump sum was entered into by the wife's solicitor with her understanding and authorization, and that the parties were *ad idem* that the lump sum was clearly agreed to be in full settlement. An appeal from the judgment of Mackay J. was dismissed with costs. In the meantime the motion under appeal was brought before Wells J. who ordered the trial of an issue. That order was appealed to

the Court of Appeal, which concluded that the motion should have been dealt with by Wells J. but which agreed, on consent, to deal instead with that question itself. The point of law answered by the Court of Appeal was whether or not the Court had power to vary paragraph 3 of the judgment of Schroeder J. in view of the fact that the same was a consensual judgment for a lump sum settlement in full satisfaction of all claims for alimony and maintenance. The Court of Appeal answered that question in the negative, allowing the appeal and dismissing the motion. The appeal of that order came before the Supreme Court of Canada. In the riginal motion before Wells J. the applicant had sought an order rescinding or varying paragraph 3 of the order of Schroeder J. as to the lump sum payment in lieu of, or in payment of, all claims for alimony or maintenance and had sought an order of monthly or annual payments of alimony or maintenance. Before the Supreme Court of Canada it was conceded, in what we may consider to be an acceptance of issue estoppel, that by virtue of the decision of Mackay J. on the question of fraud or misrepresentations as to the agreement for a lump sum payment, the appellant had to accept on that appeal that that agreement had been entered into voluntarily by the appellant. Notwithstanding that concession the appellant mounted an argument on the merits. It was countered by a defence of estoppel.

52 The estoppel defence was successful. Cartwright J. referred with approval to the following statement by Maugham J. in *Green v. Weatherall*, [1929] 2 Ch.213 at pp.221, 222:

> ...the plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: ....

His Lordship also quoted the famous dictum of Wigram V.C. in *Henderson v. Henderson*, set forth far above, and proceeded to the well-known excerpt from the judgment of the Privy Council in *Hoystead v. Commissioner of Taxation*, *supra*, at p.165:

> Parties are not permitted to begin fresh litigations because of new views which they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court to be the legal result of the documents or the weight of certain circumstance.
>
> If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle.

53 The above quotation from *Hoystead* would seem to be addressing cuse of action estoppel rather than issue estoppel. It is clearly saying, at the very least, that a question which has been decided cannot be relitigated on the ground that the party who was unsuccessful on the prior litigation has thought of a new argument. Many authorities, including *Maynard v. Maynard* itself, extend that prohibition to points that were fundamental to the prior decision, in the sense that the prior decision could not have been decided the way it was without also deciding explicitly or by necessary implication the point in question in the second proceedings. That Is the essence of issue estoppel and brings us close to the heart of the matter: the contest between what may be regarded as broad and narrow views of issue estoppel. The narrow view, as espoused by the applicant, employs a formal approach, stressing the cause of action, the pleadings and the record in the prior litigation, and confining the estoppel to what was actually decided and, by way of issue estoppel, to what was so fundamental to that decision that, whether expressly referred to or not, it must be taken to be a point settled between the parties or their privies.

54 The broader view espoused by the respondent does not expressly challenge the traditional role of the formal cause of action as the basic building block of *res judicata* but impliedly arrives at such a challenge by urging upon the Court dicta and decisions which may appear to accord with the views expressed by Lord Denning M.R. in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, [1965] 2 All E.R. 4, to the effect that the doctrine of *Henderson v. Henderson* applies not only to cause of action estoppel, but also to issue estoppel. As I understand the respondent's submissions, issue estoppel is not confined to a precise issue that was fundamental to the decision in the prior action and was decided, expressly or by necessary implication, in that prior action, but extends to bar also, in the second action, not only argumentsthat could have been raised in respect of the issues in the prior action but also issues that could have been raised in the prior action to achieve a party's over-all objective yet were not raised. Thus the respondent's focus was not so much upon what had been decided, expressly or by necessary implication in the prior action, but upon what had been omitted to be pleaded and argued in the prior action apparently whether or not the alleged omissions would have constituted, technically speaking, different causes of action.

55 On the respondent's view of the matter Tessis would now be estopped not only from reopening a decided issue to present new arguments on that issue, and not only from contesting anew points fundamental and necessary to the decision expressly made in the prior action, but also, it appears, from raising arguments such as that based upon the loan agreement as distinct from the mortgage and tending to show that Tessis was entitled to an equitable mortgage or charge. As argued, the reason for the estoppel would be that Tessis, or Scherer, could have asserted those equitable claims on the basis of materials that were part of the record, and so, in pursuance of the public policy favouring an end to litigation, he should be estopped from raising them later. Logically developed (which it was not) this approach would set little store by formal distinctions as to causes of action or as to the difference between law and equity, at least in circumstances where, as here, it was known before the argument of the appeal in the prior action that Agil was in bankruptcy, that there was a problem under the *Planning Act* and that the trustee had denied that Tessis was a secured creditor. Although it was not so expressed by the respondent the broader approach could be expressed by saying that, where the parties cannot deny awareness of the breadth of their dispute and confrontation (as here where neither Tessis nor Scherer can have been unaware of the trustee's contention that Tessis had no higher rihts than those of an unsecured creditor in the bankruptcy), an omission to initiate or advance a claim or cause of action that could impact upon that confrontation and that could have been advanced, even as an alternative claim on the material before the Court, would invite and justify the defence of issue estoppel, as much as the failure to make in the prior proceedings an available argument on the cause of action there expressly pursued is the basis for estoppel under the *Hoystead* line of cases. Such an approach relies heavily on the policy in favour of an end to litigation but would not be devoid of controls in addition to those implicit in the above quotation from *Green v. Weatherall*, and those expressed by Denning L.J. in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb*, *supra*, where he said of the rule as to extended issue estoppel this is not an inflexible rule.

56 The traditional general rule as to issue estoppel is stated in *Spencer Bower and Turner*: *Doctrine of Res Judicata*, *supra*, (hereinafter referred to as " *Spencer Bower*") at p.167 as follows:

> And indeed, wherever a plaintiff has two separate causes of action (though they arise out of the same transaction) as distinct from several remedies for one cause of action, he is not generally under any duty to set up both in the first proceedings which he may institute. As will later be seen, if he sets up one cause of action only, and is successful, he is not thereby precluded by the operation of the doctrine of merger from proceeding subsequently on the other; and the same result will attend if he fails in his first proceedings he may thereafter, notwithstanding such failure, proceed independently on the separate and independent cause of action which has not yet been litigated. He is under no duty by which he is compelled to join all his available causes of action in the first proceedings.

However, in *Spencer Bower* there is noted at .167, and again at p.376, the decision of the Supreme Court of Canada in *Cahoon v. Franks* (1967), 63 D.L.R. (2d) 274, is referred to as a decision indicating that in Canada the law as to issue estoppel appeared to be different from that in England and other Commonwealth countries in that the Supreme Court of Canada there turned its back on the decision in *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141 by holding that, in connection with a motor vehicle action where the two causes of action were a cause of action for property damage and a cause of action for personal injuries, both arising out of the same accident, that both such causes of action must be litigated in one action. In Cahoon v. Franks the plaintiff had begun an action for property damage within the twelve month limitation period provided for under the highway legislation of Alberta and, after the expiry of that twelve month period, had sought to amend his pleadings to include claims in respect of what had developed into really very serious personal injuries. It was asserted for the defence that such a claim was a new cause of action and was therefore statute barred by the special limitation period. Hall J., speaking for the Supreme Court of Canada, rejected that contention, holding that *Brunsden* was no longer good law in Canada and adopting the reasoning of Porter J.A. of the Appellate Division of the Alberta Supreme Court who had held that to perpetuate the effect of the *Brunsden* decision would be to revive the dominance of the forms of action, abolished by the *Judicature Act*. The reasons of Porter J.A. included the following (quoted at pp.277 and 278 of the said report of the Supreme Court of Canada decision):

> It is important to bear in mind that it was the "forms of action" that were abolished by the Judicature Act. To apply the *Brunsden v. Humphrey* case to the facts here would be to revive one of the very forms of action which the Act abolished. The cause of action or, to usethe expression of Diplock L.J. [the Letang case [infra]], "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty

> which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

The "Letang case" referred to in the foregoing passage is *Letang v. Cooper*, [1969] 1 Q.B. 232. In the above passage Porter J.A. treated as heads of damages matters which used to be regarded as separate causes of action. Should the reasoning of that decision be applied beyond various tort claims arising from one and the same accident? The language quoted by Porter J.A. from the reasons of Diplock L.J., where the latter used the phrase "the factual situation" to describe what gave the plaintiff a right to sue, is inconsistent with a narrow "forms of action" approach that has been at the base of traditional *res judicata* and has been urged on behalf of the applicants in these proceedings.

57 The high courts have an inherent jurisdiction to control abuse of their process and, as pointed out in *Spencer Bower* at p.379, that jurisdiction has been invoked in cases where plaintiffs had multiplied costs and aggravation by bringing numerous suits in circumstances where under the laws then in force it could not be held that the latter actions were barred by estoppel. That inherent jurisdiction was invoked by Henry J. in *Re Heather's House of Fashion Inc. (No.2)* (1977), 24 C.B.R. 193, in addition to a finding of *res judicata*. In that case a trustee in bankruptcy had attacked a secured debenture issued by the bankrupt as being void because of a defect in its registration. The claim faled and in the course of the prior proceeding it was concluded that the debenture was given in good faith. Later the trustee brought an application to have the same debenture declared void as a fraudulent preference under s-s.73(1) of the *Bankruptcy Act*. In dismissing the application Henry J. noted that the Court of Appeal had determined that the debenture was not void against the trustee, and that in the prior proceeding it was common ground that the debenture was given in good faith and was not a fraudulent preference, and he held (i) that the trustee was estopped and, (ii) that it would be an abuse of the process of the Court to permit the trustee to raise on successive applications all the possible attacks on a security that are mandated under the *Bankruptcy Act*:

> ... when by the exercise of reasonable diligence the means could be found to assert them all and have them all disposed of at the same time.

58 The ground of abuse of process was held to be available to block the second application if needed, but it is clear from his reasons that the decision of Henry J. was primarily based on *res judicata*, the *res* being that the Court of Appeal had held that the debenture was not void against the trustee and that the trustee appeared to have admitted as much in the first proceeding. In his reasons Henry J. quoted from *Maynard v. Maynard*, including the famous passage from Wigram V.C. in *Henderson v. Henderson*, and he does state that the trustee could have asserted all his claims in the first application, those statements being indicative of a broad approach to estoppel, such as is urged on behalf of the respondent in these proceedings, and involve matters which, with respect, were not necessary to the decision. The actual decision need not depend on a consideration of what was omitted in the first proceedings; it turns on the express finding that the debenture had been expressly found not to be fraudulent or void against the trustee. Te approach of Henry J. is reminiscent of the broad approach of Porter J.A. as quoted in *Cahoon v. Franks, supra*, but on its facts what was actually decided fits easily within the traditional canons of issue estoppel. It is the reference to abuse of proceeds that I find to be of greatest general significance in the decision because there Henry J. is saying, in effect, that the trustee should have brought forward his whole case, without regard to how many causes of action that might entail.

59 As noted, in *Fidelitas Shipping Co. Ltd. v. V/O. Exportchleb, supra*, Lord Denning M.R. suggested that the principle stated by Wigram V.C. with regard to cause of action estoppel might also apply to issue estoppel. That initiative has been referred to with approval in a number of Canadian decisions but, as discussed below, has been seriously questioned by the House of Lords in *Carl Zeiss Stiftung, supra.*

60 It is my observation that many of the decisions that employ or quote language suggesting the extension of the *Henderson v. Henderson* reasoning to issue estoppel are in cases where the result would be the same without any such extension, because they are cases that can be fitted into the narrower and traditional conception of issue estoppel. *Maynard v. Maynard* is itself such a case, as evidenced by the following statements of Cartwright J. at p.356:

> On comparing clauses (a) and (b) in the notice of motion in the present proceedings with paragraph 2 of the statement of claim in the former action, it appears to me that, although not expressed in identical words *they ask for the very same relief.*
>
> [Emphasis added]

The point is reiterated at p.358 as follows:

> It may be that some of the points of law argued before us were not thought of at the time. All this, however, would, it seems to me, be *nihil ad rem*. The issue now before us was, I think, expressly raised in the peadings in the earlier proceeding and was decided by the judgment of Mackay J. in dismissing that action. The appellant has submitted the same question as is now before us although perhaps not the same arguments) to the decision of a court of competent jurisdiction and he cannot now relitigate the matter.

What was actually decided in *Maynard* appears to fit within the description of *res judicata* in the sense of cause of action estoppel and not to involve issue estoppel, let alone to involve it in the extended sense referred to in *Fidelitas Shipping, supra*. Contrary to the reasons for which it was cited by the respondent, *Maynard* turned on a prior adjudication of the *same* question and not on some question or issue that could and ought to have been brought forth, under a party's obligations to present his whole case, but was not.

61 In *Spencer Bower*, at p.152, the following is offered as a compendious statement of the "rule" as to issue estoppel:

> Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a *res judicata* by implication.

It will be noted that that formulation makes no reference to matters that might have been argued, or causes of action that might have been asserted, but were not. The emphasis is all the other way, i.e. upon matters that were decided expressly or impliedly in the course of the prior decision and that were integral to it.

62 A recent statement of the broader view is that found in *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255, where Somervell L.J., at p.257, states:

> I think that on the authorities to which I will refer it would be accurate to say that res Judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly art of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

That statement speaks of the "subject-matter of the litigation" and not of a cause of action. Does it mean what *ought* to have been the subject-matter of the litigation because it was integrally bound up with the claims actually made? This, of course, raises the question of what actually is the "subject-matter of the prior litigation". Our applicant has argued that it is, in effect, what the plaintiff or applicant chose it to be and acknowledges, following *Hoystead*, that all arguments in support of that subject-matter should have been put forth in the prior litigation. In one sense, what we have on this application is a dispute as to what is the "subject-matter of the litigation".

63 In *Angle v. M.N.R.*, [1974] 47 D.L.R. (3d) 544, a decision of the Supreme Court of Canada, the majority judgment was delivered by Dickson J. and turned on the determination that the question in the second proceeding was not the same as was contested in the prior matter, with the result that there was no estoppel. In the course of his judgment Dickson J. cited with approval the definition of the. requirements of issue estoppel given by Lord Guest in *Carl Zeiss Stiftung, supra*, at p.935, as follows:

(1) that the same question has been decided:

(2) that the judicial decision which is said to create the estoppel was final;

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies.

On this application there is no difficulty about meeting requirements (2) and (3) above. The question is the extent to which the same question has been decided and the subsidiary question is whether it is so to the extent that the other claims now made by the applicant could and ought to have been brought forward in the prior proceeding. There is no reference in *Angle v. M.N.R.* to that subsidiary question, nor was there any need for such a reference.

64 The dictum in *Fidelitas Shipping* that would make applicable to issue estoppel the doctrine of *Henderson v. Henderson* has been seriously questioned. In *Carl Zeiss Stiftung, supra*, Lord Reid stated at p.916:

> Indeed I think that some confusion has been introduced by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel, such as the oft-quoted passage from *Henderson v. Henderson*....

And at p.917:

> The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim, what is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel.

It is to be note that in the immediately preceding quotation it is to cause of action estoppel that issue estoppel is contrasted. Lord Upjohn expressed at p.947 of the report last referred to essentially the same views.

65 In *Spens v. Inland* Revenue Commrs., [19701 3 All E.R. 295, at p.301, Megarry J. approved a statement in *Spencer Bower* that one must enquire with unrelenting severity whether the determination in the prior action on which it is sought to base the estoppel is "so fundamental to the substantial decision that the latter cannot stand without the former. Nothing less than this will do".

66 My attention has been drawn to Ontario decisions stated by the respondent to stand for a broad interpretation of issue estoppel, of the sort disapproved in *Carl Zeiss Stiftung*. On examination those decisions, although some of them contain statements apparently supportive of the broader view, are seen to be either cases of cause of action estoppel or issue estoppel in the narrower, traditional, sense. Thus, I have already observed of the decision in *Heather's House of Fashion (No.2)* that it was, with respect to *res judicata*, a decision turning on the finding that the fundamental point in issue had been decided in prior litigation between the parties. That decision is more important from our point of view for what it said about abuse of process. *Henning v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346 (C.A.), was expressly a case of *res judicata* or cause of action estoppel and not issue estoppel.

67 The decision of Callaghan J. in *Dominion Trust Co. v. Kay et al.* (1983), 33 C.P.C. 130, is important to this enquiry in its own right and because it sets forth a quotation from the unreported decision delivered by Arnup J.A. for the Court of Appeal in *Peters v. Unacom Industrial Equipment*, released February 27, 1976. 1 shall refer first to the latter aspect. The quotation from the reasons of Arnup J.A. is as fllows:

> In our view the County Court Judge on the second application was right in holding that the matter was *res judicata*. A judgment or order finally settles between the parties all those matters which were actually raised as issues between the

> parties, and decided by the judgment but is also conclusive as to all other issues which could have been raised at the time of the hearing and were relevant to its determination. The leading authority in this province, which in turn is based upon a number of English cases, is the judgment of the Court of Appeal in *Re Knowles*, [1938] O.R. 369.

I am not aware of the facts in *Unacom* and I appreciate that the language of the above quotation could be consistent with the extended form of issue estoppel proposed in *Fidelitas Shipping*, *supra*. However, I am satisfied that that was not the burden of the decision of Arnup J.A., because he said he was applying law laid down in *Re Knowles*, [19381 O.R. 369 and I have read that decision. It relates to a will under which the residue of an estate was left to the Town of Dundas for paving a street and beautifying a park and some other municipal property. On an application for directions brought in 1933 by the executor it was held that the gift to the Town was valid. In 1937 a further application was brought, in effect contending that the gift was invalid because it was not charitable and was a perpetuity. The matter was held to be *res judicata*, pure and simple, because the applicant was seeking to relitigate the very same point, i.e. the validity of the gift to the Town. He was found to be introducing a new argument but no new facts and no different issue or issue not already decided. That decision is fully consistent with *Hoystead*, *supra*, and in no sense is it an application to issue estoppel of the *Henderson v. Henderson* doctrine. In so far as *Unacom* is based upon *Re Knowles* (and it is stted to be so) it is not an authority for the view contended for by the respondent.

68 The decision in *Dominion Trust Co. v. Kay et al.*, *supra*, is in my respectful opinion clearly correct as a disposition of the issue that came before Callaghan J. The plaintiff had sued in contract on an alleged oral agreement under which he was to be paid for services in relation to a sale of real estate. He was not at the material time registered under the *Real Estate and Business Brokers Act*, R.S.O. 1980, c.431, and so under that Act was prevented from bringing an action for such a commission or payment. The statement of claim in the first action was struck out as disclosing no cause of action. The plaintiff immediately brought an action in tort for deceit, claiming exactly the same amount. On a motion under Rule 126 of the *Rules of Practice* Callaghan J. found that on the merits that claim was equally barred by the Act and he struck out the statement of claim. He also found that the matter was *res judicata*, following *Fidelitas Shipping*, *supra*, *Unacom*, *supra*, and *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.). *Fidelitas Shipping* has been seriously questioned by the House of Lords in *Carl Zeiss Stiftung*, *supra*, and *Unacom*, as based on *Re Knowles*, *supra*, was not nearly as broad a decision as the quote from it might suggest to someone already accepting the doctrine of *Fidelitas Shipping*. With respect to the case before him and with respect to *Morgan Power Apparatus*, Callaghan J. made and quoted the following statements, at pp.138 and 139:

> In my view, the present action is simply an attempt to impose a different legal conception of the relationship between the parties upon the identical facts which were pleaded in the original action. In my view what has been done here is he same as was attempted in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.). In that case the plaintiff commenced an action against the defendant alleging that the defendant owed it sums of money on an account stated for services rendered, or for breach of contract, or on an accounting. After some time, by agreement between the parties, the action was dismissed without costs. The plaintiff then commenced a second action against the defendant based upon allegations that by contracts between the plaintiff and the defendant, they were partners in a joint venture or, alternatively, that the defendant was an agent for the plaintiff and had breached its duty as a partner or its duty under the fiduciary relationship established by the contracts. In this second action the plaintiff sought a somewhat lesser sum of money than in the first. Davey C.J.B.C. said at p.251:
>
> > That being the case, it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services but based upon a different legal conception of the relationship between the parties. The first action was one of contract, for damages for breach of contract (leaving aside for a moment the moneys claimed under an account stated) and the second action is dependent upon breach of a duty which the defendant assumed under the very same contracts, which would give the plaintiff in the second action the money it sought in the first action but under a different legal concept.
> >
> > It seems to me that, that being so, the doctrine of *res judicata* applies.

69 As is probably apparent, I am unable to accept in full, with respect to issue estoppel, either the position put forward by the applicant or that put forward by the respondent. With respect to the latter, it is my opinion that the serious reservations expressed

by Lords Reid and Upjohn in *Carl Zeiss Stiftung*, will have effectivly ended the influence of the doctrine in *Fidelitas Shipping Co.* and in *Thoday v. Thoday*, [1964] 1 All E.R. 341, which would have made the inclusive rule of *Henderson v. Henderson* applicable to issue estoppel. Furthermore, statements in Canadian decisions that seemed to support that sort of extension of *Henderson v. Henderson* have been seen to have been made in cases that were actually decided on more traditional grounds. *Maynard v. Maynard, Unacom, Re Knowles* and at least part of *Heather's House of Fashion (No.2)* are examples discussed above.

70 On the other hand, the position urged by the applicant, with its entire focus on the cause of action as the sole criterion for *res judicata* other than issue estoppel, seems to me to be excessively rigid and formal. It would leave the question of what constitutes *res judicata* (other than issue estoppel) for purposes of subsequent litigation between the parties or their privies to be determined entirely by what causes of action had been chosen to be put forward by the parties in their prior litigation, regardless of the range of the background confrontation between the parties or the comprehensive nature of the dispute between them. It seems to me that there is a broad evolution in the law, away from formalism, or perhaps, to state it more cautiously, away from formal distinctions from time to time found to be no longer relevant in the sense of representing meaningful and valuable differentiations or categories. It is surely time to question whether the distinction between legal remedies and equitable remedies, for disputes between the same parties arising out of the same factual situations or series of transactions, ought always to be determinative of whether or not the defence of *res judicata* is available. The fundamental concerns, operating in the background, are the public policy in favour of an end to litigation and the policy, in the interess of fairness between the parties, of not letting a party split his case. It appears to me that the law has been evolving in the direction of a revised set of criteria and control devices. The leading decision is *Cahoon v. Franks* where the Supreme Court of Canada treated as separate heads of damages claims which in the heyday of the analytical, parsing, fragmenting approach had long been categorized as separate causes of action. That decision seems to me to have been a significant departure, albeit that it was expressed in the traditional language of cause of action. Thus, it did not decide that the cause of action was no longer the touchstone. Rather it declared that what had hitherto been regarded as two causes of action would henceforth be regarded as two heads of damage in a single cause of action. The breakout having occurred, is it to stop there and be confined to a statement that where a party has suffered damages in a motor accident his cause of action is for all the damages he or she has suffered whether in the way of property damage or personal injuries, or anything else that is compensable? Or was the development more significant, signalling a move toward criteria and categories of more contemporary relevance than the traditional causes of action? I believe it was the latter and that the cause of action, narrowly conceived, is no longer always determinative. It is premature, and at this stage of the development inappropriate for judge of first instance to attempt to formulate the general criteria and the control devices that will come to supplement and sometimes displace the traditional ones stressed by the applicant. It is enough for these purposes to note that in *Cahoon v. Franks* the narrow version was broken away from. Moreover, the decision of Henry J. in *Heather's House of Fashion (No.2)*, where it dealt with abuse of process, was asserting the public interest in an end to litigation and referred to the whole series of transactions, claims and causes of action involed in the confrontation between the trustee in bankruptcy in that case and a creditor bank claiming to be a secured creditor on the basis of an impugned debenture. The remarks may have been *obiter*, as they dealt with an alternative argument where there was in effect a finding that the pre-empting defence of *res judicata* had been made out, but they are nevertheless important because they manifest an unwillingness to be confined to the criterion of the cause of action, narrowly conceived. Similarly, in *Dominion Trust Co. v. Kay et al.*, Callaghan J. looked to the reality of the underlying situation that gave rise to the claims in the two actions, to the illegality that affected both actions equally and to the facts that the dollar amount of the successive claims were the same and that the two claims arose out of the same transaction or series of transactions, differently characterized firstly as a contract claim and secondly as a tort claim.

71 As evidenced by the foregoing quotation therefrom, the decision of the British Columbia Court of Appeal in *Morgan Power Apparatus* was also one in which the court looked at the underlying realities of the relationship of the parties and did not base its decision on the technicality of whether the second action involved the same cause of action.

72 The four decisions last mentioned cannot properly be interpreted as applications of the doctrine of *Henderson v. Henderson* to the question of issue estoppel. Their focus is not on what was omitted to be argued in the prior action but upon what was in fact the issue, broadly and realistically stated, in the prior action. That, and not a narrow cause of action, was taken to be the *res*, or the 'matter' or 'substance' of the prior action. It was not confined to one or more formal causes of action. Regard was paid

to the real scope of the confrontation in the prior action, including the whole of the relevant relationship between the parties, the transactions btween them and the objectives of the parties.

73 That certainly does not mean that parties should have to join in one action all causes of action that they may have against one another, or risk being met with the defence of *res judicata*. There are many situations, probably the majority of situations, where traditional criteria based upon the distinctness causes of action are quite appropriate as the basis for deciding whether a matter is *res Judicata*. Examples abound, including claims with respect to different motor accidents, or based on quite different contracts, or based on claims arising out of quite different transactions not part of a longer whole or related series of transactions. But where the prior litigation and the subsequent litigation arise out of the same transaction a claimant should not, particularly in a bankruptcy situation where there is an imperative about settling all claims because, for practical purposes, one of the parties may be going to disappear, be able after failing with a contract claim to bring, with no new evidence, a claim in tort to recover substantially the same amount in respect of the same transaction, or, having failed with a legal claim to bring in the same circumstances a claim based on equity, in each case attempting to rely on the fact that different causes of action are involved. In such circumstances the different cause of action should be treated as if it were no more than a different *argument* advanced to achieve essentially the same recovery, and the above-quoted dictum from *Hoystead v. Commissioner of Taxation* should be applied. That would be to treat the real confrontation and issues between the parties as the res or the substance or matter of the prior litigation and make it unnecessary to attempt to apply to issue estoppel the expanded scope of *res judicata* established in *Henderson v. Henderson*.

74 In *Tessis v. Scherer et al., supra*, by the time the appeal was head the bankruptcy of Agil had taken place and the trustee in bankruptcy had been made a party to the action, the trial judgment had at the least raised a problem under the *Planning Act* and it was known that the trustee in bankruptcy was contending that Tessis had no rights vis-a-vis Agil or its property other than the rights of an unsecured creditor in the bankruptcy. Generally speaking, that was the scope of the confrontation between Scherer and the trustee as the main protagonists in the prior action. What then was the subject or matter of the defence of *res judicata*? In my opinion it properly included of all questions or causes of action, legal or equitable, impacting upon the question of whether or not Tessis was a secured creditor in the bankruptcy. As the loan agreement was before the Court of Appeal and was referred to in the pleadings at trial, rights assertable under it formed part of the res before the Court of Appeal. In my opinion the omission to make at that stage, arguments based on equity and the loan agreement, should not turn on the question of whether such arguments involved the assertion of a different, equitable, cause of action but should be regarded as the omission to make an argument available on the material before the Court, whether or not such arguments or claims would entail a different cause of action. The *res* in the prior action is the real confrontation between the parties and the finding of estoppel would be made on a basis complying with or analogous to, the decision in *Hoystead, supra*. Given the knowledge of the parties by the time of the appeal, the practical difficulties of concern to Lords Reid and Upjohn in *Carl Zeiss Stiftung* do not arise because neither Scherer nor the trustee would have decided to omit in the prior action any claim or argument on the ground that its importance would not justify the cost of putting it forward. Both knew what was actually at stake between them.

75 The result in my judgmen is that the applicant is estopped from asserting that Tessis is entitled to any interest in the real property in question, or to rank as a secured creditor in the bankruptcy of Agil.

76 The remaining issue with respect to the defence of *res judicata* or issue estoppel is whether the applicant is estopped from asserting a claim to the proceeds of the sale of the real property, not as a secured creditor but as the beneficiary of a constructive trust. Such a claim is based upon the same loan agreement which was before the court in the prior action. In one sense the assertion of entitlement to be the beneficiary of a constructive trust is merely another legal conception or argument to counter the trustee's position that Tessis is no more than an unsecured creditor in the bankruptcy and that the issue should have been raised on the appeal. The facts upon which the constructive trust argument was based were all known by the time of the argument of the appeal. Thus it was known that there was a loan agreement, that the expressed intention was that Tessis was to advance the money only if he obtained the mortgage and only if all zoning and similar regulatory requirements had been met, that the loan agreement provided that most of the proceeds of the loan were to be applied to paying off prior (purported) mortgages and to finance improvements to the building (meaning that as a factual matter all but a small fraction of the loan proceeds could be traced). All of the documentary and other factual elements available on this application as the basis for the

submissions as to a constructive trust were available, or could readily have been made available, on the appeal in the prior action. The bankruptcy of Agil made it more urgent that all relevant causes of action be put forth. In *Heather's House of Fashion (No.2)*, *supra*, Henry J. stated that it would be an abuse of process for a trustee in bankruptcy to bring successive actions attacking the validity of the same debenture issued by the ankrupt, first because of alleged defects in its registration, next as a preference under the *Bankruptcy Act*, next as a fraudulent conveyance, and so forth. Although, based on the doctrine of *Re Condon; Ex parte* James, the duty on the trustee is probably higher than the duty on a person disputing the trustee's right to specific property, there is force to the contention that in a bankruptcy situation such a claimant should bring forth all his claims arising out of the transaction in question whether or not they involved different causes of action. On that basis the matter or substance of the prior litigation would include not only all issues impinging on the question of whether Tessis is a secured creditor in the Agil bankruptcy, but also all issues impinging on the broader question of whether Tessis is anything more than an unsecured creditor in the bankruptcy.

77 If Scherer had been a participant at the trial level and separately represented I would, on balance and not without difficulty, have held that he was estopped from putting forth in these proceedings a claim to be other than an unsecured creditor in the bankruptcy and therefore estopped from claiming to be the beneficiary of a constructive trust. However, the matter is complicated by the fact that Scherer became a party only at the appeal level and so might have encountered real difficulty, whether because of the pleadings or otherwise, in expanding the claims on behalf of Tessis to include the constructive trust claim. I conclude therefore that it would be unfair to hold Scherer to be estopped from asserting in these proceedings that Tessis should be dealt with as the beneficiary of a constructive trust. It is therefore necessary to consider the constructive trust claim on its merits.

Constructive Trust

78 The applicant's alternative submission is that Tessis should be regarded as the beneficiary of a constructive trust in accordance with which the trustee, as successor to Agil, holds s Trustee for Tessis the traceable proceeds of the funds advanced by Tessis.

79 It is submitted that Tessis advanced the $625,000 to Agil on the mistaken assumption, induced by the false representation of Agil, that Agil owned no abutting lands and therefore that the mortgage created a legal interest in the land. The loan agreement is cited as evidence of the intention of both Tessis and Agil that the loan be secured by a valid realty mortgage. It is therefore submitted that the proceeds of the loan were paid out by Tessis under a mistake, in effect that there was a fundamental mistake, and a material misrepresentation in the inducement, in that Tessis clearly would not have made the loan if he had known that it was not to be secured by a valid and enforceable legal mortgage. It was also strongly argued that, as between Tessis and Agil, Agil is more at fault, and that in all the circumstances, equity would not allow Agil to be unjustly enriched by keeping the loan proceeds without providing the security agreed to be given. The related assertion is that the trustee now stands in the shoes of Agil as representative of the unsecured creditors of Agil and that the same arguments should apply to prevent the unjust enrichment of such creditors.

80 I digress to deal with the question of whether an unsecured creditor in a bankruptcy can be said to be unjustly enriched where, even with the benefit of the disputed property, he would still be receiving less than one hundred cents in the dollar of his claim. Clearly the answer has to be in the affirmative. The focus of attention should be on the transaction or transactions in question and not on the totality of the financial position of the bankrupt estate. An unjust enrichment is no less an unjust enrichment where its receipt leaves the unsecured creditors receiving less than the amount of their respective claims.

81 Similarly, nothing should turn in these proceedings on the fact that it is Scherer and not Tessis who is arguing for the imposition of a cnstructive trust. Scherer having been given standing, he is fully entitled (subject to any applicable issue estoppel) to have the constructive trust question dealt with in these proceedings.

82 Another peripheral question arises from the oral submission by counsel for the applicant that the constructive trust claim is an alternative means of providing the security bargained for by Tessis. With respect, the assertion of a constructive trust is not a means of executing on the judgment or enforcing the alleged security of Tessis. It is an independent alternative claim which, if

made out, does not require an interest in the land (such as would offend the *Planning Act*) and, at least arguably, is not affected by s-s.50(1) of the *Bankruptcy Act*. It is not to be seen as an assertion that Tessis is a secured creditor. Incidentally, if it were to be so regarded it would be met, successfully in my opinion, with the defence of issue estoppel. Furthermore, if the remedy of constructive trust based on unjust enrichment were to be regarded as some form of execution, it would be blocked by the provisions of s-s.50(1) of the *Bankruptcy Act*. In their written material and throughout most of their argument counsel for the applicant dealt with the constructive trust claim as a fully independent alternative claim, and that is how I propose to consider it.

83 Yet another peripheral question relates to the effect on this claim of claims Tessis may have against Scherer and indirectly against the latter's insurance. As acknowledged in the statement of fact and law filed on his behalf on this application, Scherer carried solicitor's liability insurance to which Tessis could look if he were successful in an action against Scherer. It is common ground that if Scherer is successful on this application that success will reduce his exposure and that of his insurer to the claims of Tessis against him. There arises the question of whether the existence of the claim against Scherer or of such insuranc should have any bearing upon the decision as to the imposition of a constructive trust in favour of Tessis. It is clear that if the claims put forward on behalf of Tessis had been based upon an express trust the existence of such insurance would have made no difference whatsoever. If property were found to have been held by the bankrupt on an express trust for another the property would not be property of the bankrupt and so the trustee in bankruptcy would have no claim to it. This position is confirmed by s.47(a) of the *Bankruptcy Act* which states:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) of property held by the bankrupt in trust for any other person,

84 The position would be the same with respect to the traditional forms of non-express trusts, such as implied trusts, resulting trusts and the older conception of the constructive trusts, all of which are sometimes, along with express trusts, referred to collectively as 'substantive trusts' to distinguish them from the openly remedial constructive trust which the courts do not purport to 'discover' or imply but frankly impose in order to do justice by preventing an unjust enrichment. When a remedial constructive trust is imposed the imposition necessarily reaches back in time to impose the trust upon property or its proceeds as of an earlier time. The imposition creates a property right. In effect, in a bankruptcy situation it would, if applicable, amount to a determination that the property in question was not property of the debtor and had not been so at the time of the bankruptcy. Once imposed the remedial constructive trust has the same effect as an ex press trust or other 'substantive' trust. The question is whether the existence of insurance that might indemnify a claimant for all or part of his losses is a factor that should be taken into account by the Court in deciding whether or not to impose a constructive trust. In my view it is not. Insurance is a contract of indemnity ad, whether by subrogation or otherwise, the insurer is entitled to see that all the insured's rights against third parties are enforced to the full. Although a remedial constructive trust is sometimes imposed where, the other required elements being present, it is expressly stated by the Court (as in *Palachik v. Kiss, supra*), that the claimant has no other legal or equitable remedy, the primary meaning of such statements is that the claimant has no other remedies against the parties to the transactions. The existence or non-existence, of a claim against Scherer or of insurance not taken out pursuant to the agreement between the parties with respect to the transaction ought not in themselves, in my opinion, be factors affecting the Court's decision as to whether or not to impose a constructive trust. If the insurance had been taken out pursuant to an agreement relating to the transaction that would be a factor to be taken into account in relation to the question of the assignment of risks under the contract, but that is not our case. The question of the assignments of risks under the loan agreement will be dealt with below but on a basis quite independent of whether or not Scherer's liability to Tessis would be in whole or in part covered by insurance.

85 To return to the main argument, the submissions of Ms. Robinson on behalf of the applicant were based upon the conception of the remedial constructive trust clearly made part of the common law (as distinct from civil law) of Canada by the decisions of the Supreme Court of Canada in *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289, *Pettkus v. Becker* (1981), 117 D.L.R. (3d) 257 and *Palachik v. Kiss*, 146 D.L.R. (3d) 385. The remedial constructive trust as applied in such decisions differs from the earlier English and Canadian conceptions of the constructive trust in that it does not depend upon the finding of a pre-existing fiduciary relationship.

86 The recent Canadian developments have been centre in matrimonial or family property cases, starting with the minority judgment of Laskin C.J. in *Murdoch v. Murdoch*, [1957] 1 S.C.R. 423. As noted by John L. Dewar in his, article "The Development of the Remedial Constructive Trust", (1982) 60 C.B.R. 265 at p.260:

> Even before *Pettkus v. Becker*, a number of Canadian judgments had explained the constructive trust in terms of the American model, though they do not appear to have made a significant impact on the development of the law until the judgment of Laskin J. (dissenting) in *Murdoch v. Murdoch*. Laskin J.'s views-were adopted by three members of the Supreme Court in *Rathwell v. Rathwell*, and finally prevailed in *Pettkus v. Becker*.
>
> [Footnote references omitted]

To those decisions of the Supreme Court of Canada there should be added the decision of Wilson J., speaking for the Court, in *Palachik v. Kiss*, *supra*, one part of which was decided on the basis of quasi-contract but another major part of which was based squarely on a remedial constructive trust on the American model as approved and applied in *Pettkus v. Becker*. In *Palachik v. Kiss* the constructive trust was applied to a fund of money.

87 Although it emerges from the lengthy judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel British Bank (London) Ltd.* (1979), 3 All E.R. 1025 (Ch.D.) that the American law of unjust enrichment and the related constructive trust is not fully evolved or without fundamental disputes as to its nature, the following quotation from *Scott: The Law of Trusts* (3d.ed.) Vol.5, p.3215 may be taken as a very general description or outline of the American concept of the constructive trust:

> ... A constructive trust is imposed where a person holding title to a property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The dutyto convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of fiduciary duty, or through the wrongful disposition of another property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily a constructive trust arises without regard to the intention of the person who transferred the property.

In the same volume at pp.3427 and 3428, there appears the following statement which is of interest with relation to the factual background of the within application:

> *465. Transfer induced by mistake.* There are numerous cases in which a court of equity has decreed reformation or rescission where land is conveyed under a mutual mistake. Where under a mutual mistake the grantor conveys a piece of land which it was not intended by the parties should be conveyed, the title to the land passes to the grantee in spite of the mistake, and it is within the power of the grantee to pass the title to a purchaser for value and without notice of the mistake. If the land has not been conveyed to a bona fide purchaser, the grantee can be compelled to reconvey it to the grantor, since he would be unjustly enriched if he were permitted to retain it. While the grantee holds title to the land, therefore, he holds it upon a constructive trust for the grantor. If the grantee sells the land to a bona fide purchaser, the grantor can enforce a constructive trust of the proceeds in the hands of the grantee, although he cannot reach the land itself in the hands of the purchaser.
>
> Similarly where chattels are conveyed or money is paid by mistake, so that the person making the conveyance or payment is entitled to restitution, the transferee or payee holds the chattels or money upon a constructive trust. In such a case, it is true, the remedy at law for the value of the chattels or for the amount of money paid may be an adequate remedy, in which case court of equity will not ordinarily give specific restitution. If the chattels are of a unique character, however, *or if the person to whom the chattels art are conveyed or to whom the money is paid is insolvent*, the remedy at law Is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution. The beneficial interest remains in the person who conveyed the chattel or who paid the money, since the conveyance or payment was made under a mistake. ...
>
> [Emphasis added and footnote references omitted]

88 In *Dewar: The Development of the Remedial Constructive Trust, supra*, the following is stated at p.275:

> It should be noted that in American law the significant development which marked the transformation of the constructive trust into a generalized remedial device was the dispensing by the courts with any necessary connection with fiduciary relationship as a prerequisite to its imposition and to the granting of the tracing remedy.
>
> [Footnote references omitted]

Counsel for the respondent has argued that a constructive trust should not be imposed where there is an obvious and acknowledged relationship of debtor and creditor. With respect, that contention would have much greater force if a constructive trust depended on the prior existence of a fiduciary relationship, for the relationship of debtor and creditor might then be inconsistent with the fiduciary relationship. The remedial constructive trust is not similarly barred by the existence of a debtor-creditor relationship.

89 Turning to the above-mentioned Canadian authorities one finds in the judgment of Dickson J. in *Rathwell v. Rathwell*, *supra*, at p.306, the following statement with respect to the constructive trust:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the Court in order to achieve a result consonant with good conscience. As a matter of principle, the Curt will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; *but for the principle to succeed the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment.*
>
> [Emphasis added]

90 Although the above-mentioned Supreme Court of Canada decisions expressly adopting the remedial constructive trust have been decisions relating to matrimonial relationships and family property, there is nothing in them to suggest that the principles there adopted are to be confined to cases of that type. The statement by Dickson J. that the principle upon which a constructive trust is based is not to be defeated by the existence of a matrimonial relationship is to quite the opposite effect.

91 In *Rathwell* the majority did not decide the case on the basis of constructive trust but rather on the basis of resulting trust. It was in *Pettkus v. Becker* that a clear majority decided on the basis of constructive trust and approved the above-quoted excerpt from *Rathwell*. The principle was further reinforced by the Supreme Court's unanimous decision in *Palachik v. Kiss*.

92 The decision in *Pettkus*, by clearly eliminating the former requirement of a pre-existing fiduciary relationship, has changed the character and greatly broadened the availability of the constructive trust remedy, but the three requirements outlined by Dickson J. in *Rathwell* are very broad. By adopting those requirements *Pettkus* inevitably raises questions not only as to control devices but as to the relationship of constructive trust to remedies such as subrogation and equitable lien. In *Unjust Enrichment* (Butterworths, Toronto 1983), Professor G. B. Klippert asserts at p. 193 that although future decisions wll be needed to work out its implications the decision in Pettkus is the clearest indication to date that the Supreme Court of Canada intends, with respect to the law of unjust enrichment, a real fusion of common law and equitable principles. It is to be expected that such a development will not only increase the scope and flexibility of the remedies based on unjust enrichment but will also increase the application in constructive trust cases of control devices developed with respect to common law restitution action based on unjust enrichment. There is concern, such as that expressed by Maitland J. in *Pettkus*, that a broad principle of liability based on unjust enrichment would result in too broad a judicial discretion. In Chapter 2 of *Unjust Enrichment* Professor Klippert states that the history of the development of control devices in the law of negligence after *Donoghue v. Stevenson*, [1932] A.C. 562, introduced the broad principle of liability based on negligence is instructive in this regard. He suggests that a similar development is necessary with respect to unjust enrichment. Thus at p.36 he states:

> A restitutionary action is not resolved by reciting the general principle of unjust enrichment, and leaving it to each judge to decide what is fair. As in a negligence case, the decision-making process is more complex. The definition of unjust enrichment becomes the starting point, and not a substitute, for an analytical approach focusing on the elements of the unjust enrichment cause of action. These constituent elements provide the courts with a means to test the limits of liability.

> Without the recognition of specific elements based on the general principle, there is no mechanism to delimit the scope of legal protection. This point has been stressed in the area of negligence:

Professor Dewar then quotes the following paragaraph from Fleming, " *Duty and Remoteness: The Control Devices in Liability for Negligence*" (1953), 31 Can. Bar Rev. 471:

> The basic problem in connection with the 'tort of negligence is, therefore, that of limitation of liability. The mechanisms associated with liability for negligence, such as the duty and causation concepts, are nothing more or less than the control devices fashioned by the courts to achieve that purpose. Their function may be assessed both from this general point of view as a necessary feature conditioned by the otherwise unlimited scope of the action of negligence or more particularly as instruments designed to assist judicial control of the jury 'law'.

93 An example of a control device attaching to prevent recovery on a claim based on alleged unjust enrichment is afforded by decision of our Court of Appeal in *Nicholson v. St. Denis* (1976) 57 D.L.R. 699. There the plaintiff made improvements to a building at the request of a person who occupied the lands under an agreement of purchase and sale. The plaintiff did not know of the vendor's interest in the land and the vendor was unaware that the improvements were being made. When the purchaser fell into arrears under the agreement of purchase and sale the vendor retook possession of the land. The unpaid plaintiff obtained judgment at trial for the value of the improvements, the judgment purporting to be given to avoid unjust enrichment. The judgment was reversed on appeal. MacKinnon J.A., as he then was, explicitly rejected the trial judge's contention that with regard to such a claim the outcome was totally dependent on the individual judge's conscience as to whether he considered the circumstances such as to give rise to the remedy of unjust enrichment, stating, at p.701:

> If this were a true statement of the doctrine then the unruly house of public policy would be joined in the stable by a steed of even more unpredictable propensities.

MacKinnon J.A. went on to state that restitution would not follow every enrichment of one person and corresponding loss by another. He noted the absence of both knowledge of the alleged benfit on the part of the defendant and any suggestion that there was an express or implied request by the defendant for the benefit. The defendant had no opportunity to refuse the alleged benefit. The plaintiff had not troubled to ascertain the state of the title. In the literature the absence of knowledge, request or acquiescence on the part of the defendant is sometimes referred to as the absence of the "volition factor" required for an unjust enrichment. From the point of view of the defendant a person with whom the defendant had no prior contact incurred expenses officiously making alleged improvements, which the defendant was under no duty, statutory or otherwise,' to make and in circumstances where the defendant cannot be said to have asked for the improvements and where he was afforded no opportunity to refuse them. The volition factor is not an issue in our case. Clearly Agil wanted Tessis' money. And furthermore money is always deemed to be a benefit. *Nicholson v. St. Denis* is cited not because of its particular facts but because it provides such a clear statement of an important control factor and such a clear answer to those who assume that the doctrine of unjust enrichment is merely a matter of the conscience of the individual judge. I believe that none of the intervening decisions on unjust enrichment would result in *Nicholson v. St. Denis* being decided differently today and furthermore that the same general approach is applicable to the remedial constructive trust.

94 The inability to trace the proceeds of money or property has traditionally been a control device with respect to restitutionary claims, more so at common law than in equity. The absence of a generalized unjust enrichment remedy sometimes lead to decisions in which the ability to trace seemed to serve as the basis for a cause of action. Especially where there is developed doctrine of unjust enrichment, the factual ability or inability to trace must be seen as a control device. The ability to trace does not itslf confer a cause of action. In our case the application by Agil of the bulk of the loan proceeds is known. Under the terms of the loan agreement most of the proceeds were applied to the discharge of (what were believed to be) prior mortgages and most of the balance was expended upon improvements to the building. The property has been sold and the proceeds are segregated. Had the prior mortgages been shown to be valid, tracing as against the respondent would thus have presented little problem on the application of a subrogation or constructive trust remedy.

95 The adoption of the remedial constructive trust, viewed as evidence of an intent by the Supreme Court to develop generalized liability based on unjust enrichment, subject to appropriate control devices, casts new light on the remedies of subrogation and equitable charge. But even under the older law of subrogation Tessis on the facts of the case might, if the prior mortgages had been valid, have had a subrogation claim and then, in equity, a right to trace the proceeds into their present form. In this regard see *Brown v. McLean* (1889) O.R. 533 where the plaintiffs made a mortgage loan the proceeds of which were used to pay off a prior mortgage registered against the same property. Unbeknownst to the plaintiff the defendant judgment creditor had a writ of execution in the hands of the sheriff and had directed him to sell. In the absence of subrogation the defendant had priority over the plaintiff's mortgage. The subrogation claim was allowed. The court noted that, if the plaintiff had been aware of the defendants' writ of execution he would have either refused to make the loan or he would have taken assignments of the prior mortgages. The court also stated, at p.536, that the defendant judgment creditor had "not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position." The case has parallels with the present case. The mortgagee or his solicitors should, as a matter of ordinry prudence, have satisfied themselves as to the absence of writs of execution. It may be asked whether the plaintiff would have prevailed before the Court of Appeal that held in *Tessis v. Scherer et al., supra*, that Tessis was not a *bona fide* purchaser for value and without notice because a search of the realty tax rolls for the adjoining properties would have disclosed that Agil owned abutting lands. Clearly a search for executions is as much a part of the obligation of the solicitor for a mortgagee as a search of tax rolls. There is nothing in the report of *Tessis v. Scherer et al.* to suggest that *Brown v. McLean* was brought to the attention of the court.

96 Subrogation itself is of no avail to Tessis on the facts of this case, because there is nothing to dispel the inference that the mortgages discharged with the proceeds of Tessis's loan were as invalid as Tessis' own mortgage, and for the same reason, contravention of the *Planning Act*. Thus, even if Tessis could claim the rights of the holders of the prior mortgages he would be no further ahead. On the facts, subrogation would avail Tessis nothing.

97 In *Brown v. McLean* the prior mortgage was not a nullity. *Brown v. McLean* remains of interest because of the statement that no injustice was done to the execution creditor by replacing him in his former position. It is clear that in *Brown v. McLean* a valid and prior ranking mortgage was in place before the judgment creditor commenced any steps to realize upon the property. The judgment creditor was deprived of a windfall gain by the granting of the subrogation remedy. If the prior mortgagees in this case had been valid, would the subrogation remedy have been granted to remove a windfall gain from the unsecured creditors in the bankruptcy? That question involves, but is not limited to, the question of whether *Brown v. McLean* would be decided the same way today. The strictures of the Court o Appeal in *Tessis v. Scherer et al* to the effect that Tessis was not in a position analogous to that of a *bona fide* purchaser for value suggest that it might not be decided the same way.

98 In the first part of these reasons, dealing with the several assertions by Scherer that Tessis was a secured creditor of Agil, I held that Tessis could not be regarded as the holder of an equitable lien because such a holder would have an interest in land, and such an interest would be contrary to express provisions of the *Planning Act*. Part of my reasoning was that if an equitable lien were found, its effective date would be the same as the date of the first advance of the loan under the invalid mortgage. It would have been contrary to the statute for the lien to have attached at that time. The equitable lien there considered was a substantive property right, found rather than imposed by the court. It had to arise, if at all, as a lien against land and the statute killed any possibility that the court would find such a lien. The question arises whether, in the context of unjust enrichment and imposed trust devices there could not be a species of equitable lien or charge that did not have to arise, if at all, at the time of the loan but might be imposed as of a later time, specifically when the land was sold and the lien or charge could attach to the proceeds without in any way constituting an infringement of the *Planning Act*. Such a lien might "spring" into existence as a remedial device when imposed by the court but only as of the earliest date upon which it would not offend the *Planning Act*. I believe that such an equitable lien could be imposed in a proper case, which I take to be a situation in which all of the main criteria for the imposition of a constructive trust had been satisfied but the imposition of the constructive trust would result in the trust beneficiary getting too high a proportion of the total property in question. An example would be where the roperty had been expensively improved by the innocent third party into whose hands it was wrongfully transferred by an intervening party. That is not our case. Here, the amount claimed by, or rather for, Tessis is substantially more than is available.

The constructive trust remedy is more appropriate, and so no further consideration will be given to the possibility of imposing that sort of equitable lien to avoid unjust enrichment.

99 Although the applicant can correctly attest that Tessis would not have advanced his money unless he thought he was secured by a valid mortgage and can attest that, at least at the level of his solicitor there was reliance on misinformation provided by the governing mind of Agil, this is not a case of simple mistake such as gave rise to the riveting judgment of Goulding J. in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1979] 3 All E.R. 1025. In that case a New York bank by reason of a clerical error paid a second time a large amount of money through the New York clearing house system for the account of the defendant bank in London, which was insolvent. The New York bank sued for a declaration that the second payment was held in trust for it and so formed no part of the assets subject to the statutory trust on the winding up of the insolvent London bank. There was an important issue as to whether the law of England or the law of New York applied. After a lengthy trial Goulding J. found that for different reasons the result was the same under the laws of both jurisdictions, namely that the new York bank was entitled to a declaration that the defendant bank become a trustee for the New York bank as to the second payment. Goulding J. found the second payment was a "pure mistake" (at p.1028). Under English law he purported to find a fiduciary duty on the part of the receiving bank and a corresponding continuing propriety interest in the payor bank as a result of the court operating upon the conscience of the payee. As to the law of New York, GouldingJ. heard and dealt with extensive expert evidence and adopted as a proper statement of the law of New York the above-quoted passage from *Scott on Trusts*3rd ed. (1967), Volume 5 at p.3428. Summarizing the second paragraph of that passage to remove matters relating to different types of transactions, it could be stated as follows:

> ... that where money is paid by mistake so that the person making the payment is entitled to restitution, the payee holds the money upon a constructive trust; although it is true the remedy at law for the amount of the money may be an adequate remedy (with the result that a court of equity will not ordinarily grant specific resolution), where the person to whom the money is paid is insolvent, the remedy at law is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution.

Scott adds that the beneficial interest remains in the person who paid the money since the payment was made under a mistake. Under that description the constructive trust would appear to have been present in an inchoate way from the time the mistake was made, so that it is there to enforce if the remedy at law proves inadequate. Although it seems to have more of the character of a substantial legal institution than does the openly remedial constructive trust imposed in *Pettkus*, it is well to remember the opening words of Scott's statement, because they introduce the threshold criterion of an entitlement to restitution. It appears that the constructive trust is utilized so that a person already found to be entitled to restitution will not come up short because of the insolvency of the obligor. That is in one sense a narrower net than was set in *Pettkus* and so parts of the area covered by *Pettkus* may not qualify for the full reach of the back-up constructive trust remedy said by Scott to be available to keep a deserved restitutionary remedy from being cut down.

Re Clark (a bankrupt) exp. the Trusteev. Texaco Ltd., [1957] All E.R. 453 is a case that involved a claim by Texaco Ltd. for the price of motor fuel and oil supplied to a bankrupt petrol retailer after the effective date of the bankruptcy of the latter. Texaco was unaware of the bankruptcy when it made the deliveries and was not entitled to submit a proof of loss in the bankruptcy. The bankrupt had paid for certain of those deliveries and the bankruptcy trustee sued to recover those payments. It was held that the trustee could not recover. Although the trustee was clearly entitled under the term of applicable bankruptcy legislation to recover the money, it was decided by the court that in the circumstances it would be unfair for the trustee, as an officer of the court, to assert its legal rights and enrich the estate at the expense of Texaco by taking the whole benefit of the retail sales of the petrol and motor oil in question without paying its wholesale price. There being no constructive trust under the laws of England in the absence of a fiduciary relationship, the decision was founded in part on the rule in *Ex parte* James: Re Condon, [1874] 9 Ch., p.609 [874-80], All. E.R. Rep.388. That rule provides that where it would be unfair for a trustee or other officer of the court to take full advantage of his legal rights as such, the court will order him not to do so and indeed will order him to return monies which he may have collected. The rule imposes a higher standard on the trustee than would be imposed on an ordinary litigant not exercising statutory rights as an officer of the court. The decision in *Re Clark* was urged upon me with the argument that it would likewise be unfair to allow the trustee in bankruptcy to prevail over Tessis on our facts. However,

it is my opinion important to note that in *Re Clark* Wolfan J. stated clearly the view that except in the most unusual cases the rule must not be applied where the claimant is in a position to submit an ordinary proof of claim in a bankruptcy. Tesis has submitted such a proof of claim and the trustee has not challenged it. At p.458 of the report Wolfan J. stated:

> The rule is not to be used merely to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any.

In my opinion *Re Clark, supra,* is no help to the applicant and indeed, although not directly, runs counter to his claim by showing equity less willing to interfere where the claimant has *some* remedy.

The Waters: Law of Trusts in Canada (1974 edn.) a work published before Pettkus made it clear that the remedial constructive trust was firmly established in the law of common law Canada, the learned author speaking of the older formulation of constructive trust based upon a pre-existing fiduciary relationship, said at.p.363-4:

> In principle the constructive trust should be the expression of the right of the claimant to priority in the wrongdoers insolvency; the right to trace should enable that priority to be claimed in the insolvency of the wrongdoing third party who has the property. At this point bankruptcy legislation would intervene to mark off those so-called trustee and *cestui que trust* relationships which having escaped debtor and creditor relationships through the artifice of fiduciary status ought not in policy terms to confer a priority upon the *cestui que trust* in the insolvency of the trustee.

100 Speaking still of the substantive as opposed to the imposed remedial constructive trust, Waters states in footnote is on p.364:

> The question for the courts will be whether, like third parties, the general creditors of the insolvent holder of the property have an equity of their own against the claimant asserting equitable title. They stand in the shoes of the bankrupt, but the relative ease with which the claimant can establish a fiduciary relationship means that persons are able to trace whose inherent merits may e no greater than those of the general creditor.

101 In both the above passages Walters is clearly speaking of express trusts. An imposed, remedial constructive trust has nothing to do with "the artifice of fiduciary status" in the sense of something contrived by the beneficiary to give him an advantage over an ordinary creditor. It arises on being imposed by the court.

102 It is noteworthy that in *Rathwell, Pettkus* and in *Palachik v. Kiss* the claimant would have had no basis for recovery had it not been for the finding of a resulting trust or latterly, the imposition of a constructive trust. Similarly, in *Re Clark, supra,* it was stated that the *Re Condon: Ex parte* James rule would not be applicable, except in rare circumstances where the claimant had any other remedy.

103 Although I believe it to be likely that the impetus of the recent Supreme Court of Canada decisions culminating in *Pettkus* and *Palachik v. Kiss* will result in the remedial constructive trust being applied in certain bankruptcy situations to avoid unjust enrichment, I do not believe this to be an appropriate case for such a remedy.

104 It has been asserted that the monies paid by Tessis produced a windfall for Agil and therefore for the unsecured creditors. However, most of those monies went to pay off prior mortgages, inferred to be equally invalid, and so, on a dollar for dollar basis, the position of the unsecured creditor was not much changed, on the not unreasonable assumption that a well-informed trustee would have come to realize that the prior mortgages were themselves invalid. The parties who really received the windfall were the prior mortgagees whose invalid mortgages were paid off out of the proceeds of Tessis' loan. They are not before the court. That argument does not apply to the parts of the Tessis loan that can be traced into improvements to the property. To the extent of such improvements the unsecured credtors have received a windfall from the fact that Tessis has advanced monies that he would not have advanced had he known that his mortgage would pass no interest in the land. However, not every windfall gain is an unjust enrichment.

105 The applicant stresses the element of mistake and the misleading affidavit and asserts that Agil should not be allowed to keep money when it has not delivered the consideration therefor, i.e. a valid mortgage, and that the trustee can stand in no better position than Agil. But this is not pure mistake as in *Chase Manhattan Bank N.A., supra.* Tessis intended to pay over the money against Agil's promise to pay and the guarantee of Agil's president, and he did receive that consideration. He also expected to be a mortgagee under a valid mortgage and it must be acknowledged that he would not have made the loan if he had not believed that he was getting a good mortgage.

106 The difficulty with the mortgage, apart from the triggering fact that Agil could not keep up its payments, was that it was illegal in that it contravened the *Planning Act.* This was no mere matter of being hoisted by the "vagaries of the *Statute of Frauds*", to use the phrase employed by MacKinnon J.A. in *Nicholson v. St. Denis, supra,* to describe the claimant's difficulty in *Degelman v. Guaranty Trust Company of Canada,* [1954] 3 D.L.R. 785. The illegality was sufficiently serious to have been visited by the legislature with the dread remedy of nullity. Such a heavy legislative thrust should cause a court to be cautious about setting aside even its secondary effects. Clearly a court cannot thwart the primary legislative purpose by imposing any trust or other remedy that has the effect of conferring upon Tessis any interest in the land. It is not similarly impossible for the court to impose a trust upon the proceeds for that does not have the effect of creating an interest in the land. But even at that secondary level there is reasonfor caution: if the court imposed a trust upon the proceeds it would be weakening the sanction imposed by the legislature in pursuit of the legislative objective of preventing unauthorized subdivision of land. It is a factor to consider and, at some weight, it is always a factor against imposing a constructive trust. In a proper case a court may feel that other factors override it, but it is not a factor not to be ignored. I believe it to be, on the above-mentioned tests in *Rathwell,* a juristic factor but not one that, alone, is necessarily determinative. I am not persuaded by the applicant's contention that this is merely a case of unjust enrichment occasioned by mistake based on misrepresentations.

107 A strong reason for not imposing a constructive trust in this case is the justice factor represented by the fact that the loan agreement, which governed and set out the relationship between Tessis and Agil assigned to Tessis the task and risk satisfying himself as to the title of Agil to the property in question and as to the validity of the mortgage. It was even provided that Agil was to pay the fees and disbursements of the solicitor for Tessis. As between Tessis and Agil, Tessis was not authorized to rely upon any affidavit as to non-ownership of abutting lands. Whether that statement was put into affidavit to comply with registration requirements or at the request of Tessis' solicitor, it could not reasonably have been intended to shift to Agil any part of Tessis' burden of satisfying himself as to the validity of the mortgage. Agil was required to pay for the necessary legal services and to allow Tessis to use a solicitor of his own choosing. This is not a simple case of monies paid under a mistake.

108 I appreciate that in unjust enrichment cases the focus is on the enrichment, in contrast to tort cases where the focus is on the damage and the liability. However, most of the proceeds of the Tessis loan went to enriching the holders of the invalid prior mortgages. The considerations dicussed above with respect to subrogation are relevant here. To the extent that unsecured debts were paid off out of the proceeds of what turned out to be another unsecured loan can Agil or its unsecured creditor be said to have been enriched? In my opinion they cannot. Although a constructive trust is imposed *nunc pro tunc* it is imposed, if at all, on the basis of contemporaneous scrutiny. Such scrutiny discloses here that, with respect to most of the Tessis loan, Agil simply exchanged unsecured creditors, so to that extent there was no enrichment of Agil let alone of its unsecured creditors and the test in *Rathwell* was not met. True, a smaller part of Tessis' funds were used to finance improvements of the building. Even although the low sale price of the property may call in question the objective value of the improvements, it must be assumed that they were worth something. We do not, however, know how much they contributed to the sale price. Clearly they would not of themselves justify the imposition of a constructive trust on the whole of the proceeds.

109 In my opinion, this is not a proper case for the imposition of a constructive trust.

110 Accordingly, the application is dismissed with costs, as to be assessed, against the applicant, those of the trustee on a solicitor and client basis and those of counsel to Tessis on a party and party basis.

"Signed"

End of Document

TAB 8

2008 CarswellOnt 6914
Ontario Superior Court of Justice

Holborn Property Investments Inc. v. Romspen Investment Corp.

2008 CarswellOnt 6914, [2008] O.J. No. 5722, 77 R.P.R. (4th) 262

Holborn Property Investments Inc. (Applicant) and Romspen Investment Corporation and Woods Property Development Inc. (Respondents)

Wilton-Siegel J.

Heard: July 14-18, 23, 24, 2008
Judgment: August 8, 2008
Docket: CV-08-00007545-00CL

Counsel: Arnold Zweig, Mark Ross, for Applicant
David Preger, for Respondent, Romspen Investment Corporation
Benjamin Salsberg, for Respondent, Woods Property Development Inc.

Subject: Property; Corporate and Commercial; Contracts; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Real property --- Mortgages — Priorities — Between types of creditors — Registered mortgagee and equitable interest holder

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. covenanted not to register agreement on title to property — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement, and did not obtain any protection against default or increase in encumbrances — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for order vesting title to property in its name upon payment of sales proceeds to R Corp. — Application dismissed — Agreement, as equitable interest in property, did not have priority over first and second mortgages based on doctrine of actual notice — While R Corp. had actual notice of agreement at time of execution and registration of first and second mortgages, agreement was subordinated to those mortgages by virtue of s. 93(3) of Land Titles Act — Doctrine of actual notice does not apply in Ontario to subordinate interest of registered chargee who has actual notice of unregistered agreement of purchase and sale — Even if doctrine of actual notice continues to operate, no issue of priority arose because chargee had actual knowledge of subordinated interest — Covenant not to register agreement of purchase and sale constitutes subordination of that agreement for purposes of actual notice — H Inc. was not entitled to discharge of first and second mortgages on basis that it ranked prior to such instruments by application of doctrine of actual notice.

Real property --- Registration of real property — Registration of land — Land titles — Priorities — Effect of unregistered interest

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. covenanted not to register agreement on title to property — H Inc. was not aware that R Corp. held three mortgages over property before entering into

agreement, and did not obtain any protection against default or increase in encumbrances — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for order vesting title to property in its name upon payment of sales proceeds to R Corp. — Application dismissed — Agreement, as equitable interest in property, did not have priority over first and second mortgages based on doctrine of actual notice — While R Corp. had actual notice of agreement at time of execution and registration of first and second mortgages, agreement was subordinated to those mortgages by virtue of s. 93(3) of Land Titles Act — Doctrine of actual notice does not apply in Ontario to subordinate interest of registered chargee who has actual notice of unregistered agreement of purchase and sale — Even if doctrine of actual notice continues to operate, no issue of priority arose because chargee had actual knowledge of subordinated interest — Covenant not to register agreement of purchase and sale constitutes subordination of that agreement for purposes of actual notice — H Inc. was not entitled to discharge of first and second mortgages on basis that it ranked prior to such instruments by application of doctrine of actual notice.

Real property — Mortgages — Priorities — General principles — Notice

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. covenanted not to register agreement on title to property — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement, and did not obtain any protection against default or increase in encumbrances — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for order vesting title to property in its name upon payment of sales proceeds to R Corp. — Application dismissed — Agreement, as equitable interest in property, did not have priority over first and second mortgages based on doctrine of actual notice — While R Corp. had actual notice of agreement at time of execution and registration of first and second mortgages, agreement was subordinated to those mortgages by virtue of s. 93(3) of Land Titles Act — Doctrine of actual notice does not apply in Ontario to subordinate interest of registered chargee who has actual notice of unregistered agreement of purchase and sale — Even if doctrine of actual notice continues to operate, no issue of priority arose because chargee had actual knowledge of subordinated interest — Covenant not to register agreement of purchase and sale constitutes subordination of that agreement for purposes of actual notice — H Inc. was not entitled to discharge of first and second mortgages on basis that it ranked prior to such instruments by application of doctrine of actual notice.

Real property — Mortgages — Payment and discharge of mortgage — Statutory discharge — Partial release or discharge

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement, and did not obtain any protection against default or increase in encumbrances — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — Comfort letter did not refer to requirement in first mortgage that mortgage not be in default in order to obtain partial discharge — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for order that it was entitled to partial discharge of first mortgage and discharge of second mortgage upon payment of sales proceeds to R Corp., based on reliance on comfort letter from R Corp. — Application dismissed — Comfort letter constituted representation by R Corp. that was intended to be acted upon, and that representation was not limited in time — Any ambiguity in comfort letter was removed by subsequent letter to H Inc. which was intended

to "clarify" operation of partial discharge provisions in first mortgage — H Inc. could not reasonably have believed that R Corp. was prepared to waive its rights under these provisions if H Inc., rather than W Inc., requested partial discharge — Comfort letter did not constitute representation that R Corp. would grant H Inc. partial discharge whether or not first mortgage was in default — H Inc. could not reasonably rely on comfort letter as representation to such effect.

Estoppel --- Estoppel in pais — Elements — Representation of existing fact not future intention

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement, and did not obtain any protection against default or increase in encumbrances — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — Comfort letter did not refer to requirement in first mortgage that mortgage not be in default in order to obtain partial discharge — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for order that it was entitled to partial discharge of first mortgage and discharge of second mortgage upon payment of sales proceeds to R Corp., based on reliance on comfort letter from R Corp. — Application dismissed — Comfort letter constituted representation by R Corp. that was intended to be acted upon, and that representation was not limited in time — Any ambiguity in comfort letter was removed by subsequent letter to H Inc. which was intended to "clarify" operation of partial discharge provisions in first mortgage — H Inc. could not reasonably have believed that R Corp. was prepared to waive its rights under these provisions if H Inc., rather than W Inc., requested partial discharge — H Inc. could not reasonably rely on comfort letter as representation that R Corp. would grant H Inc. partial discharge whether or not first mortgage was in default, and could not assert entitlement to estoppel based on reliance on alleged representation.

Torts --- Negligence — Duty and standard of care — Duty of care

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement, and did not obtain any protection against default or increase in encumbrances — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for order that it was entitled to partial discharge of first mortgage and discharge of second mortgage upon payment of sales proceeds to R Corp., based on breach by R Corp. of duty of care — Application dismissed — H Inc. and R Corp. did not have relationship of sufficient proximity that R Corp. was subject to duty of care in favour of H Inc. — Mortgagee having no contractual relationship with purchaser of interest in mortgaged property owes no duty of care to purchaser except in very unusual circumstances, none of which were demonstrated here — Nature of relationship among parties did not impose obligation on R Corp. to disclose existence of arrears to H Inc. — Comfort letter constituted representation by R Corp., but did not create contractual relationship and could not be basis for duty of care — H Inc. entered into agreement with W Inc. under which it subjected itself to significant risk of loss — R Corp. had nothing to do with formation of agreement or H Inc.'s decision to develop property, and was not subject to duty of care to protect H Inc.'s investment simply because it became aware of risk H Inc. undertook.

Real property --- Mortgages — Payment and discharge of mortgage — Determining amount due

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement — W Inc. refinanced mortgages by way of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition

of granting discharge — H Inc. applied for ruling on amount to be paid to obtain partial discharge of first mortgage and discharge of second mortgage — Amounts determined — Evidence did not support existence of agreement between W Inc. and R Corp. to "principal repayment holiday," deferring W Inc.'s obligation to pay principal on first mortgage — R Corp. was entitled to require that default on first mortgage be cured as condition of delivery of partial discharge on property — Amount required to cure default under $17 million mortgage was $3,907,995.40 or 3,607,995.40, depending on whether $300,000 ground lease payment being held in escrow was treated as received by W Inc. — H Inc. failed to demonstrate that W Inc. agreed to "draft" statement of adjustments showing net sales proceeds of $9,629,276.19 — Net proceeds of sales transaction was $10,187,835.22 or $10,487,835.22, subject to credit adjustment in respect of rental payments — Second mortgage was enforceable obligation of W Inc. — H Inc. was entitled to discharge of lien constituted by second mortgage, without payment of principal amount, on satisfaction of requirements to obtain partial discharge under first mortgage.

Table of Authorities

Cases considered by *Wilton-Siegel J.*:

Armatage Motors Ltd. v. Royal Trust Corp. of Canada (1997), 34 O.R. (3d) 599, 1997 CarswellOnt 2758, 12 R.P.R. (3d) 19, 102 O.A.C. 308, 149 D.L.R. (4th) 398 (Ont. C.A.) — distinguished

Counsel Holdings Canada Ltd. v. Chanel Club Ltd. (1997), 1997 CarswellOnt 1163, 33 O.R. (3d) 285, 29 O.T.C. 193 (Ont. Gen. Div.) — distinguished

Dominion Stores Ltd. v. United Trust Co. (1976), 1 R.P.R. 1, 11 N.R. 97, [1977] 2 S.C.R. 915, 71 D.L.R. (3d) 72, 1976 CarswellOnt 383, 1976 CarswellOnt 404 (S.C.C.) — distinguished

Midland Mortgage Corp. v. 784401 Ontario Ltd. (1997), 34 O.R. (3d) 594, 1997 CarswellOnt 2762, 102 O.A.C. 226, 12 R.P.R. (3d) 14 (Ont. C.A.) — considered

Reviczky v. Meleknia (2007), 66 R.P.R. (4th) 254, 287 D.L.R. (4th) 193, 2007 CarswellOnt 8258, 88 O.R. (3d) 699 (Ont. S.C.J.) — distinguished

Statutes considered:

Land Titles Act, R.S.O. 1970, c. 234
s. 52 — referred to

s. 91 — referred to

Land Titles Act, R.S.O. 1990, c. L.5
Generally — referred to

s. 71(1.1) [en. 1998, c. 18, Sched. E, s. 129] — considered

s. 93(3) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01(6) — referred to

Words and phrases considered

actual notice

Notice of an interest that is stated to be subordinated is not actual notice of a prior interest that defeats a mortgagee's registered charge.

APPLICATION by purchaser for order vesting title to property in its name upon payment of sales proceeds to mortgagee, and for order extinguishing mortgagee's interest in property or compelling it to discharge two mortgages on property.

Wilton-Siegel J.:

1 On this application, Holborn Property Investments Inc. ("Holborn") seeks an order vesting title to the property known municipally as 20 High Street, Collingwood, Ontario (the "Property") in its name upon payment of the sales proceeds of the Property to Romspen Investment Corporation ("Romspen"). As part of the vesting order, it seeks an order extinguishing all interest in Romspen in the Property or, alternatively, an order compelling Romspen to discharge its two mortgages on the Property upon payment to it of the sales proceeds.

Background

2 Holborn is the purchaser under an agreement of purchase and sale (the "Agreement") dated October 17, 2005 between Holborn and Woods Property Development Inc. ("Woods") for the purchase of the Property.

3 At the time of the Agreement, Romspen held the following mortgages over the Property:

1. a first mortgage in the principal amount of $8.6 million;

2. a second mortgage in the principal amount of $1.55 million, which mortgage was also secured against a property known municipally as 395 Raglan Street, Collingwood, Ontario (the "Raglan Property"), which was owned by another corporation under common ownership with Woods, TDCI Holdings Inc. ("TDCI"); and

3. a third mortgage in the principal amount of $500,000.

4 The purchase price for the Property was $16,650,000. Holborn paid Woods an initial deposit of $50,000 plus additional deposits of $200,000 monthly commencing February 1, 2006. These payments were neither secured nor held in trust. In addition, pursuant to clause 7 of the Agreement, Holborn was entitled to pursue development approvals for the Property at its own expense. Holborn intended to re-develop the Property as a "big box" shopping centre. Holborn says that it has expended approximately $3.5 million on the Property in connection with such redevelopment.

5 The Agreement contemplated a closing date of October 14, 2008, which could be advanced by Holborn at its option by requiring Woods to give notice of termination to the existing tenants. The Agreement was, however, an unconditional purchase agreement subject only to satisfaction that Woods was conveying good title to the Property.

6 By agreeing to a delayed closing, Holborn essentially acquired the property in 2005 and received an interest-free loan in the amount of the purchase price for three years. Holborn also obtained a period of time in which to find equity investors for the project.

7 The monthly deposit payments of $200,000 were intended to provide Woods with the cash flow that Woods believed was necessary to meet its on-going obligations during that period, including its debt service obligations on the Romspen mortgages. However, because rental income from the Property was insufficient to cover the expenses of Woods, its profit on the sale of the Property was reducing monthly by the amount of the cash flow deficiency. This meant Woods had an incentive to close the transaction as soon as possible whereas Holborn had an economic incentive to delay the closing as long as possible.

8 Critically, for unexplained reasons, Holborn did not obtain any contractual or other protections in the Agreement against (1) an inability of Woods to keep the Romspen mortgages current; (2) an insolvency of Woods; (3) an increase in advances secured under the existing Romspen mortgages; or (4) any new mortgages or other encumbrances on the Property in favour of Romspen or any third party. Instead, Holborn says it trusted that Woods would meet its obligations and that Romspen would notify it of any arrears that arose and take prompt steps to enforce its security if Woods went into default. However, Holborn never advised Romspen of this expectation.

9 In addition, pursuant to clause 20(d) of the Agreement, Holborn covenanted not to register the Agreement, or notice thereof, on title to the Property. Moreover, Holborn did not obtain a complete title search of the Property prior to entering into the Agreement. Accordingly, at the time of execution of the Agreement, it was not aware of the three mortgages on the Property or of the involvement of the common owner of Woods and TDCI in the Raglan Property.

10 Romspen was aware of the negotiations between Woods and Holborn and received at least one draft copy of the Agreement prior to its execution. At the request of Clive Figueira ("Figueira"), who is understood to be the common owner of Woods and TDCI, Wesley Roitman ("Roitman") of Romspen commented on the proposed deal. While Romspen did not receive an executed copy of the Agreement until January 16, 2006, it was made aware of the execution of the Agreement shortly after its execution. Romspen was therefore aware of the material terms of the Agreement from shortly after its execution. There was, however, no communication between Holborn and Romspen at the time of the negotiation and execution of the Agreement.

11 At the time it acquired the Raglan Property earlier in January 2005, TDCI obtained a mortgage loan in the principal amount of $3.6 million secured against the Raglan Property (the "Raglan Mortgage") to fund a portion of the purchase price. The remainder of the purchase price for the Raglan Property was financed by the second mortgage in the principal amount of $1.55 million referred to above.

12 The Raglan Mortgage included a covenant of TDCI to pay Romspen a profit participation fee (the "Profit Participation Fee") in the event of the sale of the Raglan Property or on the maturity of the mortgage if the Property was not sold prior to that date.

13 On January 26, 2006, the second and third mortgages on the Property, both of which contemplated payment of all interest thereon at maturity, were refinanced by Woods in the form of a new second mortgage in the amount of $2.5 million in favour of Romspen. A total of $2,337,318.07 was required to pay off the old mortgages. Romspen did not seek a subordination agreement or other acknowledgment from Holborn with respect to the priority of the $2.5 million mortgage because the Agreement was not registered on title.

14 On July 6, 2006, Woods refinanced the two outstanding mortgages on the Property and the Raglan Mortgage by way of a new first mortgage in the principal amount of $17 million (the "First Mortgage"), which was secured against both the Property and the Raglan Property. The First Mortgage incorporated the terms of a commitment letter dated June 1, 2006 previously delivered by Romspen to Holborn in connection with this refinancing (the "Commitment Letter"). The amount necessary to discharge the amounts owing in respect of the outstanding Romspen mortgages on the Property at the time of the First Mortgage was $11,338,090.84. This amount included realty tax arrears of $112,316.27 on the Property. The remainder of the advance under the First Mortgage was used to pay out the Raglan Mortgage and to finance redevelopment of the Raglan Property in order to move the tenants of the Property to the Raglan Property upon completion of the sale transaction with Holborn.

15 In addition, on the same day a second mortgage in the principal amount of $545,000 was registered against the Property (the "Second Mortgage"). The Second Mortgage was expressed to be security for an amount that the parties had agreed would represent the value of the Profit Participation Fee provided for in the Raglan Mortgage. This is addressed further below.

16 The First Mortgage and the Second Mortgage were registered against title to the Property on or about July 6, 2006. The First Mortgage was a joint obligation of TDCI and Woods and was therefore also registered against the Raglan Property. Romspen also did not obtain a subordination agreement or other acknowledgment from Holborn with respect to the priority of the Agreement in connection with these mortgages.

17 The First Mortgage contained the following partial discharge provision:

> Provided no event of default has occurred, the Chargor, WOODS PROPERTY DEVELOPMENT INC., shall have the right of partial discharge for the property municipally known as 20 High Street, Collingwood, Ontario, upon payment, on account of principal, of all net proceeds of sale to be received by the Chargor pursuant to an agreement of purchase and sale between the Chargor and Holborn Property Investments Inc. ("Holborn") as of the 17th day of October, 2005 (the "Holborn Agreement"). For greater certainty, such net proceeds shall be in the amount specified in the Holborn Agreement and if any subsequent amendments of the Holborn Agreement results in a reduction of such net proceeds, Chargee shall not be obliged to discharge the subject lands unless Chargee receives the payment, on account of principal, which would have resulted prior to any such subsequent amendment.

18 In July 2006, Holborn, or one of its prospective investors in the Property, sub-searched the Property and identified the Romspen mortgages on the Property, which at that time totalled approximately $29 million in face amount because none of the refinanced mortgages had been discharged on title.

19 Holborn and its solicitor, Sheldon Berg ("Berg"), recognized the risk that Holborn was running in the absence of any contractual or other protection against an increase in encumbrances against the Property. Accordingly, Berg wrote a letter dated August 9, 2006 to Eli Gutstadt ("Gutstadt"), the solicitor for Woods, requesting an amendment to the Agreement to include two forms of protection. The relevant portion of the letter reads as follows:

> Further to our recent telephone conversations and in furtherance of our continued due diligence with respect to the above-noted transaction our client has requested that we proceed with an Amendment to the Agreement of Purchase and Sale inserting the following provisions:
>
> 1. An option in favour of the Purchaser to complete the purchase of the Property at any time upon the providing of thirty (30) days notice to the Vendor; and
>
> 2. A Covenant on the part of the Vendor to the effect that the Property will not be further encumbered without the express written consent of the Purchaser.
>
> With regard to 2) please note that our most recent sub-search of title to the Purchaser has indicated total financing approximating $29,000,000.00. We are sure you can appreciate our client's concern in light of the fact that the total financing amount is well in excess of the purchase price. We assume that the face value of the financing does not reflect the actual amount outstanding and would appreciate if you provide us with a current mortgage statement with respect to all security for the mortgages.

20 This letter prompted a telephone call between Berg and Gutstadt. The result of the telephone call was a different approach embodied in a letter of August 10, 2006 from Berg to Gutstadt. In this letter, Holborn requested comfort from Romspen that it would deliver a partial discharge if Holborn completed the purchase of the Property in accordance with the terms of the Agreement. The letter reads as follows:

> Further to our letter of August 9, 2006, and our telephone conversation of the same date, would you immediately provide us with a letter from the existing mortgagees of the Property confirming that upon the closing of the within transaction and the payment by the Purchaser of the balance of the purchase price, that all security held by the mortgagees on the Property will be immediately discharged.
>
> There is some urgency in obtaining this letter so your expeditious reply would be appreciated. May we also hear from you with respect to our letter of August 9, 2006.

21 Berg drafted the form of comfort letter that Holborn wished to obtain from Romspen and forwarded it by e-mail to Gutstadt. Gutstadt forwarded the letter by e-mail to Sheldon Esbin ("Esbin"), the president of Romspen who was temporarily

attending to this matter in the absence of Roitman, who was responsible for the Woods/TDCI relationship at Romspen. At Esbin's request, Gutstadt also prepared and enclosed a preliminary statement of adjustments to reflect the net sales proceeds, before any adjustments apart from deposits paid to date, that Romspen could expect to receive on closing.

22 Esbin signed the requested comfort letter on behalf of Romspen on or about August 25, 2006, although the letter is dated August 14, 2006, and forwarded it to Gutstadt. This comfort letter (the "Romspen Comfort letter") refers to the existing security on the Property, states in an amendment added by Esbin that it does not relate to the Raglan Property, and then provides as follows:

> We further confirm and acknowledge that on payment to us of the net proceeds of sale with respect to the above-noted transaction, we will discharge all of the above-noted security from the said Property.

23 While the letter does not specifically identify the sale of the Property as the "above-noted transaction", there is no dispute that the reference was intended to be to the sale of the Property under the Agreement. Significantly for this proceeding, the Romspen Comfort Letter did not refer to the requirement in the First Mortgage that the mortgage not be in default in order to obtain a partial discharge.

24 On November 2, 2006, Roitman, on behalf of Romspen, wrote to the solicitor for Holborn stating that "further to our correspondence of August 14, 2008, we wish to clarify that the right of partial discharges contained in the mortgages are subject to a number of conditions contained in the commitment which enclose [sic] for your review." The enclosed commitment referred to is the Commitment Letter. Romspen attached stickered arrows beside four provisions in the Commitment Letter, including a provision that was substantially identical to the partial discharge provision in the First Mortgage set out above.

25 Berg reviewed the Romspen letter of November 2, 2006 and concluded that it did not affect the Romspen Comfort Letter. He discussed this letter with Joe Maio, a principal in Holborn ("Maio"), and advised him to the same effect. Berg did not think it was necessary to discuss the purpose or reason for the letter with Romspen or its solicitor and, accordingly, he did not contact or otherwise communicate with either of them with respect to this letter.

26 There were no communications between Holborn and Romspen after Holborn's receipt of the Romspen letter of November 2, 2006 until May 8, 2008.

27 In late 2007, Holborn and Woods tentatively agreed to a closing date for the transaction of March 4, 2008, which was subsequently re-scheduled for March 28, 2008.

28 When Woods informed Romspen of the proposed date for completion of the Holborn purchase of the Property in March 2008, Romspen responded by letter dated March 10, 2008 stating that the terms of the First Mortgage "did not provide for partial Discharges of the secured properties". The letter went on to say "[h]owever, considerations to such a proposal will only be considered once the Mortgage is brought into good standing". Romspen enclosed a mortgage statement showing an outstanding amount of $2,235,590.66. This amount included principal payments for the period August 15, 2007 to March 15, 2008 of $1,040,000 together with interest for the period December 5, 2007 to March 26, 2008 of $514,249.12.

29 Woods did not advise Holborn of Romspen's position regarding the status of the First Mortgage or the requirement to cure the First Mortgage to obtain a partial discharge. The parties agreed, however, to extend the closing date at least two more times, eventually settling on May 28, 2008.

30 On May 8, 2008, Romspen made formal demand on Woods and TDCI for repayment of the First Mortgage and the Second Mortgage indicating that if repayment was not made within ten days, it would commence enforcement proceedings. Woods did not advise Holborn of this development. Woods and TDCI failed to repay the mortgages by this date. On May 23, 2008, Romspen commenced an application for the appointment of a receiver over the assets and undertaking of each of Woods and TDCI.

31 On the same day, the solicitor for Romspen telephoned Berg to advise him, on behalf of Holborn, that the First Mortgage was in arrears and that Romspen required payment of the arrears before it would provide a discharge. This was the first time that Holborn learned of the history of arrears on the First Mortgage.

32 The evidence indicates that principal repayments on the loan secured by the First Mortgage ceased in September 2007, when Woods paid the principal obligation for July 2007. While Woods made payments on account of interest from time to time thereafter, interest payments ceased after January 2008. In addition, there are realty tax arrears in respect of the 2006, 2007 and 2008 taxes on each of the Property and the Raglan Property.

33 On June 4, following further extensions of the closing date, Holborn tendered the amount of $9,629,276.19, being the amount set out on a statement of adjustments delivered to it on May 28 by Gutstadt. Holborn says that it and Woods had agreed to this statement of adjustments, which Woods denies. At that time, Woods advised Holborn that it was unable to provide clear title because Romspen required payment of a further amount of $3.545 million as a condition of granting a discharge of the First Mortgage and the Second Mortgage.

Issues

34 The following issues require determination by the Court:

> 1. does the Agreement, as an equitable interest in the Property, have priority over the First Mortgage and the Second Mortgage, notwithstanding the failure of Holborn to register the Agreement, based on the doctrine of actual notice?
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> 2. if the answer to #1 is yes, does Romspen have a subrogated claim that ranks ahead of the Agreement and, if so, in what amount?
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> 3. in the alternative, is Holborn entitled to a partial discharge of the First Mortgage and a discharge of the Second Mortgage based on reliance on the Romspen Comfort Letter?
>
> 4. in the further alternative, is Holborn entitled to a partial discharge of the First Mortgage and a discharge of the Second Mortgage based on a breach by Romspen of a duty of care owed to Holborn? and
>
> 5. if the answer to #1, #3 and #4 above is in the negative, what amount is required to be paid to obtain a partial discharge of the First Mortgage and a discharge of the Second Mortgage?

Priority of the Agreement Based on Actual Notice

Positions of the Parties

35 Section 71(1.1) of the *Land Titles Act* R.S.O., c. L5, as amended (the "Act") permits a purchaser under an agreement of purchase and sale to register a caution in respect of its rights thereunder:

> (1.1) An agreement of purchase and sale or an assignment of that agreement shall not be registered, but a person claiming an interest in registered land under that agreement may register a caution under this section on the terms specified by the Director of Titles.

36 However, Holborn agreed not to exercise its rights to register a caution in respect of the Agreement pursuant to clause 20(d) of the Agreement.

37 Romspen argues that the First Mortgage and the Second Mortgage therefore rank prior to the Agreement by virtue of section 93(3) of the Act, which addresses the effect of registration of a charge under the Act:

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

38 Holborn argues that it is entitled to an order discharging the First Mortgage and the Second Mortgage on the grounds that the Agreement has priority based on Romspen's actual knowledge of the existence and terms of the Agreement. Holborn submits that the reasoning of the Supreme Court in *Dominion Stores Ltd. v. United Trust Co.* (1976), [1977] 2 S.C.R. 915 (S.C.C.) also applies to sub-section 93(3). It argues that the decision requires wording of the nature in the comparable Alberta legislation referred to by Spence J. in order to exclude the operation of actual notice in Ontario and that the wording of subsection 93(3) is insufficient for this purpose. Holborn also suggests that the dicta of J. MacDonald J. in *Reviczky v. Meleknia*, [2007] O.J. No. 4992 (Ont. S.C.J.) at para. 59 and of Adams J. in *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.*, [1997] O.J. No. 1428, 33 O.R. (3d) 285 (Ont. Gen. Div.), at para. 18 support its position.

Analysis and Conclusions

39 There is no dispute that Romspen had actual notice of the Agreement at the time of execution and registration of the First Mortgage and the Second Mortgage. I conclude, however, that the Agreement is subordinated to the First Mortgage and the Second Mortgage for two reasons.

40 First, I do not think that the doctrine of actual notice applies in Ontario to subordinate the interest of a registered chargee who has actual notice of an unregistered agreement of purchase and sale. Subject to the qualification that subsection 93(3) has been read subject to section 155, which deals with the invalidity of the registration of fraudulent instruments and is not at issue in this proceeding, I conclude that subsection 93(3) provides a mortgagee with an absolute defence to a claim based on actual notice.

41 The Supreme Court did not address the operation of section 93(3) in *United Trust* and, in particular, did not address a conflict between a registered charge and an unregistered purchase agreement. *United Trust* instead addressed a conflict between the interest of a transferee of title to property and the interest of a holder of an unregistered interest in the property. In addition, neither *Reviczky v. Meleknia* nor *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* specifically addressed this issue and the statements that Holborn relies on from these decisions are clearly *obiter dicta*. The issue of whether the doctrine of actual notice operates in Ontario to defeat an interest of a registered chargee therefore remains to be determined.

42 Subsection 93(3) specifically addresses the operation of actual notice in the phrase "free from any unregistered interest in the land". This wording is sufficiently explicit to satisfy the test in *United Trust*. There is nothing in that decision that requires language substantially similar to the wording in the Alberta legislation to exclude actual notice. Moreover, both sections 52 (now section 45) and section 91 (now section 87) of the Act, which were considered by the Supreme Court in *United Trust*, expressly contemplate the possibility of unregistered rights or interests having priority over the rights of a first-registered owner or a transferee, respectively. In contrast, subsection 93(3) expressly contemplates the opposite. On this basis, I think that a registered chargee can rely on the provisions of subsection 93(3) to defeat an unregistered agreement of purchase and sale even if the chargee has actual notice of the agreement prior to registration of the charge.

43 Second, even if the doctrine of actual notice continues to operate in Ontario, the principle applied by Adams J. in *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* is applicable in this proceeding. In that decision, Adams J. concluded that no issue of priority arose because the chargee had actual knowledge of a subordinated interest:

> While I accept that a purchaser's lien arose in the context of all of these purchase and sale agreements, the liens were not registered and do not take priority over the first registered charge against the lands and premises of Chanel in favour of Counsel. Although the priority of a registered mortgage may be affected by actual notice of a prior equitable lien, *the priority will not be affected where the lien, by its own terms, is expressed to be subordinate or subject to the registered mortgage*. That is the effect of paragraph 26 of all of the agreements of purchase and sale concerning these condominium units. Therefore, *the only actual notice that the initial purchase agreements gave to the plaintiff was notice of a subordinate*

interest of each purchaser to the rights of a mortgagee under a mortgage arranged by the vendor. While no issue of priority arises with respect to the subsequent purchase agreements, the same result would prevail in light of paragraph 26.

[emphasis added]

44 Adams J. based his decision on a provision of the relevant agreements that specifically subordinated the agreements to a mortgage on the property. While the agreements also contained a covenant not to register similar to clause 20(d) of the Agreement, it was unnecessary for Adams J. to consider whether that covenant also constituted a subordination.

45 In my opinion, however, a covenant not to register an agreement of purchase and sale does constitute a subordination of that agreement for purposes of actual notice. By precluding registration of the Agreement on title, clause 20(d) of the Agreement constitutes the Agreement an interest in the Property that is subordinated to Romspen's interest as chargee under the First Mortgage and the Second Mortgage. The only reasonable inference from a covenant not to register, in an agreement that does not contain a covenant against further encumbering the Property, is that the Agreement is intended to be subordinate to any encumbrance registered against the Property after the date of the Agreement.

46 Notice of an interest that is stated to be subordinated is not actual notice of a prior interest that defeats a mortgagee's registered charge. As Adams J. also points out, this is not a matter of enforcement of a contractual provision by a third party to the Agreement but a matter of the extent of the actual notice to Romspen.

47 Based on the foregoing, I conclude that Holborn is not entitled to a discharge of the First Mortgage and the Second Mortgage on the grounds that it ranked prior to such instruments by application of the doctrine of actual notice.

Alleged Subrogation Right of Romspen

Positions of the Parties

48 Romspen argues that, if the doctrine of actual notice is found to entitle Holborn to an order discharging the First Mortgage and the Second Mortgage in respect of the Property, it is entitled to rely on the doctrine of subrogation to the extent of the registered mortgage debt outstanding as of September 30, 2005 with interest brought forward to the date of this trial. It calculates this amount to be $14,091,419.23 as of July 14, 2008. Romspen relies on the statement of Austin J.A. in *Midland Mortgage Corp. v. 784401 Ontario Ltd.* (1997), 34 O.R. (3d) 594 (Ont. C.A.) to the effect that the doctrine of subrogation applies not just to third parties but also to a first mortgagee who renews, replaces, refinances, amends or increases his mortgage.

49 Holborn does not dispute that a mortgagee in Romspen's position may be entitled to rely on rights of subrogation in respect of the principal amounts of any mortgages existing at the time of execution of the Agreement, together with interest from such date. It also does not dispute the calculation of the amount of Romspen's subrogated claim, apart from minor issues regarding the calculation of interest.

50 However, it says that the Court should not exercise its equitable discretion to permit Romspen to rely on rights of subrogation for three reasons. First, it argues that Romspen does not come before the Court with clean hands. It refers to the circumstances pertaining to the $100,000 donation to the Collingwood Humane Society described below. Second, it says it would be unfair for Romspen to look to Holborn for payment in excess of $9.6 million when there is adequate security for the balance of Romspen's loan on the Raglan Property. Third, it argues that Romspen and TDCI or Figueira, as the owner of Woods and TDCI, will be unjustly enriched. Holborn relies on the decision in *Armatage Motors Ltd. v. Royal Trust Corp. of Canada* (1997), 34 O.R. (3d) 599 (Ont. C.A.).

Analysis and Conclusions

51 Given the determinations above regarding the doctrine of actual notice, it is unnecessary to address the operation of rights of subrogation to the facts in this proceeding. I have, however, set out my views on this issue in case I am found to have erred in reaching those conclusions.

52 Holborn acquired its interest in the Property subject to registered mortgages having an aggregate face amount of $10,650,000, which loans remain outstanding although subsumed by, and secured under, new mortgages that have been issued pursuant to subsequent refinancings. Holborn was deemed under the Act to be aware of these prior mortgages. Holborn's failure to register the Agreement did not arise as a result of an accidental error of which Romspen is seeking to take advantage but as a result of an express agreement between Holborn and Woods. It would be unfair to subordinate the First Mortgage and the Second Mortgage, as registered instruments, to the unregistered Agreement in the absence of special circumstances that would justify the Court withholding the right of subrogation. Such exceptional circumstances do not exist in this proceeding for the following reasons.

53 First, any loss that Holborn may suffer does not arise as a result of any illegal action of Romspen on the evidence before the Court. Under the Agreement, Holborn was content to rank behind the Romspen mortgages inasmuch as (1) it was prepared to pay unsecured deposits to Woods; (2) it agreed not to register the Agreement; and (3) it required no other contractual protections against further advances under the Romspen mortgages on the Property. It cannot request the Court to withhold an entitlement to subrogation in order to relieve it of the consequences of this commercial decision.

54 Second, as discussed below, Holborn has failed to demonstrate, on the evidence before the Court, that the circumstances surrounding the donation to the Collingwood Humane Society involved illegal actions on the part of Romspen or its shareholders. In addition, even if this donation were proven to have involved some illegal activity, Romspen is not claiming a right of subrogation with respect to the advance out of which the donation was made. This is, therefore, insufficient to constitute an absence of clean hands for the purposes of subrogation.

55 Third, the argument of fairness fails on several grounds. Holborn has not established that the value of the Raglan Property would exceed the amount secured under the First Mortgage if Holborn were to pay down $9.6 million of that mortgage. Even if that were the case, I do not think that considerations of fairness can be applied to reduce the quantum of a subrogated claim. Subrogation is either available in respect of the entirety of a claim or it is not available at all.

56 Lastly, Holborn has failed to satisfy the onus upon it to demonstrate that either Romspen or Figueira would be unjustly enriched if Romspen were entitled to subrogation to the full extent of its claim.

57 With respect to Romspen, it cannot be unjustly enriched. Its claim is limited to the principal and interest payable on the First Mortgage and the Second Mortgage. The most that can be said is that the value of the Property has increased as a result of a voluntary decision on the part of Holborn, in which Romspen took no part, to invest in the re-development of the Property. This does not constitute unjust enrichment.

58 With respect to Figueira, Holborn says that he will be unjustly enriched because TDCI will have only a small loan outstanding to Romspen under the First Mortgage if Holborn pays the amount required by Romspen to obtain a partial discharge. To succeed on this argument, Holborn has to establish that there is no possibility that Holborn would have a right of subrogation or other remedy against TDCI that would address the unjust enrichment.

59 It has not done so. TDCI and Woods are jointly liable under the First Mortgage. There is a real possibility that Holborn would have a subrogated claim against TDCI although possibly subordinated to the remaining claim of Romspen. Alternatively, it could redeem or acquire the entire First Mortgage in order to obtain a claim or right of subrogation against TDCI. If Holborn truly believes that the value of the Raglan Property exceeds the amount outstanding under the First Mortgage after the repayment of $9.6 million thereof, it would suffer no loss under either of these scenarios. It has certainly not established the converse, that is that the value of the Raglan Property is such that TDCI, or Figueira as the owner of TDCI, will be unjustly enriched if it pays Romspen the amount required to satisfy its subrogated claim.

60 In these circumstances, there is no equitable consideration that would justify denying Romspen its rights of subrogation.

61 I would add that I do not consider the decision in *Armatage* to be applicable to the present circumstances for several reasons. First, *Armatage* involved a contest between two lenders. Second, Armatage Motors relied on the title abstract after

discovering the error. It therefore had a strong claim to equitable relief itself. The effect of the decision was to recognize that, where the equities are balanced, the Court should give effect to the priorities resulting from the order of registration under the Act. Third, in *Armatage* Royal Trust had a very strong claim against the solicitor who negligently advised that it had a first mortgage. Romspen does not have a similar claim in the present proceeding, apart from its claim against TDCI. It would not be appropriate, however, by denying a right of subrogation, to shift the risk associated with the value of the Raglan Property from Holborn to Romspen.

Holborn Claim Based on Reliance on the Romspen Comfort Letter

62 Holborn argues that it relied to its detriment on the Romspen Comfort Letter. It says that Romspen is thereby estopped from relying upon the provisions of the First Mortgage to require that the default thereunder be cured as a condition of delivery of a partial discharge.

63 I agree with Holborn that the Romspen Comfort Letter constituted a representation that was intended to be acted upon. I also agree with Holborn that the representation made by Romspen in that letter was not limited in time. The issue for the Court is the content of that representation after delivery of the letter dated November 2, 2006.

64 It is Holborn's position that the Romspen Comfort Letter granted Holborn a right not given to Woods — namely a right to obtain a partial discharge that was more restrictive to Romspen in the circumstances of default under the First Mortgage. I do not agree.

65 I accept that the Romspen Comfort Letter on its own is ambiguous when applied to the circumstances of default under the First Mortgage. However, any ambiguity was removed by the letter of November 2, 2006 which indicated that it was intended to "clarify" the operation of the partial discharge provisions in the First Mortgage. It clearly referenced by arrow stickers the relevant discharge provisions in the Commitment Letter, which are substantially the same as the partial discharge provisions in the First Mortgage, including the provision set out above. After receipt of that letter, Holborn could not reasonably have believed that Romspen was prepared to waive its rights under these provisions if Holborn, rather than Woods, requested a partial discharge of the Property.

66 This conclusion is consistent with the fact that neither the Romspen Comfort Letter nor the letter of November 2, 2006 expressly states that Romspen is restricting its rights under the First Mortgage in any manner, although the Romspen Comfort Letter, on its own, it may be read to have that effect. In the context in which it was delivered, the only reasonable interpretation of the letter dated November 2, 2006 is that it advised that Romspen was not restricting its rights under the First Mortgage, including its right to insist that any default be cured prior to delivery of a partial discharge.

67 This interpretation is also consistent with the business context in which Romspen made this representation. There is no business reason for the differing treatment between Woods and Holborn implied by Holborn's position. Romspen would obtain no greater advantage if Holborn, rather than Woods, sought a partial discharge. Moreover, the Holborn position implies that, if there were a default, Woods could avoid the need to cure the default by having Holborn apply for the partial discharge.

68 In addition, the conclusion is consistent with the actions of Berg and Maio upon receipt of the letter of November 2, 2006. Despite Berg's evidence, I do not think that there was any misunderstanding on his part as to the purpose of the letter of November 2, 2006 and the nature of the representation made by Romspen. He simply did not focus on the implications of the requirement to cure any default at the time he received the letter of November 2, 2006.

69 Berg admits that he was aware of the contents of the First Mortgage by the time he received the letter of November 2, 2006. He would therefore have been aware that the provisions of the Commitment Letter referred to in the letter were the same as the provisions in the First Mortgage. However, there was no default under the First Mortgage at the time and Berg had no reason to believe that Woods would default in the future. Therefore, I think it is probable that neither Berg nor Maio turned their minds to the issue of default. If this had been important to them, Berg would at least have contacted Romspen to ascertain whether the letter purported to alter its entitlement to a partial discharge in such circumstances. He did not do so. I think it is probable that this was because, as Berg testified, he and Maio focused on the need for comfort that a right of partial discharge

existed under the First Mortgage if the principal amount of that mortgage exceeded the net proceeds of sale of the Property, rather than on the possible complications that defaults under the First Mortgage could present on the exercise of that right.

70 From this perspective, the testimony of Berg and Maio that they did not believe that the letter of November 2, 2006 altered the representation of Romspen makes sense. The letter of November 2, 2006 did not alter the entitlement to a partial discharge at the level as addressed by Holborn. Their actions confirm that the representation cannot reasonably be interpreted to restrict the right of Romspen to require that any defaults be cured as a condition of a partial discharge.

71 Holborn argues that Romspen failed to withdraw the Romspen Comfort Letter by the letter of November 2, 2006. This argument mischaracterizes the issue before the Court. The letter of November 2, 2006 did not purport to withdraw the earlier representation but to remove any ambiguity that might have existed if the Romspen Comfort Letter were read on its own. It did so by setting out in complete detail the right of partial discharge to which Woods and/or Holborn would be entitled. In doing so, it advised that the continuing representation of Romspen was that it would provide a partial discharge on the Property if, and only to the extent that, the partial discharge provisions of the First Mortgage were satisfied.

72 In summary, the Romspen Comfort Letter did not constitute a representation that Romspen would grant a partial discharge to Holborn whether or not the First Mortgage was in default. Holborn could not, therefore, reasonably rely on the Romspen Comfort Letter as a representation to such effect. Accordingly, Holborn cannot assert an entitlement to estoppel based on reliance on the alleged representation. Because there was no such representation, there can be no reliance and therefore no estoppel.

Alleged Duty of Care of Romspen to Holborn

73 Holborn had a contractual relationship with Woods. Holborn could have required Woods to cause Romspen to provide material disclosure to it. It could also have required that its monthly payments be made directly to Romspen. It could have registered a caution on the title to the Property respecting the Agreement. It could have required its consent to any further encumbrances against the Property. It did not negotiate for any of these protections in the Agreement. Holborn chose instead to rely on the honesty and forthrightness of Woods as well as its continued financial solvency. If Woods did not, or could not, meet these standards, Holborn's claim, if any, lies against Woods not Romspen.

74 However, Holborn argues that Romspen and Holborn had a relationship of sufficient proximity that Romspen was subject to a duty of care in favour of Holborn. Holborn says that Romspen breached this duty by failing to inform Holborn of the arrears on the First Mortgage and in failing to take commercially prudent actions to enforce its security upon the occurrence of default by Woods. It says that Romspen's failure to do so prevents Romspen from asserting its rights to require that the First Mortgage be cured of any default as a condition of granting a partial discharge.

75 Holborn argues that the duty to disclose arose by virtue of (1) Romspen's knowledge that the Agreement required monthly deposit payments by Holborn; (2) Romspen's knowledge that Holborn had invested a considerable amount of money in the re-development of the Property; (3) the Romspen Comfort Letter; and (4) Romspen's knowledge that its failure to inform Holborn of the arrears would cause Holborn substantial loss. Holborn says "it was reasonable for Holborn to expect that a lender, acting in the ordinary course, would seek to ensure that the mortgage did not go into arrears while knowing that the borrower had money to pay for it" and that it was reasonable for Holborn to rely on Romspen to inform it of the arrears. It says it was not reasonable, from a commercial standpoint, for Romspen to have sat back and allowed its substantial arrears to accumulate while knowing that there was a flow of money (from Holborn) to cover those arrears and that these prevented Holborn's transaction from closing. It claims damages equal to the amount of its deposits paid to date, the amount invested in the Property, and the loss of the value added to the Property by those investments.

76 I disagree with all of these statements.

77 First, except possibly in very unusual circumstances, a mortgagee having no contractual relationship with a purchaser of an interest in mortgaged property owes no duty of care to the purchaser. There are no special circumstances demonstrated in these proceedings.

78 It is true, as Holborn suggests, that both Holborn and Romspen had an economic interest in the Property. It is also true that Woods could not satisfy its financial obligations, including the debt service obligations on the First Mortgage, without receipt of the monthly deposit payments from Holborn. It is also true that Holborn needed a partial discharge from Romspen to close its purchase of the Property. It is incorrect, however, to characterize this relationship as "interdependent". There is no basis for concluding that the nature of the relationship among the parties in some manner restricted Romspen's actions or imposed disclosure obligations upon it in favour of Holborn.

79 The four circumstances upon which Holborn relies do not support the imposition of a duty of care on Romspen. They do not satisfy the requirement of proximity.

80 Holborn's argument from the first two circumstances is essentially that Romspen became subject to a duty of care because it became aware that Holborn was investing a considerable amount of money in the Property and that it ran the risk of losing its investment if the sale of the Property was not completed. That is insufficient to establish a duty of care. Holborn entered into the Agreement with Woods, not Romspen, under which it subjected itself to significant risk of loss. It cannot turn this around and argue that Romspen is subject to a duty of care to protect Holborn's investment because it became aware of the risk that Holborn undertook by executing the Agreement with Woods.

81 The legal significance of the Romspen Comfort Letter and the letter of November 2, 2006 have been addressed above. The Romspen Comfort Letter constituted a representation of Romspen. It did not create a contractual relationship between Holborn and Romspen. It cannot be the basis for a duty of care. In the absence of a contractual relationship between Holborn and Romspen, there is no basis for imposing a duty of care or a duty of good faith upon Romspen in favour of Holborn based upon the Romspen Comfort Letter.

82 Holborn also alleges that Romspen became subject to a duty of care because it was aware that its failure to inform Holborn of the arrears under the Mortgage would result in a loss to Holborn. For the reasons discussed below, the certainty of loss to Holborn has not been established. Moreover, not only is there no rule of law that required Romspen to disclose the existence of arrears to Holborn, there would also have been legitimate concerns that Romspen would be breaching a duty of confidentiality if it had done so. Holborn must be assumed to have been aware of the potential risks associated with the arrangements under the Agreement. If it expected Romspen to advise it when those risks became a reality, it had to establish a relationship with Romspen to protect itself. The law does not impose a duty of care to relieve it of the consequences of its failure to do so.

83 Similarly, Holborn also cannot claim that Romspen breached a duty of care in its favour by failing to act in a manner that Holborn says would have been expected of a commercial lender in a default situation. Romspen was under no duty to realize upon its security when Woods went into default. Each party was entitled to act in such manner as it believed to be in its commercial interest, provided it did not involve any illegality. It could equally be argued that Romspen was entitled to assume that Holborn would act prudently with a view to protecting its investment in the Property by minimizing its development expenditures and accelerating its purchase of the Property.

84 There is also no rule of law that prevented Romspen from taking advantage of Holborn's contractual arrangements with Woods to its commercial benefit and potentially to Holborn's commercial detriment in the absence of a contractual relationship between Romspen and Holborn. In entering into the Agreement and in expending money on the Property before it owned it, Holborn created the risk from which it seeks protection by imposition of a duty of care on Romspen. Romspen had nothing to do with the formation of the Agreement or with Holborn's decision to pay the development costs of the Property. The fact that Roitman advised Woods that monthly deposit payments of $50,000 merely financed Woods' cash flow deficiency, including its debt service obligations to Romspen, is not sufficient to establish a duty of care in favour of Holborn. Holborn cannot prevent Romspen from acting on the basis of those arrangements.

85 For the same reasons, there are also significant difficulties of causation with Holborn's position. Holborn could have minimized, if not excluded its loss altogether, by closing the sale prior to any default by Woods. It chose not to do so for economic reasons. It could also have minimized its re-development costs, which were entirely discretionary, until it had acquired

the Property. It chose instead to proceed with these expenditures thereby increasing the value of the Property. It also chose not to pursue contractual protections in the Agreement or, after it was alerted to the potential risks, to pursue an amendment to the Agreement. After it received comfort that a partial discharge right existed, it also did not monitor Woods' financial status. It cannot be said, therefore, that any loss that Holborn might suffer would not have been suffered but for Romspen's decision to withhold its advice to Holborn of Woods' financial difficulties and resulting defaults under the First Mortgage and/or its decision not to take enforcement action.

86 Lastly, any claim for breach of this alleged duty of care would lie in damages. This is also premature inasmuch as Holborn has not asked for a determination of any claim it might have for an equitable mortgage on the Property based on its expenditures for property development, which appear to have increased the value of the Property. In addition, as is addressed further below, it has failed to demonstrate that its rights of subrogation would be inadequate. Moreover, the claim for damages, even if established in principle, cannot be translated into an order that Romspen provide a partial discharge of the First Mortgage and the Second Mortgage on the grounds suggested by Holborn, namely that Holborn's damages flowing from Holborn's duty to inform it of Woods' default "offset" any claim to arrears asserted by Romspen as a condition of a partial discharge. These are entirely separate and unconnected issues.

The Amount Required to Obtain a Partial Discharge of the First Mortgage and a Discharge of the Second Mortgage

87 Given the findings above, the Court is required to determine the amount that either Woods or Holborn is required to pay to Romspen to obtain a partial discharge of the First Mortgage and a discharge of the Second Mortgage. This raises three questions:

1. what amount is required to cure the default under the $17 million Mortgage?

2. what are the net proceeds of sale of the Property pursuant to the Agreement?

3. is Romspen entitled to require payment of the principal amount of the Second Mortgage as a condition of a discharge?

Amount Required to Cure the Default under the First Mortgage

88 Romspen takes the position that, as of July 24, 2008, the amount required to bring the First Mortgage into good standing was $3,911,952.98. This amount includes tax arrears of $565,059.28 in respect of the Property and $192,922.55 in respect of the Raglan Property, plus the amount of $650,000 paid by Home Depot to Woods prior to that date under a ground lease between these parties. Woods says that Romspen agreed to a principal repayment holiday for the period from September 2007, which it believes was the first month for which a principal repayment was not made, until February or March. It says this agreement was made in September 2007 between Figueira and Roitman.

89 There are therefore two issues that must be addressed to determine the amount required to cure the default under the First Mortgage:

1. did Romspen and Woods agree to defer Woods' obligation to pay principal on the First Mortgage?

2. what quantum must be paid to cure the existing default on the First Mortgage?

Did Romspen and Woods Agree to a Principal Repayment Holiday?

90 Figueira says that he thought that he had an agreement with Roitman that he would be permitted to defer the principal repayments required under the First Mortgage after September 2007 until such time as the sale transaction with Holborn closed or Roitman advised him that it was terminating the agreement. He says that Romspen agreed to such a deferral on this basis until February or March 2008, when it advised Woods by letter dated March 10, 2008 as to the amount required in its view to obtain a partial discharge in connection with the closing of the transaction with Holborn.

91 Holborn goes further. It argues that there was a scheme agreed to between Figueira, on behalf of Woods, and Roitman, on behalf of Romspen, to force Holborn to pay Romspen as much as possible and thereby to reduce the principal amount secured against the Raglan Property under the First Mortgage to as small an amount as possible.

92 It points to a number of matters including (1) the refinancing of the various mortgages of Woods and TDCI on maturity into the First Mortgage without payment of principal or accrued interest at the time of the refinancing; (2) the alleged unreasonableness of the quantum of the Second Mortgage agreed between Woods and Romspen as the amount necessary to discharge the Profit Participation Fee; (3) the failure of Romspen to enforce a number of covenants in the Commitment Letter; (4) the arrangements pertaining to certain tax receipts issued in favour of the principals of Romspen discussed below; and (5) the decision of Romspen at Figueira's request not to enforce its security when Woods went into default in September 2007.

93 Romspen denies that Roitman agreed to a principal repayment holiday that resulted in a deferral of the principal repayment schedule by six or seven months. It says that Woods' failure to pay principal reflected only Woods' inability to pay and is not evidence of any forbearance agreement reached with Romspen or of any agreement with Figueira directed towards Holborn.

94 The evidence does not support the existence of either Figueira's alleged interim agreement or Holborn's alleged scheme between Woods and Romspen, on a balance of probabilities standard.

95 With respect to the former, the evidence before the Court is that Figueira met Roitman in September 2007 and advised that Woods would be unable to meet its obligations under the First Mortgage as a result of the loss of a major tenant. At that time he sought Romspen's assistance in not enforcing its security under the First Mortgage because he believed it would adversely affect Woods' relationship with the tenants of the Property and, in turn, could adversely affect the closing with Holborn. The evidence also establishes that Roitman said he was willing to "work with" Figueira in some manner to address his financial difficulties. At the time it was clear to both parties that the answer to Woods' financial problems was completion of the sale of the Property as soon as possible and a refinancing of the Raglan Property with Romspen, if it was prepared to do so, or with another lender, for which it was necessary to move the existing tenants at the Property to the Raglan Property. It was also clear that this would require some time and, in the short-term, Romspen had no choice under the circumstances but to provide some accommodation to Woods, provided it believed it was fully secured, given its preference for avoiding enforcement proceedings.

96 The issue is the nature of that accommodation. I find that the accommodation granted by Roitman on behalf of Romspen took the form of a unilateral forbearance from taking enforcement proceedings against Woods, notwithstanding the expectation that Woods would not be making any principal repayments under the First Mortgage. I find that Roitman was prepared to continue this unilateral accommodation for so long as (1) Woods kept the interest due on the First Mortgage current; (2) there continued to be progress towards a closing of the Holborn transaction within a reasonable timeframe; and (3) there was a reasonable prospect of a viable mortgage loan secured against the Raglan Property after payment of the proceeds of sale of the Property to Romspen. I also find, however, that Romspen did not agree to a deferral of the principal repayment schedule under the First Mortgage and, accordingly, the principal repayments due since July 2007 remain outstanding and in default.

97 There is no evidence to support Figueira's belief that he had an agreement with Roitman to defer the principal repayment schedule. The provisions of section 6 of the First Mortgage require an agreement in writing to amend the mortgage in this manner. Prudent practice also dictates formal amending documentation. No such documentation was ever tendered. Neither Romspen nor Woods ever drafted or proposed documentation giving effect to such an amendment. In addition, the only consideration that Figueira identifies for this alleged interim agreement is the charitable tax deductions made available to the shareholders of Romspen. However, for the reasons set out below, I do not accept that this donation was made at a time when the alleged interim agreement was contemplated and, therefore, I find that it could not constitute consideration for the alleged agreement. In addition, Romspen sent a letter on November 2, 2007 to Woods advising that it was in arrears on the principal repayments and requiring it to make arrangements to repay the arrears by January 15, 2008. Figueira did not respond at that time, either orally or in writing, to dispute the characterization of the status of the First Mortgage even though it was inconsistent with the alleged interim agreement.

98 With respect to the alleged agreement between Woods and Romspen, a number of the circumstances alleged to evidence an improper agreement are far more consistent with the nature of Romspen's business. Romspen is an asset-based lender that takes on riskier mortgages that are not attractive to more traditional lenders. As a result, it is not unusual to provide interest-only and "balloon" mortgages and to refinance mortgages on maturity by extending new mortgages that capitalize unpaid principal and interest, provided there is reasonable certainty that the underlying asset will support such loans. For the same reason, Romspen is accustomed to mortgages going into default and is prepared to defer enforcement proceedings if it satisfied that there are other viable options available to the borrower that would result in repayment of the mortgage.

99 In this context, the decisions of Romspen to refinance the original mortgages on the Property as well as the Raglan Mortgage, and to accede to Figueira's pleas not to enforce after Woods went into default in September 2007, are ordinary course decisions that do not evidence any agreement between these parties to act to the detriment of Holborn. There was also some force to Figueira's argument to Roitman in September 2007 that enforcement proceedings could complicate and therefore delay the closing of the sale of the Property, which was not in the interest of either Woods or Romspen. In addition, Roitman provided reasonable explanations for the waiver of a number of the standard terms in the Commitment Letter pertaining to the construction advances under the First Mortgage.

100 Holborn suggests, however, that two other circumstances indicate the existence of the alleged agreement between Woods and Romspen.

101 The first is an alleged proposal of Roitman made to Figueira and subsequently repeated at a meeting in Roitman's office in May 2006 with Gutstadt present. While the full details of this proposal are unclear, it has been established that Roitman suggested that a default by Woods and the commencement of enforcement proceedings by Romspen might prempt an accelerated closing by Holborn of its purchase of the Property. In making this suggestion, he was clearly assuming that Holborn would feel economically compelled to complete the purchase to protect its investment in the Property.

102 The proposal was overly aggressive, not fully thought through, and probably foolish. However, to succeed in this submission, Holborn must demonstrate that Woods agreed to this proposal and proceeded to implement it. This evidence is lacking. Instead, the evidence is that the proposal was rejected by Figueira, on the strong recommendation of Gutstadt, as being both uncertain of success and potentially improper. Holborn relies on the fact of Woods' subsequent default as confirmation that the proposal was implemented. However, Woods' default did not occur until the late summer of 2007, at which time it is uncontradicted that Woods began experiencing cash flow problems as a result of the sudden loss of a major tenant of the Property. This is a more probable explanation of Woods' default than implementation of the agreement alleged by Holborn.

103 The main difficulty in establishing the existence of this alleged agreement is the testimony of Figueira, who adamantly denied that any agreement or partnership/co-venturer relationship existed between Romspen and Woods. Figueira was a credible witness, particularly when his testimony is considered against the business context in which Woods found itself. I think it was wishful thinking on his part to consider that he had obtained an agreement on a principal repayment holiday from Roitman, rather than unilateral forbearance for a period of time. However, that speaks to his lack of sophistication or experience with lenders rather than to his credibility. I accept his evidence as to the reason for the suspension of principal repayments over the speculation of Holborn of a plot or scheme between Woods and Romspen.

104 Second, Holborn suggests that the tax deductions that Woods gave to the principals of Romspen were made in return for an agreement not to enforce the First Mortgage when it went into default. In his second affidavit, Figueira also makes the same suggestion.

105 It should be noted that the circumstances pertaining to these tax deductions are unclear. They arose as a result of Figueira's perception that it would be necessary for Woods to make a $100,000 donation to the Collingwood Humane Society in order to obtain certain development approvals from the Town of Collingwood. The donation was funded by an advance under the First Mortgage. Figueira says he offered to make the donation in the names of the Romspen principals because neither he nor Woods had sufficient income to use the tax deductions that would arise. There was also an understanding that Romspen would allow

the advance to be used for this purpose notwithstanding that any fresh advances under the First Mortgage were intended under the Commitment Letter to be used for the re-development of the Raglan Property.

106 While Holborn submits that this arrangement was illegal, and it may have been, I have not been provided with sufficient evidence or legal argument to conclude that it is. The only relevance of this event for this proceeding is, therefore, as a possible indication of the alleged agreement between Woods and Holborn in the form of the consideration for such agreement.

107 However, the donation was made in June 2007 when the First Mortgage was in good standing; the request or plea of Figueira not to enforce was made in September, 2007. There is no evidence that Figueira knew in June 2007 of the likelihood of the circumstances that would give rise to Woods' default in September 2007. It is also highly improbable that a lender would agree to withhold enforcement proceedings in respect of a mortgage having a principal amount of $17 million based solely on a charitable donation on behalf of its principals in the amount of $100,000.

Amount Required to Obtain a Partial Discharge

108 Based on the foregoing, Romspen is entitled to require that the default on the First Mortgage be cured as a condition of delivery of the partial discharge on the Property. Romspen submits that the amount required to cure the default as of July 24, 2008 is $3,911,952.98.

109 This amount includes accrued and unpaid interest, unpaid principal in accordance with the schedule established by First Mortgage, and realty tax arrears on the Property and the Raglan Property, together with fees of obtaining realty tax certificates. Given the determinations above, these amounts are properly included in the amount required to cure the default. There is no evidence before the Court to support a credit in favour of Woods of approximately $406,000, shown on Woods' statement of adjustments as Home Depot's portion which, in any event, may have been intended only as a credit on the calculation of the sales proceeds. At the hearing, Roitman agreed that certain late fees totalling $3,957.50 are not payable under the First Mortgage and should be deducted from the amount required to cure the defaults.

110 The amount calculated by Romspen also includes the amount of $650,000, representing the total of ground lease payments received by Woods from Home Depot in excess of $250,000. The second paragraph under "payments" in the Commitment Letter specifically required Woods to pay to Romspen any ground lease payments received from Home Depot, in excess of $250,000, on account of principal.

111 The evidence establishes that Woods received $600,000 in total under the Home Depot ground lease on account of "land lease payments". There is no evidence that Woods paid such amounts to Romspen. Woods is therefore also in default of this covenant under the First Mortgage. Accordingly, an amount equal to such ground lease payments less $250,000, being $350,000, is also required to be paid to cure the default under the First Mortgage.

112 The evidence further indicates that the most recent ground lease payment of $300,000 is being held in escrow by a trustee. As I do not know the circumstances pertaining to this escrow, I have not treated this amount as received by Woods and therefore payable to Romspen. If, however, it is agreed by Home Depot that such amount is to be treated as received by Woods subject only to a determination in this proceeding, then such amount would also be payable to Romspen.

113 Based on the foregoing, I find that, in order to obtain a partial discharge of the First Mortgage, Holborn or Woods are required to pay Romspen the amount of $3,907,995.40 in order to cure the existing defaults under the First Mortgage, if the payment held in escrow is to be included in accordance with the preceding paragraph, or $3,607,995.40, if it is not to be included.

Net Sales Proceeds of the Sale of the Property

114 The remaining issue to be addressed is the calculation of the net sales proceeds for purposes of the Agreement and the partial discharge provision of the First Mortgage.

115 Holborn alleges that the parties agreed on the statement of adjustments marked "draft" delivered on or about May 28, 2008 by Gutstadt to Berg. This shows net proceeds of $9,629,276.19. Woods denies that it agreed to this statement of adjustments and tendered another calculation showing net sales proceeds to be $10,816,863.24.

116 Holborn has failed to satisfy the onus on it of demonstrating that the statement of adjustments marked "draft" was agreed to by Woods. While Berg says it was, there is no documentary evidence to support this position. Moreover, Gutstadt, who appears to be a very careful solicitor, was compelling in his testimony that the draft stamp was specifically intended and represented a departure from his customary practice. I would note as well that there was no compelling reason for Woods to have settled the statement of adjustments with Holborn on or about May 28 as Holborn suggests. By that date, Holborn had commenced this litigation and a closing was not feasible given Romspen's position on the partial discharge. On the other hand, the statement of adjustments provided by Woods also lacks credibility. The evidence suggests that it was created after the tender by Holborn for the purposes of this litigation as a statement of its preferred position rather than as a true statement of adjustments. I have therefore proceeded on the basis that the items in both of these schedules remained outstanding except to the extent set out below.

117 The following items are agreed by the parties to be credits in favour of Holborn:

1. deposits paid under the Agreement totalling $5,650,000; and

2. rental adjustments.

118 With respect to rental adjustments, I have proceeded on the basis that the adjustments totalling $61,164.28 as of May 28, 2008, as set out on the draft statement of adjustments as of that date, are accurate as there is no evidence to the contrary. I have not used the rental adjustments set out on Woods' statement as there is no explanation for these numbers. In any event, the actual credit in favour of the purchaser would be determined as of the date of completion of the sale of the Property.

119 It is also agreed that, because Romspen is entitled to receive an amount equal to the unpaid realty taxes on the Property and the Raglan Property in order to cure the default under the First Mortgage, no adjustment is required for such taxes in the net sales proceeds.

120 In addition, at trial it was agreed that the credits in favour of Woods on its statement of adjustments in the amounts of $385,000, for early discharge fees payable to Romspen, and $155,000, for legal fees related to the refinancing in July 2006, were no longer being claimed. In the case of the former, Romspen is not seeking the payment of early discharge fees to obtain a partial discharge. In the case of the latter, there was no evidence to support this credit and no evidence of any agreement by Holborn that the legal fees would be a credit in favour of Woods. Similarly, the further credits in favour of Woods on its statement of adjustments for water pumping ($21,666.33), Huronia Alarm ($2,114.70) and legal fees ($9,750.00) were not supported by any evidence and are therefore also disallowed. It is my understanding that Woods also indicated at the hearing that it was not seeking these credits.

Home Depot Ground Lease Payments

121 The remaining items are to be addressed:

1. the amount, if any, of the credit to Holborn for amounts paid under the Home Depot ground lease;

2. the amount, if any, of the credit to Holborn for certain development credits received by Home Depot on the partial demolition of the industrial building on the Property; and

3. the entitlement of Holborn to a credit of $25,000 for certain legal fees of the legal counsel for one of the tenants at the Property.

122 With respect to the Home Depot ground lease payments, clause 28 of the Agreement provided as follows:

> Any payment or payments, received by [Woods] from Home Depot in connection with the Home Depot sale shall be credited in reduction of the Purchase Price on closing pursuant to this Agreement.

There is no dispute that this clause captures all the ground lease payments as well as the initial deposit under the Home Depot sale agreement as amended and restated as of November 30, 2005.

123 However, as mentioned above, there is one issue relating to the total amount received to date by Woods on account of the sale. Holborn relies on the May 28 statement of adjustments. It calculates the amount to be $450,000, comprising a deposit of $100,000 under the relevant agreement and two payments of $50,000 and $300,000, respectively. Woods sets out the same amount in its statement of adjustments. In its submission to the Court, Romspen also adopts this calculation. However, in connection with the partial discharge calculation, Romspen calculates the ground lease payments to be $900,000, making the total of payments to be $1 million, based on evidence of the total payments from counsel for Home Depot.

124 This evidence indicates that a total of $1 million has been paid to date, of which $100,000 represents a deposit and $300,000 is held by a trustee in escrow. If, as mentioned above, Home Depot agrees that such amount is to be treated by Woods as received by it subject only to a determination in this proceeding, I find that the credit in favour of Holborn is $750,000. If this $300,000 is being held in escrow on some other basis or for some other reason not before the Court, then the credit in favour of Holborn would be $450,000.

Development Credits

125 The development credits arose on the partial demolition of the industrial building on the Property by Holborn. As a result of this demolition, Home Depot received a development credit in the amount of $301,977 which was paid to it. The evidence suggests that this amount was paid by Home Depot to Woods. Holborn claims it is entitled to this amount under clause 28 of the Agreement.

126 The wording of clause 28 of the Agreement does not capture this credit based on the express language of the provision. Holborn is limited to payments "received in connection with the Home Depot Sale". The evidence is insufficient to establish that Woods separately agreed that this amount was payable by it to Holborn pursuant to the Agreement or by way of an adjustment on closing. While there is a letter from Berg indicating that, in his view, Woods had agreed that the development credits were to be a credit in favour of Holborn on closing, Gutstadt denies that Woods agreed to this and there is no documentation from Gutstadt reflecting the alleged agreement. As Gutstadt was otherwise a credible witness, I am not prepared to reject his oral testimony on this relatively small matter. There is no other documentation upon which Holborn can rely that bears on this issue. The evidence of the context in which the Agreement was negotiated is also insufficient to support the broader interpretation proposed by Holborn with respect to the development credits.

127 Accordingly, I find that Holborn is not entitled to a credit in the amount of the development credits to the extent received by Woods from Home Depot.

Legal Fees

128 The circumstances in which these fees arose was not established in detail at trial. The legal fees arose in respect of an attempt by Woods to negotiate a termination of the lease of one of its tenants whose lease did not contain an early termination provision. Apparently, the tenant made payment of these fees a pre-condition to any further negotiations with Woods or Holborn. Holborn paid these fees in order to advance the negotiations.

129 Clause 17 of the Agreement required Holborn to take the Property on closing subject to the existing leases on the Property. Holborn has not established that it was entitled by agreement between the parties to reimbursement from Woods or to a credit in its favour on the completion of the sale of the Property. As Holborn was required to take the Property subject to the lease of this particular tenant, there is no compelling reason why Woods should have borne this expense. Holborn suggests that

the fees are properly a credit under clause 10(a)(ii) of the Agreement. This provision addresses the costs of physical renovations or repairs to rental areas of the Property. It does contemplate these legal fees.

130 Accordingly, Holborn is not entitled to a credit in its favour of the amount of these legal fees in the calculation of the net sales proceeds.

The Second Mortgage

131 Holborn argues that it is entitled to a discharge of the Second Mortgage on the completion of the purchase of the Property without payment of the principal amount thereof. This presents two principal issues:

1. is the Second Mortgage an enforceable obligation? and

2. if the answer is yes, is Holborn entitled to a discharge without payment of the principal amount of the Second Mortgage based on actual notice or another legal principle?

Is the Second Mortgage an Enforceable Obligation?

132 I have no hesitation in finding that the Second Mortgage is an enforceable obligation of Woods on the evidence before the Court. In the absence of any evidence that the Second Mortgage was not given for valuable consideration, the Court must find that the Second Mortgage is enforceable. There is no such evidence. To the contrary, the evidence indicates that this was a *bona fide* transaction.

133 As mentioned above, the Raglan Mortgage funded a portion of the purchase price of that property by TDCI and included a covenant to pay the Profit Participation Fee. On the refinancing of this mortgage pursuant to the First Mortgage, Woods and Romspen agreed by letter dated June 1, 2006 that Woods would issue the Second Mortgage in the amount of $545,000 in satisfaction of its obligations in respect of the Profit Participation Fee. Because Woods agreed to have the principal amount of the Second Mortgage paid out of the proceeds of sale of the Property, it was also agreed that the Second Mortgage would be secured against the Property rather than the Raglan Property.

134 The Court does not inquire into the adequacy of consideration given in a commercial transaction except when it is so inadequate as to evidence an absence of consideration. It cannot be said that there was no consideration given in the present case for two reasons. First, the evidence is insufficient to find, on a balance of probabilities, that the Profit Participation Fee payable in the future on Raglan could never have reached $545,000. Second, even if that were the case, the Second Mortgage was given as part of the overall refinancing of all of the outstanding mortgages on the Property and the Raglan Property in July 2006, even if it is not referred to in the Commitment Letter. Romspen made it a condition of that financing that the matter of the Profit Participation Fee be addressed. There is, therefore, ample consideration demonstrated by Romspen in the form of the refinancing, including the additional funds advanced for the re-development of the Raglan Property.

Is Holborn Required to Repay the Second Mortgage to Obtain a Discharge?

135 Holborn relies principally upon the doctrine of actual notice to argue that Romspen is not entitled to require repayment of the Second Mortgage as a condition of a discharge. This issue has been addressed above. There remains the issue of whether Holborn is entitled to a discharge of the Second Mortgage on the grounds of an estoppel in reliance on the Romspen Comfort Letter or otherwise.

136 For the following reasons, I conclude that Holborn is entitled to a discharge of the lien constituted by the Second Mortgage on satisfaction of the requirements to obtain a partial discharge under the First Mortgage.

137 There is an inherent complication in the arrangement evidenced by the Second Mortgage as originally conceived by Romspen and Woods.

138 These parties agreed that Woods would be obligated to pay the principal amount of the Second Mortgage at the time of the sale of the Property. The obligation was evidenced by the Second Mortgage on the assumption that Woods would be able to satisfy this obligation out of the proceeds of sale. However, from the outset, the value of the Property was less than the principal amount of the First Mortgage with the result that all net sales proceeds would have been payable to Romspen on account of the principal amount of the First Mortgage.

139 This raises the question of the intention of the parties with respect to the right of Woods to a discharge of the Second Mortgage on a sale of the Property. It would be unreasonable to expect that Romspen would have been entitled to prevent the sale from being completed unless Woods found an additional $545,000 outside the sale transaction to retire the Second Mortgage. Nor is there any evidence that the parties intended Romspen to have such a right. In addition, there was no certainty that Woods could have obtained financing on the Raglan Property to pay off the Second Mortgage. Moreover, if Figueira required such financing, there is no reason why he would have agreed to satisfy the obligation on the sale of the Property rather than on the sale of the Raglan Property as originally contemplated.

140 Accordingly, the only reasonable interpretation of the agreement between the parties is that Woods was to be entitled to a discharge of the lien constituted by the Second Mortgage on payment of whatever sales proceeds were available in satisfaction of the Second Mortgage after prior payment of the amount of the sales proceeds necessary to obtain a partial discharge of the First Mortgage. In the circumstances where no proceeds remained to be paid on account of the Second Mortgage, Romspen would therefore be obligated to release the lien constituting security for payment of the principal amount secured by the Second Mortgage but Woods would remain obligated to pay such principal amount.

141 Given the foregoing analysis, I conclude that Holborn is entitled to a discharge of the charge constituted by the Second Mortgage without payment of the principal amount thereof and that Woods remains liable for satisfaction of the obligation evidenced thereby. While I have concluded that Holborn does not have a better right than Woods to a partial discharge of the First Mortgage, I also see no legal reason why it should have a lesser right than Woods to obtain a discharge of the Second Mortgage.

142 The Romspen Comfort Letter included the Second Mortgage in the list of security to be discharged upon payment of the net sales proceeds of the sale of the Property. This may have been inadvertent as Berg, rather than Romspen's solicitor, drafted the document. However, the Romspen letter of November 2, 2006 did not "clarify" the availability of a discharge of this mortgage as there were no provisions in the Commitment Letter, or in the Second Mortgage itself, that addressed this issue.

143 The conclusion expressed above flows from the agreement between Woods and Romspen rather than from the Romspen Comfort Letter. However, it also suggests that the inclusion of the Second Mortgage in the Romspen Comfort Letter is not incorrect, even if inadvertent. In effect, the representation to Holborn in the Romspen Comfort Letter with respect to the Second Mortgage is that it will be discharged in the circumstances in which Holborn is entitled to a partial discharge of the First Mortgage. To the extent that this constitutes an incomplete statement of the intended representation of Romspen, it is irrelevant as any inaccuracy pertains to circumstances that are moot — the scenario in which there are excess sales proceeds available to satisfy some or all of the principal amount of the Second Mortgage.

144 As these circumstances do not exist at present, I conclude for these two reasons that Holborn is entitled to a discharge of the lien constituted by the Second Mortgage upon satisfaction of the requirements for a partial discharge under the First Mortgage.

Conclusion

145 Based on the foregoing, the following amount is required to be paid to Romspen in order to obtain a partial discharge of the Property on the completion of the sale of the Property to Holborn pursuant to the Agreement:

> 1. net sales proceeds of the sale transaction, being either $10,187,835.22 or $10,487,835.22 depending upon whether the $300,000 payment from Home Depot in escrow is treated as received by Woods, subject to any necessary adjustment of the credit in respect of rental payments to the date of payment; and

2. the amount necessary to cure the existing defaults under the First Mortgage, being either $3,907,995.40 or 3,607,995.40, depending upon whether or not the payment from Home Depot in escrow is treated as received by Woods, plus interest from July 24, 2008 to the date of payment.

Costs

146 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other parties' submissions to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Order accordingly.

End of Document

TAB 9

2011 ONSC 3648
Ontario Superior Court of Justice

Romspen Investment Corp. v. Woods Property Development Inc.

2011 CarswellOnt 2380, 2011 ONSC 3648, [2011] O.J. No. 1163,
200 A.C.W.S. (3d) 118, 4 R.P.R. (5th) 53, 75 C.B.R. (5th) 109

In the Matter of Section 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as Amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990 C. C.43, as Amended

Romspen Investment Corporation (Applicant) v. Woods Property Development Inc. and TDCI Holdings Inc. (Respondents)

H.J. Wilton-Siegel J.

Heard: October 25, 2010; November 8, 2010; December 2, 2010
Judgment: March 17, 2011
Docket: CV-08-00007543-00CL

Counsel: Harvin Pitch for Receiver, SF Partners Inc.
David P. Preger for Romspen Investment Corporation, 2204604 Ontario Inc.
Craig A. Mills for Home Depot Canada Inc.

Subject: Property; Corporate and Commercial; Insolvency; Estates and Trusts; Restitution; Contracts

Headnote

Real property --- Mortgages — Priorities — Between types of creditors — Miscellaneous

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — Sale was conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage, and receiver was appointed — 220 Inc. was owned and controlled by R Corp. — Receiver brought motion seeking approval of agreement of purchase and sale between receiver and 220 Inc. regarding sale of Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — With respect to priorities, R Corp. had interest in Property that ranked prior to H Inc.'s interest under H Agreement and ground lease by way of subrogation to extent of monies refinanced under R Mortgage plus interest — R Corp. had actual notice of H Agreement, but not ground lease, at time of execution and registration of R Mortgage — R Corp. had interest in Property that ranked prior to H Inc.'s interest under H Agreement and ground lease by operation of s. 93(3) of Land Titles Act to extent of all monies secured under R Mortgage — H Inc. failed to establish as undisputed fact that R Corp. consented to H Agreement or ground lease such that R Mortgage was subordinated to either or both of these instruments.

Real property --- Mortgages — Priorities — Between types of creditors — Registered mortgagee and equitable interest holder

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — Sale was conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease

— H Inc. commenced construction of store (H store) on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage, and receiver was appointed — 220 Inc. was owned and controlled by R Corp. — Receiver brought motion seeking approval of agreement of purchase and sale between receiver and 220 Inc. regarding sale of Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — With respect to priorities, R Mortgage had priority over any equitable lien in favour of H Inc. arising as result of construction of H store on Property — Fact that R Corp. would obtain value of H store was not, by itself, sufficient to determine issue of priority of H Inc.'s lien — H Inc. failed to identify any other equitable consideration that justified imposition of prior lien in absence of R Corp.'s consent to construction of H store — H Inc. failed to show R Corp. consented to construction of H store on H Lands in circumstances that it understood, or should reasonably have understood, H Inc. would have prior lien over H Lands to extent of value of such improvement.

Debtors and creditors — Receivers — Conduct and liability of receiver — General conduct of receiver

Mortgages in favour of R Corp. were registered against property owned by W Inc. (Property) — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands), with sale conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage — Receiver brought motion for approval of sale agreement between receiver and 220 Inc., owned and controlled by R Corp., for Property, and order vesting Property free of claims of H Inc. — H Inc. brought cross-motion — Motion granted in part; cross-motion dismissed — R Corp.'s interest in Property ranked ahead of H Inc.'s to extent of monies secured under R Mortgage or to extent of monies secured under earlier R Corp. mortgages in existence at date of H Agreement plus interest — R Mortgage had priority over any equitable lien of H Inc. arising as result of construction of store — H Inc. failed to establish as undisputed fact that R Corp. consented to H Agreement, ground lease or store construction in manner intended to affect its rights in Property — No equity in H Inc.'s interest in Property — Equities favoured R Corp., so receiver entitled to order permitting sale on basis that it vested out H Inc. interests — Market might have improved since receiver's effort to market Property — Court could not consider approval of sale agreement until receiver conducted sales process on basis that purchaser would be entitled to acquire Property free of any claim of H Inc.

Real property — Mortgages — Right of subrogation

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — Sale was conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage, and receiver was appointed — 220 Inc. was owned and controlled by R Corp. — Receiver brought motion seeking approval of agreement of purchase and sale between receiver and 220 Inc. regarding sale of Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — R Corp. had subrogated claim in amount of monies outstanding under earlier R Corp. mortgages at time of their refinancing by means of R Mortgage, plus interest at rates provided under earlier mortgages — R Corp.'s subrogated interest in Property in respect of amounts outstanding under earlier R Corp. mortgages at time of execution of H Agreement ranked prior to H Inc.'s interest in H Lands under H Agreement and ground lease — R Corp. was entitled to assert subrogated claim against Property in priority to that of H Inc. based on principles of unjust enrichment.

Real property — Registration of real property — Improvements made under mistake of title — Requirements for relief — Mistaken belief

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — H Inc. commenced construction of store (H store) on H Lands — R Corp. refinanced earlier mortgages and advanced

further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage — Receiver brought motion for approval of sale agreement between receiver and 220 Inc., which was owned and controlled by R Corp., for Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — H Inc. was not entitled to lien sought under s. 37(1) of Conveyancing and Law of Property Act (CLPA) in amount of value by which Property had been improved as result of construction of H store — At best, H Inc. had unregistered equitable agreement to purchase H Lands, and that was subject to important qualification — H Agreement provided it would only be effective to create interest in land if provisions of Planning Act were complied with, and that could not occur until severance of H Lands occurred — H Inc. did not have sufficient interest in land under H Agreement to assert claim under s. 37(1) of CLPA — As to ground lease, language of s. 37(1) of CLPA appeared to require belief that lien claimant was owner of relevant property — Court was not provided with any case law that supported proposition that leasehold interest was sufficient interest to obtain relief under s. 37(1) of CLPA, and there was some authority to contrary.

Table of Authorities

Cases considered by *H.J. Wilton-Siegel J.*:

Armatage Motors Ltd. v. Royal Trust Corp. of Canada (1997), 34 O.R. (3d) 599, 1997 CarswellOnt 2758, 12 R.P.R. (3d) 19, 102 O.A.C. 308, 149 D.L.R. (4th) 398 (Ont. C.A.) — distinguished

Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd. (1967), 62 D.L.R. (2d) 230 (B.C. S.C.) — considered

Chalmers v. Pardoe (1963), [1963] 1 W.L.R. 677, [1963] 3 All E.R. 552 (Fiji P.C.) — followed

Coast Capital Savings Credit Union v. 482451 B.C. Ltd. (2004), 2004 BCSC 40, 2004 CarswellBC 52, 20 R.P.R. (4th) 62, 1 C.B.R. (5th) 1, 30 B.C.L.R. (4th) 177 (B.C. S.C.) — considered

Derro v. Dube (1948), 1948 CarswellOnt 171, [1948] O.W.N. 287, [1948] 2 D.L.R. 296 (Ont. H.C.) — referred to

Dominion Stores Ltd. v. United Trust Co. (1976), 1 R.P.R. 1, 11 N.R. 97, [1977] 2 S.C.R. 915, 71 D.L.R. (3d) 72, 1976 CarswellOnt 383, 1976 CarswellOnt 404 (S.C.C.) — considered

Elias Markets Ltd., Re (2005), 2005 CarswellOnt 3865, 14 C.B.R. (5th) 20, 77 O.R. (3d) 461, 34 R.P.R. (4th) 127, 8 P.P.S.A.C. (3d) 228 (Ont. S.C.J.) — considered

Elias Markets Ltd., Re (2006), 2006 CarswellOnt 5597, (sub nom. *Elias Markets Ltd. (Bankrupt), Re)* 216 O.A.C. 49, 274 D.L.R. (4th) 166, 47 R.P.R. (4th) 32, 25 C.B.R. (5th) 50, 10 P.P.S.A.C. (3d) 255 (Ont. C.A.) — referred to

Geldhof v. Bakai (1982), 139 D.L.R. (3d) 527, 1982 CarswellOnt 1326 (Ont. H.C.) — considered

Goodyear Canada Inc. v. Burnhamthorpe Square Inc. (1998), 43 B.L.R. (2d) 1, 116 O.A.C. 1, 21 R.P.R. (3d) 1, 1998 CarswellOnt 4156, 166 D.L.R. (4th) 625, 41 O.R. (3d) 321 (Ont. C.A.) — referred to

Halton Hills (Town) v. Row Estate (1993), 1993 CarswellOnt 3499 (Ont. Gen. Div.) — referred to

Hatoum v. Hatoum (1988), 1988 CarswellOnt 1543 (Ont. H.C.) — referred to

Hatoum v. Hatoum (1990), 1990 CarswellOnt 3442 (Ont. C.A.) — referred to

Holborn Property Investments Inc. v. Romspen Investment Corp. (2008), 2008 CarswellOnt 6914, 77 R.P.R. (4th) 262 (Ont. S.C.J.) — considered

Isabelle v. Lahaie (2007), 2007 CarswellOnt 8251, 65 R.P.R. (4th) 299 (Ont. S.C.J.) — referred to

Manias v. Norwich Financial Inc. (2008), 76 R.P.R. (4th) 81, 2008 CarswellOnt 3813, 2008 ONCA 532, 238 O.A.C. 253 (Ont. C.A.) — considered

McGuire v. Warren (2006), 2006 CarswellOnt 4267, 46 R.P.R. (4th) 113 (Ont. S.C.J.) — followed

Meridian Credit Union Ltd. v. 984 Bay Street Inc. (2006), 2006 CarswellOnt 4783 (Ont. S.C.J.) — considered

Metzger Estate v. Gardiner (2000), 34 R.P.R. (3d) 79, [2000] O.T.C. 455, 35 E.T.R. (2d) 102, 2000 CarswellOnt 2125 (Ont. S.C.J.) — considered

Midland Mortgage Corp. v. 784401 Ontario Ltd. (1997), 34 O.R. (3d) 594, 1997 CarswellOnt 2762, 102 O.A.C. 226, 12 R.P.R. (3d) 14 (Ont. C.A.) — followed

Montreuil v. Ontario Asphalt Co. (1922), 1922 CarswellOnt 131, 63 S.C.R. 401, 69 D.L.R. 313 (S.C.C.) — referred to

Romspen Investment Corp. v. 2126921 Ontario Inc. (2010), 2010 ONSC 317, 2010 CarswellOnt 863 (Ont. S.C.J.) — distinguished

Romspen Investment Corp. v. 2126921 Ontario Inc. (2010), 2010 ONCA 854, 2010 CarswellOnt 9582 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Terastar Realty Corp., Re (2005), 16 C.B.R. (5th) 111, 39 R.P.R. (4th) 1, 2005 CarswellOnt 5985 (Ont. S.C.J.) — considered

Toronto Dominion Bank v. Faulkner (1990), 11 R.P.R. (2d) 161, 71 D.L.R. (4th) 364, 40 O.A.C. 61, 74 O.R. (2d) 92, 1990 CarswellOnt 536 (Ont. C.A.) — referred to

Winick v. 1305067 Ontario Ltd. (2008), 41 C.B.R. (5th) 81, 2008 CarswellOnt 900 (Ont. S.C.J. [Commercial List]) — considered

1420111 Ontario Ltd. v. Paramount Pictures (Canada) Inc. (2001), 45 R.P.R. (3d) 109, [2001] O.T.C. 821, 2001 CarswellOnt 4067, 56 O.R. (3d) 447 (Ont. S.C.J.) — considered

1565397 Ontario Inc., Re (2009), 2009 CarswellOnt 3614, 54 C.B.R. (5th) 262, 81 R.P.R. (4th) 214 (Ont. S.C.J.) — considered

2022177 Ontario Inc. v. Toronto Hanna Properties Ltd. (2005), 203 O.A.C. 220, 17 C.B.R. (5th) 12, 2005 CarswellOnt 5194, 37 R.P.R. (4th) 1 (Ont. C.A.) — considered

Statutes considered:

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34
s. 37 — referred to

s. 37(1) — considered

Land Titles Act, R.S.O. 1990, c. L.5
Generally — referred to

s. 71(1.1) [en. 1998, c. 18, Sched. E, s. 129] — referred to

s. 93(3) — considered

s. 111(1) — referred to

Planning Act, R.S.O. 1990, c. P.13
Generally — referred to

MOTION by receiver for approval of agreement of purchase and sale regarding certain property, and order vesting property free of any claims of company; CROSS-MOTION by company for various relief relating to property.

***H.J. Wilton-Siegel J.*:**

1 On this motion SF Partners Inc. (the "Receiver") seeks approval of an agreement of purchase and sale dated October 13, 2009 between the Receiver and 2204604 Ontario Inc. (the "Purchaser") (the "Sale Agreement") regarding the sale of a property known municipally as 50 High Street, in the Town of Collingwood, (the "Property") and an order in connection with the completion of such sale vesting in the Purchaser all of the assets of Woods Property Development Inc. ("Woods"), the owner of the Property, free of any claims of Home Depot of Canada Inc. ("Home Depot").

2 By a cross-motion, Home Depot seeks an order that it is entitled to purchase a portion of the Property defined below as the "Home Depot Lands" pursuant to the Home Depot Agreement (as defined below) or to a lease defined below as the "Ground Lease" or, alternatively, that it is entitled to a lien pursuant to section 37 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34 (the "CLPA") or in equity that ranks prior to the Romspen Mortgage (as defined below) and, accordingly, should not be affected by any court approval of the transaction contemplated by the Sale Agreement.

Background

The Parties

3 Woods is an Ontario corporation that is the owner of the Property.

4 Romspen Investment Corporation ("Romspen") is a secured lender to Woods and a sister corporation, TDCI Holdings Inc. ("TDCI"), which is the owner of another property in the Town of Collingwood (the "Raglan Property"). The lending arrangements between Romspen and Woods/TDCI are described below. Wesley Roitman ("Roitman") is the chief financial officer of Romspen and the person at Romspen principally responsible for the Woods/TDCI loan arrangements.

5 Holborn Property Investments Inc. ("Holborn") was a proposed purchaser of the Property under the Holborn Sale Agreement (as defined below). Holborn no longer claims an interest in the Property and is no longer a party to these proceedings. The priority of its interest under the Holborn Sale Agreement was the subject of earlier litigation. The judgment of the Court in

that litigation was reported as *Holborn Property Investments Inc. v. Romspen Investment Corp.*, [2008] O.J. No. 5722 (Ont. S.C.J.) (the "Holborn Judgment").

6 The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of this Court dated November 25, 2008 (the "Receivership Order").

7 The Purchaser is an Ontario corporation that is owned and controlled by Romspen.

8 Landex Holdings Inc. ("Landex") is an Ontario corporation that owns property immediately to the south of the Property. Landex has entered into a joint venture with the Purchaser to develop the Property should the Purchaser acquire the Property pursuant to the Sale Agreement.

The Property

9 The Property consists of approximately 43 acres. An industrial building on the Property is leased to two tenants with whom the Receiver has reached an agreement and who, therefore, do not oppose the motion.

10 A portion of the industrial building was demolished in 2006. Home Depot constructed a store of approximately 85,000 square feet on a part of the Property that includes the demolished portion of the industrial building (defined below as the Home Depot Lands) at a total cost of approximately $14.5 million. Construction was completed in January 2007, and a Home Depot store has been operated on that part of the Property since then.

Home Depot's Interest in the Property

11 On or about May 19, 2005, Home Depot entered into an agreement of purchase and sale with Woods whereby Woods agreed to sell Home Depot 8.67 acres of the Property, which included the acreage on which the new Home Depot store was to be located, (the "Home Depot Lands") for $3,250,000. Among other terms, the sale is conditional upon receipt of a severance of the Home Depot Lands from the Property under the *Planning Act*, R.S.O. 1990, c. P-13.

12 On October 17, 2005, Woods entered into a further agreement for the sale of the rest of the Property to Holborn (the "Holborn Sale Agreement"). The Holborn Sale Agreement provided that Home Depot could purchase the Home Depot Lands from Holborn under the Home Depot Agreement for $3,250,000 when a severance was obtained under the *Planning Act*. It was Woods' expectation that the proceeds of sale of the two transactions with Holborn and Home Depot would repay the indebtedness of Woods and TDCI to Romspen described below and leave a profit for Woods.

The Home Depot Agreement

13 The agreement between Woods and Home Depot was amended on November 30, 2005 (as so amended, the "Home Depot Agreement"). It is this agreement upon which Home Depot relies in asserting that it has an interest in the Property. As mentioned, in order to complete the sale transaction, a severance of the Home Depot Lands is required. The severance is, in turn, conditional on among other things, demolition of the industrial building on the Property in its entirety and, as described below, a plan of subdivision for the Property.

14 The Home Depot Agreement contains the following material provisions:

- First, the portion of the industrial building referred to above was to be demolished to permit construction of a Home Depot store.

- Second, Home Depot was obligated to apply for a consent under the *Planning Act* to sever the Property.

- Third, section 4.5 of the Home Depot Agreement states that it shall be effective to create an interest in land only if the provisions of the *Planning Act* have been complied with.

• Fourth, Home Depot shall be entitled to apply to the Town of Collingwood for approval and a building permit to construct a Home Depot store on the Home Depot Lands.

• Fifth, if within 270 days of the date of execution, Home Depot fulfilled all zoning conditions and obtained all necessary approvals for its proposed store including a building permit, Home Depot would take possession of an area slightly larger than the Home Depot Lands pursuant to a ground lease (the "Ground Lease"). As there does not appear to be any significance to this slight difference, in this Endorsement the lands subject to the Ground Lease are also referred to as the "Home Depot Lands" to avoid unnecessary complexity.

15 The Home Depot Agreement set out the following terms for the Ground Lease:

• The Ground Lease was to run for a term of 50 years at a rental of $300,000 per year for the first seven years and thereafter at $100 per year.

• The Ground Lease would terminate upon receipt of the severance of the Property under the *Planning Act*, at which point the Home Depot Agreement would be completed by Home Depot's purchase of the Home Depot Lands, and the rental payments already made would be credited against the purchase price.

16 It was a condition of Home Depot's obligation to enter into the Ground Lease that Woods would deliver to Home Depot an acknowledgement of Romspen's agreement to:

> (1) permit the demolition of the existing industrial building to occur without acceleration of the Romspen mortgages described below; and
>
> (2) provide a partial discharge of the Romspen mortgages upon payment of the purchase price of $3,250,000 under the Home Depot Agreement, without any restriction that such mortgages shall be in good standing at the time.

17 Section 7.11 of the Home Depot Agreement permitted Home Depot to register a caution in respect of its rights under the Home Depot Agreement pursuant to section 71(1.1) of the *Land Titles Act* R.S.O., c. L5, as amended (the "Act"). However, Home Depot chose not register the Agreement. It is understood that Home Depot made this decision in order to avoid the payment of land transfer tax. For the purposes of this proceeding, however, the significant fact is that Home Depot bargained for, but did not exercise, a right of registration and not the particular reason it decided to forgo that registration.

The Ground Lease

18 With the exception of delivery of the acknowledgement, which is described below, Home Depot satisfied the conditions entitling it to take a Ground Lease of the Property on the terms set out above within the time period required under the Home Depot Agreement,. The Ground Lease was signed by Woods and Home Depot on May 4, 2006.

19 Prior to doing so, on April 19, 2006, solicitors for Home Depot conducted a title search against the Property. Accordingly, Home Depot would have been aware at the time it executed the Ground Lease that the Romspen mortgages on the Property at such time had an aggregate face amount of $11.1 million.

20 On May 2, 2006, two days before the Ground Lease was signed, Woods had its mortgage broker Lee Mondrow ("Mondrow") contact Romspen to obtain the acknowledgment from Romspen contemplated by the Home Depot Agreement. However, Romspen was only willing to provide an acknowledgement that demolition of the industrial building would not accelerate the Romspen mortgages (because such demolition would increase the value of the Property). An acknowledgment to this effect was executed by Romspen on May 5, 2006, one day after the Ground Lease was executed.

21 Roitman says that Mondrow and Clive Figuera, on behalf of Woods, had been pressing him to provide a broader acknowledgment to Home Depot in respect of Home Depot's rights under the Home Depot Agreement and that he was unwilling to do so because he did not wish to compromise the priority or other rights of the two Romspen mortgages on the Property at

the time. He says further that he would have refused to sign the acknowledgement if it had expressly or impliedly purported to be a postponement or a subordination of Romspen's rights as mortgagee. Home Depot did not contradict this evidence, which I have therefore taken to be an undisputed fact.

22 The Ground Lease contains a representation of Woods that the Home Depot Lands are subject to mortgages in favour of Romspen dated August 22, 2004 (for $8.6 million) and January 26, 2006 (for $2.5 million). In the absence of a Romspen acknowledgment in the form contemplated by the Home Depot Agreement, the Ground Lease contains a further representation of Woods to the effect that Romspen had agreed:

> (1) to permit the demolition of the portion of the industrial building located on the Home Depot Lands without accelerating the Romspen mortgages on the Property at the time; and
>
> (2) to give partial discharges of the Property from the Romspen mortgages "with the aggregate consideration for all such partial discharges being an amount not in excess of the balance of the purchase price payable by [Home Depot] under the [Home Depot Agreement] upon the completion of the purchase of the [Home Depot Lands] by [Home Depot] pursuant to the [Home Depot Agreement]."

It is unclear on what basis Woods gave the representation in (2), above, as the Romspen mortgages did not contain partial discharge provisions.

23 Section 19.6 of the Ground Lease addressed registration of the Ground Lease. It provides that Home Depot shall not register the Ground Lease but that either party may register a notice of the Ground Lease pursuant to section 111(1) of the *Land Titles Act* by way of a short form of notice providing certain stipulated information. Home Depot also decided not to register a notice of the Ground Lease, again apparently to avoid the payment of land transfer tax.

24 I think it is obvious from all of the circumstances, including the testimony of Sylvain Rivet, a senior real estate manager of Home Depot, the fact that Home Depot was advised by experienced solicitors, Home Depot's experience in real estate law given its extensive real estate operations, and the title subsearch of its solicitors in April 2006, that Home Depot made a conscious decision to execute the Ground Lease without obtaining the form of acknowledgment of Romspen contemplated by the Home Depot Agreement, and to forego registration of the Ground Lease, with full knowledge of the potential risks that such actions could entail.

Construction of the Home Depot Store

25 As mentioned, during 2006, Home Depot commenced construction of a store upon the Home Depot Lands.

26 In connection with such construction, on or about July 25, 2006, Romspen signed a site plan control agreement dated July 20, 2006 to which Woods, Home Depot and the Town of Collingwood were also parties (the "Site Plan Agreement'). The Site Plan Agreement specifically recites the existence of the Home Depot Agreement, although not the Ground Lease. It also recites the proposed demolition of the portion of the existing industrial building and the proposed construction of the Home Depot store.

27 Paragraph 32 of the Site Plan Agreement refers to the existence of Romspen charges on the Property in the respective amounts of $8.6 million and $2.5 million (being the earlier Romspen mortgages, which, by this time, however, had been replaced by the Romspen Mortgage) and contains an express postponement and subordination by Romspen of its interest in the Property to that of the Town of Collingwood under the Site Plan Agreement (but not to that of Home Depot). This is the only express covenant of Romspen in the Site Plan Agreement, which otherwise contains covenants of Woods and Home Depot regarding the construction of the Home Depot store on the Property.

28 Home Depot has applied for severance of the Home Depot Lands. However, it is understood that the Town of Collingwood will not consent to a severance until a comprehensive plan of subdivision is filed and approved for the entire Property. No plan of subdivision has been filed by Woods or any other party having a present or future interest in the Property. The Receiver is not proposing to file a plan of subdivision on its own.

Romspen's Interest in the Property

Mortgages Prior to July 6, 2006

29 At the time of the first agreement between Woods and Home Depot dated May 19, 2005, there were two mortgages registered against the Property in favour of Romspen. The first mortgage dated August 27, 2004 secured a loan in the principal amount of $8.6 million. The second mortgage dated January 26, 2005 secured a loan in the principal amount of $1,550,000 made to TDCI that was guaranteed by Woods. This second mortgage was also secured against the Raglan Property.

30 In September 2005, Romspen loaned an additional $500,000 to Woods that was secured by a further mortgage on the Property, bringing the total amount secured against the Property to $10,650,000. None of these mortgages contained a right of partial discharge in favour of Woods to allow it to sell the Home Depot Lands, although the mortgage dated January 26, 2005 provided for a discharge of the Property upon repayment of an amount to be determined by Romspen in its discretion up to the full outstanding amount.

31 Accordingly, at the time of the Home Depot Agreement dated November 30, 2005, there were three mortgages registered against the Property in favour of Romspen, securing loans totalling $10.65 million in principal amount.

32 On January 26, 2006, Romspen refinanced the second and third mortgages on the Property and made a further secured advance. This was effected through the issue of a new second mortgage loan dated January 17, 2006 in the principal amount of $2.5 million made to TDCI of which Woods was the guarantor. This new second mortgage was also registered against both the Property and the Raglan Property. The new second mortgage did not contain a partial discharge provision.

33 Accordingly, at the time of execution of the Ground Lease on or about May 4, 2006, there were two mortgages registered against the Property in favour of Romspen securing loans totalling $11.1 million — the mortgage dated August 27, 2004 and the mortgage dated January 17, 2006. Neither mortgage contained a partial discharge provision.

The $17 Million Romspen Mortgage

34 On June 1, 2006, Romspen provided Woods with a commitment letter (the "Commitment Letter") regarding an advance of further funds to discharge the existing Romspen mortgages against the Property, as well as a further mortgage in the principal amount of $3.6 million secured against the Raglan Property only, and to finance improvements on the Raglan Property. All such advances were to be secured against both the Property and the Raglan Property.

35 This transaction was completed on or about July 6, 2006, at which time Romspen advanced a total of approximately $17 million, of which $11,338,090.84 was advanced to discharge the three existing Romspen mortgages secured against the Property and to pay realty taxes on High Street. The total financing was secured against the Property and the Raglan Property by a joint mortgage of Woods and TDCI in the principal amount of $17 million (the "Romspen Mortgage"), which was registered on title on July 6, 2006. Subsequently, the earlier Romspen mortgages were discharged after an appropriate "seasoning period".

36 The Romspen Mortgage contained a provision allowing Woods a partial discharge of the Home Depot Lands upon payment of the purchase price under the Home Depot Agreement, provided that the Romspen Mortgage was not in default and that a loan-to-value covenant was satisfied in Romspen's sole determination after giving effect to the partial discharge.

37 The Romspen Mortgage also incorporated the following provision from the Commitment Letter, which contemplated land lease payments under the Home Depot Agreement without specifically referring to the Ground Lease:

> Monthly principal payments of $130,000 shall be due and payable on the same day each month. In addition, any land lease payments made by Home Depot pursuant to the Home Depot Agreement (both as defined below) which in aggregate exceed $250,000 shall be due and payable on account of principal, upon receipt and the Borrower shall direct Home Depot to make such payments directly to Lender.

Romspen's Knowledge of the Home Depot Agreement and the Ground Lease

Knowledge of the Home Depot Agreement

38 Roitman acknowledges that Romspen received a copy of the Home Depot Agreement in or about November 2005. Accordingly, it had knowledge from that time of the arrangements contemplated in that Agreement in respect of both the sale of the Home Depot Lands and a possible ground lease of the Home Depot Lands.

Knowledge of the Ground Lease

39 Home Depot submits that the Court should infer that Romspen had actual knowledge of the existence of the Ground Lease, if not its actual contents, as of the date of execution and delivery of the Romspen Mortgage or, alternatively, as of the date of execution of the Site Plan Agreement. It relies upon the covenant in the Romspen Mortgage (by incorporation of the terms of the Commitment Letter) requiring payment to Romspen of land lease payments in excess of $250,000 as evidence of such actual knowledge at the time of the Romspen Mortgage. In the alternative, it says that, given the structure of the Home Depot Agreement, Roitman must have known that Woods and Home Depot had executed the Ground Lease when he was presented with the Site Plan Agreement for Romspen's execution.

40 As this is a motion, the Court cannot make findings of fact by way of inference. The Court must make its determinations on the basis of undisputed facts.

41 In this case, there is no evidence that Romspen had actual knowledge of the existence of the Ground Lease prior to receiving a copy of the Ground Lease in 2008, much less that such knowledge is an undisputed fact. At best, and as Home Depot states in its factum, "Romspen was aware that an interim land lease might be entered into at a later date". This falls short of actual knowledge of the existence of the Ground Lease prior to 2008.

42 Even if the Court were able to draw inferences of fact, I do not think that such knowledge could be inferred as of the date of execution of the Romspen Mortgage, even on a balance of probabilities standard, from the facts before the Court. The language of the Romspen Mortgage is hardly unequivocal evidence of knowledge. Moreover, the fact that the Commitment Letter did not refer specifically to the Ground Lease but rather to "any land lease payments made by Home Depot", and the fact that Romspen did not pursue repayment of the Romspen Mortgage due as a result of rental payments under the Ground Lease, are both consistent with an absence of actual knowledge on Romspen's part.

43 Similarly, I do not think that the Court could infer knowledge of the Ground Lease from Romspen's execution of the Site Plan Agreement. While Romspen may have had suspicions that Home Depot had received a Ground Lease when it received the Site Plan Agreement for execution, Home Depot has not established actual knowledge as of that time. As Romspen also points out, execution of the Ground Lease was inconsistent with several conditions of the Home Depot Agreement as Romspen understood them.

Romspen's Alleged Consent to the Home Depot Agreement and the Ground Lease and to the Construction of the Home Depot Store

44 Home Depot also argues that Romspen consented to the Home Depot Agreement and the Ground Lease as well as to the construction of the Home Depot store. I will address each of these issues in turn. Again, as this is a motion, Home Depot must establish any alleged consent as an undisputed fact. In my view, it has failed to satisfy this onus.

Alleged Romspen Consent to the Home Depot Agreement and the Ground Lease

45 Romspen had actual knowledge of the Home Depot Agreement from November 2005. However, such knowledge does not automatically imply or constitute consent to the subordination of Romspen's earlier mortgages to the Home Depot Agreement. After learning of the Home Depot Agreement, Romspen had no obligation to contact Home Depot to inquire as to whether it sought, or assumed that it had received, Romspen's consent to the Agreement. It was entitled to assume that Home Depot

would do what it considered necessary to protect itself as a party having a subordinate interest in the Property. That legal position remained unchanged at the time of execution of the Romspen Mortgage notwithstanding that the Romspen Mortgage was executed after the Home Depot Agreement.

46 Home Depot acknowledges that it never sought any form of consent, subordination and postponement of rights, or non-disturbance agreement from Romspen with respect to the Home Depot Agreement. Nor did Romspen ever agree in favour of Woods or Home Depot to a partial discharge of the Property to permit the sale of the Home Depot Lands. There is, therefore, no evidence that Romspen ever consented, orally or in writing, to the sale of the Home Depot Lands pursuant to the Home Depot Agreement or to the subordination of its interest in the Property, whether under the earlier Romspen mortgages or under the Romspen Mortgage, to the interest of Home Depot under the Home Depot Agreement.

47 I have concluded above that Romspen did not have actual knowledge of the Ground Lease prior to 2008. Home Depot never sought the consent of Romspen to the Ground Lease. Nor did it ever seek any form of subordination or non-disturbance agreement from Romspen in respect of the Ground Lease. Collectively, these facts exclude any determination that Romspen consented to the Ground Lease or to the subordination of its interest in the Property to the interest of Home Depot under the Ground Lease.

48 Insofar as it may be argued that Romspen's knowledge of the Home Depot Agreement constituted an implied consent to a lease as described in the Home Depot Agreement, even without actual knowledge of the execution of the Ground Lease, I think the argument must fail for the same reasons as I concluded that knowledge of the Home Depot Agreement did not imply Romspen's consent to that document.

49 Generally, Home Depot relies on the affidavit of Sylvain Rivet, a senior real estate manager of Home Depot, in which he deposed that it was Home Depot's understanding at all times that Romspen had consented to the Home Depot Agreement and the Ground Lease, as well as to Home Depot's interest in the Home Depot Lands. There is, however, no basis in the evidence for this understanding. To the extent that Home Depot says that it relied on Woods' representation in the Ground Lease that Romspen had consented to the Home Depot Agreement and the Ground Lease, such reliance was clearly unreasonable. Neither Woods nor Home Depot has provided any evidence of Romspen's advice or other comfort to Woods or Home Depot that supports this representation.

50 Accordingly, I have proceeded on the basis that Romspen did not consent at any time to either the Home Depot Agreement, the Ground Lease, or to any interest in the Home Depot Lands that Home Depot may have acquired thereunder.

Alleged Romspen Consent to the Construction of the Home Depot Store

51 There is a separate question regarding whether Romspen consented at some point in time to the construction of the Home Depot store. This issue is relevant to the priority of any lien against the Property in Home Depot's favour in respect of an improvement to the Property as opposed to the priority of the Home Depot Agreement and the Ground Lease in the Property *per se*.

52 There is no evidence of any such consent, and it cannot be inferred from the existence of the Home Depot Agreement. Nor can it be inferred from the existence of the Ground Lease of which, in any event, I have found Romspen had no knowledge prior to 2008. The remaining possibility is that, in some manner, Romspen's execution of the Site Plan Agreement constitutes its consent, or constitutes evidence of its consent given elsewhere, to the construction of the Home Depot store in a manner that is meaningful for this proceeding.

53 Home Depot cannot, however, establish as an undisputed fact that Romspen's execution of the Site Plan Agreement either constituted, or evidenced, its consent to such construction. The reasons for this conclusion are set out below in addressing the priority of any lien of Home Depot against the Property in respect of such improvement.

The Proposed Sale of the Property

54 Woods first defaulted on the Romspen Mortgage in 2007, and payments ceased on the Romspen Mortgage in January 2008, leading to the Receiver's appointment on November 25, 2008. The Receivership Order authorized the Receiver to market the Property.

55 The Receiver listed the Property for sale with Parallel Realty Inc. ("Parallel") for a listing price of $450,000 per acre. In an offering fact sheet prepared by Parallel for distribution to prospective purchasers, the Home Depot Agreement was disclosed in the following terms:

> The developer has agreed to sell 8.67 acres of the property to Home Depot, which has constructed and opened its 85,500 square foot store. Home Depot is currently leasing its portion of the property until a severance can be applied for...

56 The Receiver's report lists the efforts of Parallel to market the Property. They include listing the property on MLS and a further listing service, advertising in two editions of the Report on Business, and responding to inquiries of numerous interested parties. Parallel has followed up on expressions of interest from more than 25 prospective purchasers. Despite such efforts, no offers have been received.

57 On October 13, 2009, the Receiver and the Purchaser entered into the Sale Agreement. The material terms of the Sale Agreement are:

> (1) a purchase price of $14.1 million satisfied by a partial reduction of the current indebtedness to Romspen under the Romspen Mortgage (apart from certain cash expenses to be paid, including outstanding realty taxes and the Receiver's fees and borrowings, if any); and
>
> (2) vacant possession of the Property or arrangements with any remaining tenants on terms satisfactory to the Purchaser in its sole discretion.

58 As no arrangements have been made with Home Depot, as the lessee under the Ground Lease, the Receiver seeks an order vesting the Property free and clear of the Home Depot Sale Agreement, the Ground Lease and any other lien in favour of Home Depot arising in respect of the construction of the Home Depot store.

Applicable Law

59 The factors that a Court should consider in determining whether to approve a sale by a Court-appointed receiver were set out by Galligan J.A. in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16 as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

60 In the present proceeding, there are two specific issues to be considered:

> 1. whether the Court should vest the Property in the Purchaser free and clear of the interest of Home Depot in the Property, which is a condition of the completion of the transaction contemplated by the Sale Agreement; and
>
> 2. whether the Property has been marketed to prospective purchasers on the same basis as is contemplated in the Sale Agreement.

61 The first issue relates to the consideration of the interests of the parties. The second relates to the efficiency and integrity of the sales process. I will deal with each in turn.

Should the Court Order a Vesting of the Property Free and Clear of any Claims of Home Depot?

62 This motion raises four general issues that are addressed below:

1. Does the Court have the authority to grant an order "vesting out" Home Depot's interest in the Property?

2. Does Romspen have an interest in the Property ranking prior to Home Depot's interest?

3. Is Romspen's interest in the Property subordinated to Home Depot's interest by virtue of a consent?

4. Is Home Depot entitled to a lien against the Property ranking in priority to Romspen's interest by virtue of the construction of the Home Depot store?

I propose to address each issue in turn. I will then address the Receiver's request for an order vesting out Home Depot's interest in the Property setting out my assessment of the equities between the parties.

Does the Court Have the Authority to Grant the Requested Relief?

63 The first issue is whether the Court has the authority to issue an order granting the requested relief. Home Depot makes two arguments that it does not. It says that a court-appointed receiver is not entitled to evict a tenant merely because it would be advantageous to do so. It also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. I will address each issue in turn.

Authority of the Court to Issue A "Vesting Out" Order in Respect of a Leasehold Interest

64 Home Depot relies on the following cases in support of its position that the Court cannot order the Receiver to sell the Property free and clear of the interest of Home Depot in the Home Depot Lands and, in particular, free and clear of the Ground Lease: *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.*, [2004] B.C.J. No. 46 (B.C. S.C.) at paras. 12-14; *Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd.*, [1967] B.C.J. No. 132 (B.C. S.C.) at paras. 9-10; and *Winick v. 1305067 Ontario Ltd.*, [2008] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para. 15.

65 These decisions do not articulate an absolute and unqualified rule that the Court lacks the authority to vest out a leasehold interest. Instead, they mandate that a receiver take into consideration the equities of the positions of the various parties involved. The principle is well summarized by Ground J. in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at para. 19 as follows:

> I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc. v. Kitwanga Lumber Co.* (2005), 75 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

The same conclusion was expressed by Gill J. in *Capital Funds, supra* in his reference to the fiduciary obligation of a court-appointed receiver to all the parties involved in a contest.

66 Accordingly, I have proceeded on the basis that the Court has the authority to grant the relief requested provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties.

67 I would note, as well, that the cases relied upon by Home Depot do not provide much assistance with respect to the equitable considerations to be taken into account in the present proceeding inasmuch as the circumstances in those decisions were very different.

68 *Coast Capital Savings*, *supra* involved residential tenancies which were not registrable and for which the tenants had prepaid the rental for the year. It is also unclear from the incomplete recitation of the facts whether the mortgagee seeking the relief was likely to be repaid or not; the references of the trial judge to the obligation of a court-appointed receiver to protect the goodwill of a business suggests that there may have been other subsequent encumbrancers with an interest in the preservation of the existing tenancies.

69 In *Capital Funds*, it was established that the tenant had paid considerable amounts for rent and for renovations to the property in respect of a commercial tenancy.

70 In *Winick*, *supra*, Pepall J. considered the issue in the context of the requirement in *Soundair*, *supra* that the Court address whether there has been unfairness in the working out of the sale process. In that case, the purchaser had agreed to acquire the property subject to the relevant lease. There was therefore no suggestion that the sale price would have been affected by the continuation of the lease. In such circumstances, it would have been unconscionable to order a vesting out of the lease.

71 As mentioned above, I propose to consider the equitable considerations between the parties after discussion of the remaining issues outlined above, which will themselves involve a consideration of certain equitable considerations.

The Home Depot Lands Were Previously Conveyed

72 Home Depot also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. In making this submission, it relies on the decisions in *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.* (2005), 203 O.A.C. 220 (Ont. C.A.); *Terastar Realty Corp., Re* (2005), 16 C.B.R. (5th) 111 (Ont. S.C.J.); and *1565397 Ontario Inc., Re* (Ont. S.C.J.).

73 The Home Depot argument on this issue is based on the legal consequences of the Home Depot Agreement and the Ground Lease. It submits that the Home Depot Agreement created an equitable interest in the Property in favour of Home Depot that was therefore excluded from the assets subject to the Receivership Order. Similarly, Home Depot has a leasehold interest in the Home Depot Lands under the Ground Lease. Home Depot submits that these interests were excluded from the assets subject to the Receivership Order and cannot be extinguished by a transfer of the Property by the Receiver.

74 I accept the starting point of Home Depot's analysis. Because the Receiver has been appointed as the receiver of Woods' assets, the effect of the Receivership Order is to transfer possession of the Property to the Receiver, subject to Home Depot's interest in the Property under the Home Depot Agreement and the Ground Lease. Nevertheless, I conclude that Home Depot's submission must fail for two reasons.

75 First, in respect of the Home Depot Agreement, section 4.5 provides that it is effective to create an interest in land only if the provisions of the *Planning Act* have been complied with. This has not yet occurred. It would therefore appear that Home Depot does not presently have an enforceable equitable interest in the land under the Home Depot Agreement and may never have such an interest.

76 Second, and in any event, the issue in the present proceedings is not whether Woods granted Home Depot a lease pursuant to the Ground Lease and an equitable interest pursuant to the Home Depot Agreement to the extent it has such an interest notwithstanding section 4.5. That is conceded by Romspen. At issue are the priorities and the equities between Home Depot and Romspen.

77 In this context, while Home Depot is correct that the Receivership Order did not give the Receiver such authority, its submission ignores the nature of the Court's authority in the present circumstances. The Receiver does not rely on its authority under the Receivership Order in seeking a "vesting out" order. Instead, it relies upon the Court's inherent jurisdiction to order a vesting out of interests in property after a consideration of the equities between the parties.

78 Accordingly, I do not accept Home Depot's argument that the Receiver lacks the power to convey the Property free of Home Depot's interest because it did not receive the equity in the Home Depot Lands upon its appointment. The Court has the authority to authorize the Receiver to sell the Property free and clear of the interest of Home Depot after a consideration of the equities between the parties. Put another way, the Court may refuse to exercise its equitable jurisdiction to enforce Home Depot's equitable interests if it determines that it is appropriate to refrain from doing so after considering the equities between the parties.

Conclusion Regarding Authority of the Court

79 Based on the foregoing, I conclude that the Court has the authority to grant the requested relief if, in the circumstances, after reviewing the applicable equitable considerations relating to the respective positions of the parties, it is appropriate to do so.

Does Romspen Have an Interest in the Property Ranking Prior to Home Depot's Interest?

80 Romspen asserts that its interest in the Romspen Mortgage ranks prior to Home Depot's interest in the Home Depot Lands on two general grounds. First, it submits that the Romspen Mortgage is entitled to priority by virtue of its registration under the *Land Titles Act*, notwithstanding actual notice of the Home Depot Agreement and the Ground Lease, which were executed earlier but never registered under the Act. Second, it argues that it has a subrogated claim under the Romspen Mortgage to the extent of the monies secured under the earlier Romspen mortgages and refinanced by the Romspen Mortgage plus interest thereon at the rates provided under such mortgages.

81 I propose to consider the two submissions of Romspen in reverse order.

Romspen's Assertion of Priority Based on Subrogation

Romspen's Position

82 Romspen submits that it has a claim against the Property under the Romspen Mortgage by way of subrogation in respect of the amounts outstanding under the Romspen mortgages as of either November 30, 2005 (the date of the Home Depot Agreement) or April 26, 2006 (the date Romspen uses as the date of execution of the Ground Lease).

83 On either calculation, the total of the monies outstanding under these mortgages, as of February 1, 2010, appears to substantially exceed the value of the Property. According to Romspen's calculation, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Home Depot Agreement (November 30, 2005) — being the mortgages in the principal amounts of $8.6 million and $1.550 million, respectively — was $17,844,975.38. In addition, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Ground Lease (the date used by Romspen is April 26, 2005) — being the mortgages in the principal amounts of $8.6 million and $2.5 million, respectively — was $18,102,971.09.

84 Romspen acknowledges that the priority of its claim by way of subrogation is limited to the monies paid at the time of the refinancing of the relevant Romspen mortgages to discharge such mortgages plus interest thereon at the rates applicable under such mortgages. It is my understanding that the calculations set out above have been prepared on this basis and are not challenged by Home Depot.

85 Romspen's argument is based on the line of cases that establishes that a mortgagee who pays off prior encumbrances is entitled to be subrogated to the payee's priority position relative to other clients: see, for example, *Elias Markets Ltd., Re* (2005), 34 R.P.R. (4th) 127 (Ont. S.C.J.) at para. 43 per Rady J., aff'd (2006), 47 R.P.R. (4th) 32 (Ont. C.A.). The principle was applied to a first mortgagee who "renews, replaces, refinances, amends or increases his mortgage": see *Midland Mortgage*

Corp. v. 784401 Ontario Ltd. (1997), 34 O.R. (3d) 594 (Ont. C.A.) at para. 14 per Austin J.A. The doctrine also applies to the extent a mortgagee pays taxes on behalf of a mortgagor: see *Elias Markets Ltd., Re, supra*, at para. 50 per Rady J.

86 Romspen argues that it is entitled to rank prior to Home Depot's interest in the Home Depot Lands to the extent of this subrogated claim based on the equities between the parties. In particular, it relies on the fact that Home Depot had knowledge of the Romspen mortgages on the Property at the time it executed the Home Depot Agreement and the Ground Lease based on their registration against title to the Property. It also relies on the fact that Home Depot did not seek either a non-disturbance or priority agreement from Romspen notwithstanding the priority of the Romspen mortgages at the time. Nor did Home Depot receive any consent or other protection from Romspen. Instead, it relied on incorrect representations from Woods in the Ground Lease when it was executed, without seeking confirmation of the validity of these representations. Romspen notes that Home Depot took these decisions without any representation on the part of Romspen. In addition, Romspen relies on its right to control partial discharges of the Property from its security, of which Home Depot had knowledge by virtue of the registration of Romspen's earlier mortgages.

Home Depot's Position

87 Home Depot notes that subrogation is a discretionary remedy for which the foundation is fairness. In reliance on J. McGhee, ed. *Snell's Equity* 31st ed. (Toronto: Thomson, 2005) at p. 869, it argues there are three conditions that must be satisfied before the doctrine can operate: (1) the subsequent encumbrancer is unjustly enriched at the lender's expense; (2) such enrichment is unjust; and (3) there are no policy reasons for denying the prior encumbrancer a remedy. It makes four submissions for denying the remedy of subrogation in the present circumstances, which I will address below.

Analysis and Conclusions

Preliminary Issue

88 Before addressing this issue, it is necessary to consider whether Romspen's subrogated claim should be considered in respect of monies outstanding under the earlier Romspen mortgages at the date of execution of the Home Depot Agreement, the date of execution of the Ground Lease, or both. The Home Depot Agreement and Ground Lease were both granted after the earlier Romspen mortgages described above but before the Romspen Mortgage. Although the parties have distinguished the rights and interests of Home Depot under the Home Depot Agreement and the Ground Lease, I do not think this distinction is meaningful for the purposes of determining against which mortgages Home Depot's priority based on subrogation is to be considered.

89 The Ground Lease was an interim measure to bridge the period until a severance was obtained and the transaction contemplated by the Home Depot Agreement could be completed. The possibility of a ground lease having terms substantially similar to the terms of the Ground Lease was contemplated in the Home Depot Agreement. The rental payments under the Ground Lease were a credit against the purchase price under the Home Depot Agreement. In these circumstances, I think that the priority of Romspen's subrogated claim under the Romspen Mortgage should be considered in respect of the monies outstanding under the earlier Romspen mortgages outstanding as of the date of the Home Depot Agreement.

Validity of Romspen's Claim for Priority By Way of Subrogation

90 On the facts of this case, I do not think that there is any doubt that Romspen has a subrogated claim in the amount of the monies outstanding under the earlier Romspen mortgages at the time of their refinancing by means of the Romspen Mortgage, plus interest at the rates provided under the earlier Romspen mortgages. The principle in *Midland Mortgage, supra* is well established law. There are no facts that exclude the operation of this principle in the present proceeding. The issue for the Court is whether the test for entitlement to the remedy of subrogation is met.

Assessment of the Equitable Considerations

91 In making their submissions on this issue, Home Depot relies on the test for subrogation set out in *Snell*, described above. Romspen relies on the analysis of unjust enrichment. I am not convinced that there is any significant difference between the two approaches, subject to one consideration discussed in the next paragraph. I will, however, consider each of these approaches in turn.

92 It should be noted that, in respect of Romspen's claim of priority for its interest in the Property based on subrogation, the interest of Home Depot at issue is its interest under the Home Depot Agreement and the Ground Lease, not the Home Depot store. In the absence of any evidence that Romspen consented to the construction of the Home Depot store in a manner that was intended to affect its legal rights in the Property, the issue of the Home Depot store must be considered in the context of an improvement on the Property. That is addressed later. In this section, the issue is limited to the right of Home Depot to acquire the Home Depot Lands under the Home Depot Agreement and, possibly, to hold a leasehold interest in the Home Depot Lands under the Ground Lease.

93 The starting point for the analysis of unjust enrichment is whether Home Depot would be enriched if the remedy of subrogation were unavailable to Romspen. I think it is clear that it would be. The Home Depot Agreement and the Ground Lease were executed after the earlier Romspen mortgages. Therefore, they ranked after such mortgages. If subrogation were not granted, Home Depot's interest in the Property would rank in priority to the interest of Romspen in the Property. Accordingly, in the present circumstances, there would be an enrichment of Home Depot and a corresponding deprivation of Romspen if subrogation were not ordered.

94 I am also satisfied that there is an absence of a juristic reason for Home Depot's enrichment. In respect of this issue, the following considerations are relevant.

95 First, insofar as Home Depot seeks to enforce the Home Depot Agreement, it is effectively seeking an order compelling Romspen to discharge the security contained in the earlier Romspen mortgages which has been continued in the Romspen Mortgage. The Court should not relieve Home Depot of the risk that it knowingly assumed by its own actions.

96 As mentioned, the Romspen mortgage loans were secured against the entire Property and provided Romspen with an absolute control over partial discharges. Even if a severance had been obtained, Home Depot could only have completed the purchase if Romspen had been willing to deliver a partial discharge. Home Depot had full knowledge of that risk. By entering into the Home Depot Agreement without obtaining a non-disturbance or priority agreement with Romspen, Home Depot took the risk that the Home Depot Lands would not be deliverable to it. Home Depot could not have obtained an order of the Court compelling delivery to it of the Home Depot Lands free of the earlier Romspen mortgages. There is no reason why the refinancing of those mortgages should increase its rights in this respect.

97 Second, the evidence before the Court suggests that the present circumstances were not anticipated by either party. However, at the time of execution of the Home Depot Agreement and the Ground Lease, the priority of the Romspen mortgages registered on title to the Property was absolutely clear. Both parties were sophisticated business entities with access to experienced and knowledgeable legal counsel. Romspen did everything that it could to protect itself against unanticipated circumstances. Home Depot did not.

98 To protect itself, Home Depot needed to obtain a consent, a priorities agreement, or a non-disturbance agreement directly from Romspen in respect of the Home Depot Agreement, the Ground Lease, or both. It made a business decision not to require Woods to obtain the form of comfort contemplated by the Home Depot Agreement and to rely instead upon representations from Woods — which proved to be incorrect — without seeking any indication from Romspen regarding the validity of those representations.

99 On the other hand, Romspen chose to protect its security position by retaining absolute control over any partial discharges of the Property under the earlier Romspen mortgages. It was under no obligation to anticipate the situation that subsequently developed. Nor did it have an obligation to advise Home Depot of the risks associated with failure to seek a consent or other comfort from Romspen.

100 Third, Home Depot argues that there is no evidence that it has derived any value or enrichment from Romspen's refinancing of the earlier Romspen mortgages by means of the Romspen Mortgage and that, on the other hand, Romspen has derived real value from Home Depot's construction and operation of its store on the Home Depot Lands. For the same reason, Home Depot says that, if its interest is vested out, Romspen will be unjustly enriched by virtue of the construction of the Home Depot store on the Property.

101 These two amount to a single argument. More importantly, I do not think this argument has any force to the extent that it relates to Home Depot's interest in the Home Depot Lands as opposed to the improvement on those Lands. As mentioned above, the present issue of priorities is a contest between Home Depot's interest in the Home Depot Lands, as a prospective purchaser under the Home Depot Agreement and as a tenant under the Ground Lease, and Romspen's interest in the Property under the Romspen Mortgage by way of subrogation. While there is no evidence that Home Depot derived any value from the refinancing of the earlier Romspen mortgages, there is equally no evidence that Romspen has derived any value from either the Home Depot Agreement or the Ground Lease between Woods and Home Depot.

102 In particular, there is no suggestion that the Ground Lease provided for a market rental. In the absence of any severance of the Home Depot Lands, the Ground Lease reverts to a 21-year term with a nominal annual rent. Further, if the Home Depot Agreement were enforceable against Romspen, the purchase price payable on closing of the sale of the Home Depot Lands would be significantly reduced by the prior rental payments made to Woods, of which it has not been established that Romspen had knowledge.

103 Fourth, as a related matter, while it may be implied in Home Depot's submission that most, if not all, of the value of the Property is attributable in the present economic circumstances to the Home Depot Lands, I do not think that this is determinative of the equitable considerations. The fact that the remainder of the Property, apart from the Home Depot Lands, if sold separately may have a value significantly less than that at the time of the Romspen mortgage loans to Woods ignores the reality that at all relevant times both Home Depot and Romspen were dealing with a single property. It also ignores the fact that Romspen did address this risk to the extent it could do so by means of the loan-to-value covenant in the Romspen Mortgage.

104 Fifth, I do not accept the Home Depot argument that the issue of fairness does not come into play in the present circumstances because Romspen discharged the earlier mortgages with full knowledge of the Home Depot Agreement rather than as a result of a mistake or inadvertence. This argument may have been made on an erroneous assumption that the earlier Romspen mortgages were discharged prior to the execution and delivery of the Romspen Mortgages. If it is not, this argument is objectionable for two reasons. It casts the fairness consideration in the context of subrogation far too narrowly. It also flies in the face of common sense and well established practice, which reflects the practical reality that there should be no reason to maintain on title mortgages that have been refinanced by a later mortgage from the same lender.

105 Sixth, the present circumstances are not analogous to those in *Armatage Motors Ltd. v. Royal Trust Corp. of Canada* (1997), 34 O.R. (3d) 599 (Ont. C.A.) in which injury to the party against whom subrogation was sought was a relevant consideration. *Armatage Motors* is a curious case in which the Court of Appeal appears to have denied subrogation on the basis that the first mortgagee had other assets against which it could recover the monies owed to it that were not also secured in favour of the second mortgagee, as well as the second mortgagee's reliance on the abstract of title. In the present proceedings, there is no evidence before the Court that Romspen will recover the outstanding loan amount from the remainder of the security under the Romspen Mortgage should subrogation not be granted. Insofar as there is any issue of reliance on the title to the Property, the present facts also favour Romspen.

106 Lastly, I do not accept Home Depot's submission that the doctrine of subrogation has no application in the context of a vesting order motion brought by a court-appointed receiver. Home Depot has offered no reason in principle why subrogation should not operate. I do not see any reason for excluding the operation of subrogation as an equitable consideration in determining whether to vest out a subsequent encumbrancer's interest.

107 On the basis of the foregoing, I conclude that Romspen is entitled to assert a subrogated claim against the Property in priority to that of Home Depot based on the principles of unjust enrichment. If it were necessary to consider the application of the principles in *Snell's Equity* upon which Home Depot relies, I would reach the same conclusion for the following reasons.

108 Turning to the test set out in *Snell's Equity*, satisfaction of the first requirement has already been addressed above. Absent subrogation, Home Depot will be enriched at Romspen's expense.

109 Similarly, for the reasons set out above pertaining to the absence of a juristic reason for such enrichment, I also conclude that such enrichment is unjust.

110 Lastly, I think that the third prong of the test in *Snell*, if in fact it is separate from the issue of a juristic reason for such enrichment, is also satisfied for the following reason. Provided that the issue of the Home Depot store is excluded from this analysis and dealt with below, as I believe is appropriate, there is no remaining policy reason for denying Romspen the remedy of subrogation. Romspen retained control over the discharge of all or any part of the Property from its security. Romspen did not benefit in any respect from the execution or performance of the Home Depot Agreement or the Ground Lease. The loss suffered by Home Depot — being the loss of the rental payments under the Ground Lease totaling $3,210,000 — was directly attributable to Home Depot's own actions in assuming a foreseeable risk.

Conclusion

111 Based on the foregoing, I conclude that Romspen's subrogated interest in the Property in respect of amounts outstanding under the earlier Romspen mortgages at the time of the execution of the Home Depot Agreement ranks prior to Home Depot's interest in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Romspen's Assertion of Priority Based on the Romspen Mortgage

112 Romspen's alternative claim is that the Romspen Mortgage has priority over both the Home Depot Agreement and the Ground Lease by virtue of the absence of registration of these documents.

Preliminary Comments

113 Before addressing this submission, I wish to make two observations.

114 First, given the determination above in respect of Romspen's subrogation claim, it is likely that, as a practical matter, it is unnecessary to address this issue. It would appear that the amount of Romspen's subrogated claim is, by itself, substantially in excess of the current value of the Property. I have addressed this issue, however, in case this assumption proves to be incorrect in marketing the Property.

115 Second, the focus of this claim differs in one important respect from that of Romspen's subrogated claim. The subrogated claim is based on the priority of the earlier Romspen mortgages by virtue of their registration at the time of execution of the Home Depot Agreement and the absence of any subsequent consent or other agreement in favour of Home Depot affecting such priority. The claim in respect of the Romspen Mortgage is based principally on the ouster of the doctrine of actual notice in respect of the Home Depot Agreement and the Ground Lease by operation of the registration provisions under the *Land Titles Act* relating to charges.

Positions of the Parties

116 Romspen argues that the Romspen Mortgage, as a registered charge against title to the Property, ranks prior to the Home Depot Agreement and the Ground Lease by virtue of section 93(3) of the *Land Titles Act* notwithstanding actual notice of the Home Depot Agreement at the time of registration of the Romspen Mortgage. Section 93(3) reads as follows:

> The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but *free from any unregistered interest in the land.* [Emphasis added]

117 Home Depot argues that section 93(3) of the *Land Titles Act* does not displace the operation of the doctrine of actual notice in Ontario and that, by virtue of Romspen's actual knowledge of the Home Depot Agreement at the time of execution of the Romspen Mortgage, the Romspen Mortgage is subordinated to this instrument.

118 Home Depot submits that it is entitled to rely on the doctrine of actual notice by virtue of the principle articulated by the Supreme Court in *Dominion Stores Ltd. v. United Trust Co.*, [1977] 2 S.C.R. 915 (S.C.C.). It argues that wording comparable to that in the Alberta legislation referred to by Spence J. in *United Trust* is required in order to exclude the operation of actual notice in Ontario. It says that the wording of section 93(3) is insufficient for this purpose.

119 In making this submission, Home Depot also relies on the more recent decisions of Mesbur J. in *1420111 Ontario Ltd. v. Paramount Pictures (Canada) Inc.*, [2001] O.J. No. 4461 (Ont. S.C.J.), as well as the Court of Appeal in *Manias v. Norwich Financial Inc.*, [2008] O.J. No. 2612 (Ont. C.A.) and *Romspen Investment Corp. v. 2126921 Ontario Inc.*, [2010] O.J. No. 5405 (Ont. C.A.).

Analysis and Conclusions

120 I propose to consider the following two issues in respect of the issue of the priority of the Romspen Mortgage relative to the Home Depot Agreement and the Ground Lease:

> (1) does section 93(3) of the *Land Titles Act* oust the operation of the doctrine of actual notice in the present circumstances? and
>
> (2) if not, is the Romspen Mortgage subordinated to the Home Depot Agreement and the Ground Lease by operation of the doctrine of actual notice?

Does Section 93(3) Oust the Doctrine of Actual Notice?

121 There is no dispute that Romspen had actual notice of the Home Depot Agreement at the time of execution and registration of the Romspen Mortgage. Accordingly, the issue in this section is whether the doctrine of actual notice could operate to subordinate the Romspen Mortgage to the interest of Home Depot under the Home Depot Agreement in accordance with the principle in *United Trust, supra*. The issue does not arise in respect of the Ground Lease given the determination above that Romspen did not have actual notice of the Ground Lease at the time of execution of the Romspen Mortgage.

122 The operation of section 93(3) of the *Land Titles Act* was previously addressed in the Holborn Judgment in the context of a contest between a registered mortgage and another unregistered agreement of purchase and sale. For the reasons set out therein, I concluded that section 93(3) operates to oust the doctrine of actual notice in Ontario in respect of a registered charge notwithstanding the chargee's actual notice of an unregistered agreement of purchase and sale.

123 Subsection 93(3) specifically addresses the operation of actual notice in the phrase "free from any unregistered interest in the land". In my view, this wording is sufficiently explicit to satisfy the test in *United Trust*. There is nothing in that decision that requires language substantially similar to the wording in the Alberta legislation to exclude the operation of the doctrine of actual notice. I am not persuaded that the conclusion reached in the Holborn Judgment was in error.

124 I do not think it is necessary to restate the reasons for my conclusion on this issue in this Endorsement. For present purposes, I adopt the reasons in the Holborn Judgment on the operation of section 93(3), with the exception of the alternative reasons of effective subordination, given the absence of any covenant against registration in the present proceedings. Subject to the qualification that section 93(3) has been read subject to section 155, which deals with the invalidity of the registration

of fraudulent instruments and is not at issue in this proceeding, I conclude that section 93(3) provides a mortgagee with an absolute defence to a claim based on actual notice.

125 I wish, however, to set out several additional observations regarding this issue in response to Home Depot's submissions.

126 First, in reaching this conclusion, I have also considered the absence of any alternative interpretation of the language of section 93(3). Home Depot's position is that section 93(3) does not operate where a receiver seeks to vest out an equitable interest. It seeks to avoid the priority issue by identifying a different fact situation. It did not, however, provide a meaningful alternative interpretation of section 93(3) that demonstrates a purpose for that provision that does not address the doctrine of actual notice. In the absence of an alternative interpretation of section 93(3), the Court must conclude that the provisions of section 93(3) are directed to the present situation.

127 In addition, I have the following observations regarding the extent to which the additional decisions cited by Home Depot on this motion can be taken as authority for the proposition that the wording of section 93(3) does not exclude the operation of the doctrine of actual notice.

128 First, section 93(3) was not cited in the decisions of either the Court of Appeal in *Manias*, *supra* or Mesbur J. in *Paramount Pictures*, *supra*. Second, *Manias* addresses an altogether different situation of a contest of priorities among registered charges, where a mistake was made in the order of registration. That issue did not invoke section 93(3). Third, *Paramount Pictures* addresses a contest between a mortgagee and a tenant in which the tenant wished to resile from its lease, rather than a situation in which a mortgagee sought to vest out a tenant's interest. This dispute therefore also does not involve section 93(3).

129 Fourth, in *Romspen Investment Corp. v. 2126921 Ontario Inc.*, [2010] O.J. No. 639 (Ont. S.C.J.), Tucker J. held that section 93(3) did not apply where a party sought to rely on that provision to take advantage of a registration error in respect of a prior mortgage in order to obtain a better position than had been bargained for. Subsequent to the hearing in the present proceeding, the Court of Appeal upheld this decision in *Romspen Investment Corp. v. 2126921 Ontario Inc.* (Ont. C.A.) [*Romspen Investment Corp. v. Orvitz*] by way of an appeal book endorsement.

130 The relevant portion of the appeal book endorsement on the substantive issue reads as follows:

> We are satisfied that the application judge's finding that the appellants had actual notice of the intended priority of the Romspen mortgage necessarily included a finding that the Romspen mortgage was an equitable mortgage in respect of the parking lot. That being so, contrary to the analysis in *Holborne* [*sic*] *Property v. Romspen* (2008), 77 R.P.R. (4th) 262, the application judge was correct in holding that section 93(3) of the *Land Titles Act* did not preclude Romspen's equitable mortgage from having priority over the appellants' registered mortgage. (See *United Trust v. Dominion Stores et al.*, [1977] 2 S.C.R. 915 at pp. 956 and 957). To that extent, the appeal must fail.

131 I do not think the decision in *Romspen Investment Corp. v. Orvitz* applies to the present circumstances for the following reasons.

132 First, I do not think that the Court of Appeal intended to state, as a general principle, that the doctrine of actual notice continued to operate in all circumstances in Ontario notwithstanding the enactment of section 93(3). The issue of the ambit of section 93(3) was not addressed by Tucker J. The Court of Appeal was also silent on the issue.

133 Second, as Tucker J. expressly noted at para. 25 of her judgment, the facts in this decision are profoundly different from those in the Holborn Judgment. She noted "[t]his is not a case where priorities are in issue; the second mortgagee always knew it was to be a second". I see nothing in the decisions of Tucker J. or of the Court of Appeal that addresses, let alone excludes, the operation of section 93(3) in substantive priority contests.

134 Third, as a related matter, it is not necessary to exclude the operation of section 93(3) in order to reach the result ordered in *Orvitz*. It appears that the solicitor's error in *Orvitz* was a failure to include a legal description — that was included in the second mortgage — of a second parcel of land intended to be charged. As Tucker J. recognized in her judgment, *Orvitz*

is essentially an unjust enrichment case based on an implied contractual subordination agreement among the parties, rather than a case of actual notice. It would be unconscionable to allow the second mortgage to retain its priority even if, in the first instance, section 93(3) operated. Moreover, the implication from *Manias* is that section 93(3) does not operate in a priority dispute between charges. Essentially, that is the situation in *Orvitz* — a contest between two mortgagees where one mortgagee seeks rectification of his instrument to reflect the intended security as between the mortgagor and mortgagee in circumstances in which rectification would be ordered notwithstanding its impact on the second mortgagee because of the intended priorities as between the two mortgages.

135 In summary, while I accept that the wording of the endorsement of the Court of Appeal may be read in different ways, I think the intention is clear and the circumstance are entirely different from those in the present case or in the Holborn Judgment.

136 Based on the foregoing, I conclude that, while Romspen had actual knowledge of the Home Depot Agreement, the Romspen Mortgage ranks prior to the Home Depot Agreement based on the operation of section 93(3) of the *Land Titles Act*.

The Operation of the Doctrine of Actual Notice

137 In the event that the doctrine of actual notice is held to operate in the present circumstances, however, I also do not think that it would be applied to subordinate the Romspen Mortgage to either the Ground Lease or the Home Depot Agreement.

138 The Court has previously concluded that Romspen did not have actual knowledge of the Ground Lease at the time that it executed the Romspen Mortgage. This excludes the operation of the doctrine of actual notice in respect of the Ground Lease.

139 With respect to the Home Depot Agreement, the doctrine of actual notice is an equitable doctrine. Its application is not automatic. If it were held that the doctrine of actual knowledge operated with respect to the Home Depot Agreement, the Court must still consider the equities between the parties.

140 In this case, in my opinion, the considerations discussed above in the context of Romspen's claim for priority by way of subrogation are equally applicable to the issue of the operation of the doctrine of actual knowledge. On this basis, I would conclude that the equities between the parties did not favour the application of the doctrine of actual notice to subordinate the Romspen Mortgage to the Home Depot Agreement.

Conclusion Regarding Priority of Romspen's Interest in the Property

141 Based on the foregoing, I conclude that Romspen's interest in the Property under the Romspen Mortgage ranks prior to Home Depot's interests in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Is Romspen's Interest in the Property Subordinated to Home Depot's Interest By Virtue of a Consent?

142 As a matter of law, if a lease is executed by a mortgagor after the mortgage has been granted, the mortgagee will be bound by the terms of the lease if it is made with his express or implied consent: see *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.* (1998), 41 O.R. (3d) 321 (Ont. C.A.) at paras. 54-57. The same principle can operate in respect of an agreement to purchase land.

143 Romspen's claim for subrogation is based on the prior registration of the earlier Romspen mortgages at the time of execution of the Home Depot Agreement. This claim could, however, be defeated by evidence that it consented to the Home Depot Agreement or the Ground Lease at some point thereafter.

144 Similarly, Romspen's claim of priority in respect of its interest under the Romspen Mortgage could also be defeated by evidence of such consent at some point after execution and registration of the Romspen Mortgage notwithstanding an initial priority position for the reasons set forth above.

145 The issue in this section is purely factual — did Romspen consent to the Home Depot Agreement or the Ground Lease? This matter has been addressed above, where I concluded that Home Depot has failed to establish as an undisputed fact that

Romspen consented to either the Home Depot Agreement or the Ground Lease such that the Romspen Mortgage is subordinated to either or both of these instruments.

146 I would add only the observation that the issue of actual notice arises in circumstances such as the present precisely because knowledge does not automatically constitute consent. Accordingly, the significance, if any, of Romspen's knowledge of the existence of the Home Depot Agreement at the time of the Romspen Mortgage is properly addressed, not as a matter of consent, but as a matter of actual notice.

Is Home Depot Entitled to a Lien Against the Property Ranking in Priority to Romspen's Interest by Virtue of the Construction of the Home Depot Store?

147 Based on the foregoing, Romspen has an interest in the Property that ranks prior to Home Depot's interest under the Home Depot Agreement and the Ground Lease on two grounds: (1) by way of subrogation to the extent of the monies refinanced under the Romspen Mortgage plus interest; and (2) by operation of section 93(3) of the *Land Titles Act* to the extent of all monies secured under the Romspen Mortgage.

148 In these circumstances, Home Depot claims a lien against the Property under section 37(1) of the CLPA or, alternatively, in equity, in either case in the amount by which the value of the Property has been increased by the construction of the Home Depot store. It should be noted that the claim for lien is asserted against the owner of the Property. To the extent a lien claimant is successful, there is a further issue regarding the priority of any such lien relative to Romspen's interest in the Property. I will first address the validity of Home Depot's lien claims before considering the issue of priority.

The Conveyancing and Law of Property Act

149 Section 37(1) of the CLPA provides as follows:

> Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

Home Depot seeks a lien under this provision in the amount of the value by which the Property has been improved as a result of the construction of the Home Depot store on the Home Depot Lands.

150 As set out in *McGuire v. Warren* (2006), 46 R.P.R. (4th) 113 (Ont. S.C.J.) at para. 7 per Wood J., before granting relief under section 37(1) of the CLPA, the Court must apply a three-part test:

> ... First, it must be satisfied that the person making the improvements genuinely believed that he or she owned the land. Secondly, it must be satisfied that the improvements made are of a "lasting" nature. Finally, if the first two parts are met, the court must weigh the equities between the owner of the encroached upon lands and the person who has made the improvements, to determine whether it is appropriate to either grant a lien on the lands for the value of the improvements or to transfer the lands to the person who made the improvements for appropriate compensation.

151 There is no question that Home Depot has made improvements of a lasting value to the Property. The issue is whether Home Depot has satisfied the requirement that it have a sufficient ownership interest in the Property.

152 The Receiver and Romspen make three submissions with respect to the first part of the test.

153 Firstly, they refer to para. 12 of *McGuire*, in which Wood J. observed that section 37(1) was enacted at a time when serious inadequacies or deficiencies in conveyancing practice resulted in disputed property boundaries. They argue the present case does not result from such factors, suggesting that the provision is therefore unavailable. However, I do not think that the purpose of section 37(1) is limited to addressing issues arising from historical conveyancing practice.

154 Second, Romspen argues that demonstration of a genuine belief that the claimant owns the relevant land requires demonstration of not only an honest belief but also a reasonable basis for that belief: *Derro v. Dube*, [1948] O.W.N. 287 (Ont. H.C.) at paras. 3-4 per McRuer C.J.H.C.; and *Halton Hills (Town) v. Row Estate*, [1993] O.J. No. 1222 (Ont. Gen. Div.) per MacKenzie J. It argues that Home Depot did not have such a belief at the time it erected its store on the Property.

155 I do not think it can reasonably be suggested that, as between Home Depot and Woods, Home Depot did not believe that it had an interest in the Property that was sufficient for the purposes of claiming relief under section 37(1). It had spent $14.5 million in improvements on the Property. The only reasonable inference is that it did so in the belief that, at a minimum, it had a right to remain on the Property for the remainder of the term of the Ground Lease.

156 Third, Romspen argues that, irrespective of that belief, Home Depot does not have a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37(1). It argues that a purchaser under an unexecuted agreement of purchase and sale, while an equitable owner of the property, does not have a sufficient ownership interest to obtain relief under section 37(1). It relies on *Geldhof v. Bakai* (1982), 139 D.L.R. (3d) 527 (Ont. H.C.) at para. 8 per Callaghan J. Insofar as it is suggested that this is a general principle of law, I think it is incorrect notwithstanding that this was the result in *Geldhof v. Bakai*. It is clear that Callaghan J. based his decision on a finding of fact in the particular circumstances of that case, including specific advice that neither plaintiff believed that they would own the land in question until the date of the closing of the agreement of purchase and sale entered into with the defendants.

157 However, on the facts of the present case, I conclude that Home Depot does not have a sufficient ownership interest under the Home Depot Agreement or the Ground Lease to seek relief under section 37(1) for the following reasons.

158 As mentioned, at best, Home Depot has an unregistered equitable agreement to purchase the Home Depot Lands. Moreover, that is subject to an important qualification. Section 4.5 of the Home Depot Agreement provides that the Agreement shall only be effective to create an interest in land if the provisions of the *Planning Act* have been complied with. That cannot occur until severance of the Home Depot Lands has occurred. Given the combination of these two factors, I think the Court must conclude that Home Depot does not have a sufficient interest in land under the Home Depot Agreement to assert a claim under section 37(1).

159 I have some sympathy for the argument that Home Depot's leasehold interest under the Ground Lease, which is effective currently, is a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37. Section 3.3(a) of the Ground Lease contains a covenant for quiet possession from Woods. The Ground Lease has a fixed term of 50 years and rental payments fixed for the entire period. In short, Home Depot has security of tenure as between itself and Woods. Such a long-term lease is often a substitute for ownership of the freehold interest. However, the language of section 37(1) appears to require a belief that the lien claimant is an owner of the relevant property. The Court has not been provided with any case law that supports the proposition that a leasehold interest in a property is a sufficient interest to obtain relief under section 37(1). Moreover, there is some authority to the contrary in *Metzger Estate v. Gardiner*, [2000] O.J. No. 2280 (Ont. S.C.J.).

160 On the basis of the foregoing, I therefore conclude that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA.

Claim for Equitable Lien

161 As mentioned, in the alternative, Home Depot claims an equitable lien in the Property equal to the amount by which the value of the Property has been enhanced by the construction of the Home Depot store. It relies on a line of cases in which equitable relief has been granted to parties who make improvements to a property at a time when they mistakenly believe they will be able to acquire the property: see, for example, *Montreuil v. Ontario Asphalt Co.* (1922), 63 S.C.R. 401 (S.C.C.) at p. 429 per Anglin J.; *Isabelle v. Lahaie*, [2007] O.J. No. 4981 (Ont. S.C.J.); and *Hatoum v. Hatoum*, [1988] O.J. No. 1216 (Ont. H.C.) at p. 6-8 per Southey J., aff'd (Ont. C.A.).

162 I do not think that this principle is limited in operation to circumstances in which a claimant has an honest belief in his or her right to acquire the subject property. It is framed more broadly in *Chalmers v. Pardoe*, [1963] 3 All E.R. 552 (Fiji P.C.) as follows:

> There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.

163 On this issue, the equities clearly favour Home Depot over Woods. There is no apparent equitable consideration in favour of Woods. Home Depot had a right to purchase the Home Depot Lands as well as a leasehold interest under the Ground Lease having a term of at least 21 years. It appears that, at the time that it constructed the Home Depot store, there was no indication of the onset of Woods' financial difficulties, which later prevented completion of the sale transaction. In addition, the Home Depot store was constructed in accordance with arrangements that were specifically agreed to by Woods. Further, Woods did not appear on this motion and does not oppose a lien in favour of Home Depot. The Receiver effectively does not oppose this relief either as it is more concerned with the issue of the priority of such lien relative to the Romspen mortgages.

164 Based on the breadth of this principle, as well as the equitable considerations set out above, I think Home Depot would satisfy the test for an equitable lien based on its honest belief that, pursuant to the Ground Lease, it had a valid leasehold interest in the Property having a term of at least 21 years.

165 Accordingly, to the extent that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA, I am of the opinion that it has satisfied the requirements of an equitable lien in the Property against the interest of Woods in the amount by which the value of the Property has been enhanced by the construction of the Home Depot store.

The Priority Issue

166 The real issue in this proceeding is not, however, whether Home Depot is entitled to a lien against the Property but whether such lien should rank in priority to Romspen's interest under the Romspen Mortgage. This issue appears to be a matter of first impression.

167 The Receiver and Romspen argue that equity cannot permit the priority of Romspen's interest in the Property to be reversed by equitable lien rights on the principle that, where the equities are equal between competing claims in a property, legal title prevails: see *Toronto Dominion Bank v. Faulkner* (1990), 74 O.R. (2d) 92 (Ont. C.A.) at para. 18. However, this submission begs the question of whether the equities between Home Depot and Romspen are equal.

168 Home Depot points to a number of factors that it says should be taken into consideration by the Court. Home Depot's principal argument is that, in its view, Romspen allowed the construction of the Home Depot store on the Home Depot Lands and now seeks to take advantage of that improvement without compensation, which it characterizes as a windfall gain. It also argues that the Court should infer Romspen's consent to the construction of the Home Depot store from its execution of the Site Plan Agreement. Lastly, it says that if Romspen is successful, the Home Depot employees will lose their employment.

169 I have considerable sympathy for Home Depot's position notwithstanding the fact that they have contributed in a significant way to the present situation by deciding not to register the Home Depot Agreement or the Ground Lease. The reality is that, if the order is granted, Romspen will obtain the benefit of an improvement that it did not originally anticipate insofar as the parties did not expect, at the time the Home Depot store was constructed, that Woods would go into default on the Romspen Mortgage prior to completion of the sale of the Home Depot Lands.

170 However, I have concluded that Romspen's interest in the Property should have priority over Home Depot's equitable lien for the following reasons.

171 First, the mere fact that Romspen will obtain the value of the Home Depot store is not, by itself, sufficient to determine the issue of the priority of Home Depot's lien. To succeed in this claim, Home Depot must do more than demonstrate that it has improved the Property and that Romspen, as the mortgagee, will benefit if it is denied a prior equitable lien in respect of the improvement. It must establish either a consent of Romspen to the construction of the Home Depot store in circumstances indicating that the issue of priority was understood to be involved or another equitable consideration that justifies imposition of a prior lien in the absence of such consent.

172 In my opinion, Home Depot has failed to identify any other equitable consideration that justifies imposition of a prior lien in the absence of Romspen's consent to the construction of the store. Home Depot suggests that the Court should consider the possibility that its employees will lose their jobs. This is always an important consideration for courts in a receivership context. However, there is simply no basis in the evidence before me that would support such a conclusion. There are a number of possible outcomes to the present situation depending upon the business decisions of the parties after the release of this Endorsement.

173 Accordingly, the issue turns on whether Romspen consented to the construction of the Home Depot store on the Home Depot Lands in circumstances that it understood, or should reasonably have understood, that Home Depot would have a prior lien over such Lands to the extent of the value of the improvement. I conclude that Home Depot has failed to demonstrate any such consent of Romspen for the following reasons.

174 First, there is no evidence that Romspen ever consented directly to the construction of the Home Depot store. There is no evidence that Home Depot ever approached Romspen for such a consent. Nor is there any evidence of any communication between the parties that Romspen should reasonably have considered constituted a request for such a consent or required a response to protect its security position. Accordingly, there is no evidence that supports Home Depot's suggestion that Romspen "allowed" the construction of the Home Depot store in some manner.

175 Second, it is not suggested that the existence of the Home Depot Agreement implied a consent to the construction of the Home Depot store. Insofar as Home Depot suggests that the execution of the Ground Lease implies such a consent, I reject the submission for two reasons. Home Depot was not a party to the Ground Lease and gave no assurances in respect of Woods' representations therein. In addition, I have concluded that Home Depot did not have actual knowledge of, and did not consent to, the Ground Lease. There is also no basis for implying consent to the construction of the Home Depot store from Romspen's execution of the Romspen Mortgage.

176 The issue therefore turns principally on whether Romspen's execution of the Site Plan Agreement somehow changes this result — that is, whether it constitutes consent to the construction of the Home Depot store or evidence of Romspen's consent given elsewhere to such construction. I do not think it does for four reasons.

177 First, there is nothing in the Site Plan Agreement that constitutes the express or implicit consent of Romspen to the construction of the Home Depot store. There is also nothing in the Site Plan Agreement that expressly contemplated that Home Depot would require or seek Romspen's consent to the construction of the Home Depot store. Romspen was entitled to assume from the absence of any contractual relationship between it and Woods, as well as the limited scope of the Site Plan Agreement, that Home Depot would approach it separately if it required a consent or other protection from Romspen in respect of the construction of the store on the Property.

178 Moreover, the Site Plan Agreement specifically referred to the earlier Romspen mortgages, which were registered against the Property and which maintained Romspen's control over the Property by the mechanism of Romspen's control over partial discharges of its security. The express subordination set out in the Site Plan Agreement related only to the rights of the Town of Collingwood. While rights of subordination of an interest in the Property are not the same as consent to the construction of the Home Depot store, the absence of any provision in the Site Plan Agreement dealing with Home Depot's rights in respect of the Property in the event of construction of the store is significant. If the Site Plan Agreement had been intended to grant Home Depot rights in respect of Romspen, it had to do so explicitly.

179 Second, more generally, there is no sense in which it can be said that Home Depot "allowed" the construction of the Home Depot store by executing the Site Plan Agreement. As mentioned, the only purpose of its execution of the Site Plan Agreement was to subordinate its interest in the Property to the interest of the Town of Collingwood. The Site Plan Agreement did not set out a timetable for the construction of the Home Depot store. Romspen could not know of Home Depot's intentions in this regard unless Home Depot chose to advise it. There is no evidence that Home Depot ever communicated its intention to construct the Home Depot store to Romspen.

180 Third, the circumstances in July 2006 were not such that Romspen's execution of the Site Plan Agreement can be taken as necessarily implying that Romspen turned its mind to the issue of the priority of any lien in favour of Home Depot in the Property that might arise after construction of the store and, by implication, agreed to subordinate Romspen' interest to any such lien. As mentioned above, the Romspen Mortgage was in good standing in July 2006. There was no reason to expect that Woods would be unable to obtain a partial discharge of the Home Depot Lands, in which case the priority issue would not arise.

181 Fourth, Home Depot has failed to identify any circumstances at the time of execution of the Site Plan Agreement that would have imposed an obligation on Romspen to take positive action to protect its position even if it suspected from the request to sign the Site Plan Agreement that Home Depot intended to construct the Home Depot store on the Home Depot Lands.

182 At all times, Home Depot's contractual relationships were restricted to Woods. The only exception was the Romspen acknowledgement, which addressed only the demolition of a portion of the industrial building on the Property. Home Depot was not required to notify Romspen of the commencement of construction of the Home Depot store or to seek its consent to such construction. Conversely, Romspen was not obligated to inquire as to Home Depot's intentions and to advise Home Depot that it did not consent to the construction of the Home Depot store insofar as it would give rise to a lien in priority to the Romspen Mortgage.

183 Ultimately, Home Depot's position is that Romspen ought to have known from the fact of the demolition of the portion of the industrial building and from the Site Control Agreement that it was proposing to build the Home Depot store on the Home Depot Lands and that Romspen had an obligation to advise Home Depot that it did not consent to such construction. There is no evidence that Romspen actually knew of Home Depot's intentions prior to commencement of construction beyond knowing that it was possible that Home Depot might construct a store on the Property. I do not think that Romspen could reasonably have known of Home Depot's intention to commence construction immediately from the demolition and the Site Control Agreement alone. It certainly could not have known that Home Depot intended to commence construction without obtaining any consent or assurance from Romspen to protect its position in the event of realization proceedings by Romspen. In any event, however, neither actual nor constructive knowledge imposed any obligation on Romspen to approach Home Depot to protect its security position in the circumstances of unilateral action by Home Depot. There was no contractual relationship between the parties. There was no prior representation from Romspen to Home Depot. I know of no legal principle that would impose such an obligation in the circumstances of this case in the absence of any express communication from Home Depot to Romspen that could ground a claim based on reliance.

184 Accordingly, I conclude that the Romspen Mortgage has priority over any equitable lien in favour of Home Depot arising as a result of the construction of the Home Depot store on the Property.

185 In addition to the equitable considerations addressed above, I would add, if it were necessary to address this issue, that I see no basis for excluding the operation of section 93(3) of the *Land Titles Act* in respect of an equitable lien. There is nothing in the language of section 93(3) that provides that the principles of equity are intended to override the operation of this provision of the *Land Titles Act*. Indeed, an unregistered inequitable lien would appear to be the very type of interest to which section 93(3) is directed.

Conclusion Regarding the Equities Between the Parties Relative to the Receiver's Request for an Order Vesting Out the Interest of Home Depot in the Property

186 The foregoing issues, while they involve a consideration of the equities between the parties in relation to specific issues, are not determinative of the question of whether the Receiver should be granted an order approving the sale of the Property on a basis that vests out the interest of Home Depot. That requires a consideration of the equities between the parties based on the determinations made above and any other applicable considerations.

187 Based on the foregoing, the Court must consider the equities between the parties in the context of findings that

> (1) Romspen's interest in the Property ranks ahead of that of Home Depot to the extent of the monies secured under the Romspen Mortgage or, alternatively, to the extent of the monies secured under the earlier Romspen mortgages in existence at the date of the Home Depot Agreement, plus interest at the rates provided for under those mortgages;
>
> (2) Home Depot's equitable lien against the Property arising as a result of the construction of the Home Depot store does not rank prior to the interest of Romspen in the Property; and
>
> (3) Home Depot is unable to establish as an undisputed fact that Romspen consented to the Home Depot Agreement, the Ground Lease or the construction of the Home Depot store in a manner that was intended to affect its rights in the Property.

188 I conclude that the Receiver should be granted an order permitting the sale of the Property free of the interest of Home Depot for the following reasons.

189 The equitable considerations addressed in the context of the determinations of the priorities of the respective interests of Romspen and of Home Depot in the Property are also applicable for the present assessment. In particular, Romspen bargained with Woods for the right to control the discharge of any portion of the Property from its security. Registration of the earlier Romspen mortgages, and of the Romspen Mortgage, was notice to Home Depot of the existence of such right. In addition, Romspen did not in any way provide assurance or comfort to Home Depot with respect to the priority of its interest in the Property or the protection of its interest in the event of realization proceedings.

190 The only other consideration to be addressed by the Court is, therefore, the value of the Property. As suggested in *1565397 Ontario Inc., Re* (Ont. S.C.J.), while a court can sell property free of a contract entered into between a debtor and a third party, the Court cannot do so in circumstances where the effect is to extinguish an interest in property except in limited circumstances. Those circumstances appear to be limited to those in which the third party has no equity in the subject property given the value of the property and prior encumbrances.

191 While the circumstances in the present proceedings are more complex than other decisions in which this principle has been applied, I think that the facts before the Court establish that there is no equity in Home Depot's interest in the Property.

192 The Sale Agreement contemplates a sale price of $14.1 million. This is substantially below the amount secured under the Romspen Mortgage, which is at least $17,844,975.38 plus interest since February 1, 2010. On this basis, there is no equity value in Home Depot's subordinate interests in the Property. Given the existing priorities, Home Depot's interest would only have value if the Receiver received an offer for the Property that fully satisfied the monies owing to Romspen.

193 Based on the foregoing analysis of the applicable equitable considerations as between Romspen and Home Depot, I conclude that the equities favour Romspen and, accordingly, that the Receiver is entitled to an order permitting the sale of the Property on a basis that vests out the Home Depot interests in the Property under the Home Depot Agreement and the Ground Lease.

Should the Court Approve the Sale Agreement?

194 The remaining issue is whether the Court should also approve the Sale Agreement at this time.

195 As mentioned, the Receiver's report sets out in detail the exposure of the Property to the market. In the usual circumstance, the nature and extent of such activities would be sufficient to satisfy the Court that the proposed sale price for the Property represented the fair market value of the Property.

196 There are, however, two unusual features of the present circumstances.

197 First, the Receiver's effort to market the Property took place principally in the first six months of 2009. While there are legitimate reasons for the delay in bringing on this motion, the stock market and residential real estate market have nevertheless improved significantly since then. There is, therefore, a possibility that the real estate market in Collingwood has improved in a like manner since then. The Court must be concerned that the sale price under the Sale Agreement may not represent the current fair market value of the Property.

198 Second, and more importantly, the Receiver marketed the Property on the basis that a purchaser was bound to sell the Home Depot Lands to Home Depot in accordance with the Home Depot Agreement. It is possible that the Property would be attractive to other potential purchasers as a result of the determination in this Endorsement that the Receiver has the authority to sell the Property free of any claim by Home Depot. This consideration is relevant to the question as to whether the sale price under the Sale Agreement represents the current fair market value of the Property.

199 Further, the Receiver itself suggests that Home Depot is financially able to acquire the Romspen Mortgage and develop the Property itself if this motion is decided against it and it wishes to avoid the loss of its investment in the Home Depot store. I do not suggest that any such action is probable. However, it does raise the possibility that, as a result of the determination in this proceeding, Home Depot may itself wish to participate in the sales process in some manner.

200 Given these circumstances, the Court is of the view that it cannot consider approval of the Sale Agreement until the Receiver has conducted a further sales process in respect of the Property on the basis that a purchaser would be entitled to acquire the Property free and clear of any lien or claim of Home Depot. Rather than address the nature of and length of any such sales process, the Court is of the view that it should leave such details to the Receiver subject, of course, to the Receiver's right to seek the advice and directions of the Court at any time.

Further Order

201 At the request of the Receiver, an appraisal of the Property obtained by the Receiver from High Point Danbury Realty Advisors Corporation is hereby sealed pending completion of the sale of the Property or further order of this Court.

Costs

202 If the parties are unable to agree on costs of this motion, they shall have thirty days to make written submissions to the Court through the Commercial List Office, not to exceed seven pages in length.

Motion granted in part; cross-motion dismissed.

End of Document

2011 ONCA 817
Ontario Court of Appeal

Romspen Investment Corp. v. Woods Property Development Inc.

2011 CarswellOnt 14462, 2011 ONCA 817, 14 R.P.R. (5th) 1, 210 A.C.W.S. (3d) 302, 286 O.A.C. 189, 346 D.L.R. (4th) 273, 85 C.B.R. (5th) 21

Romspen Investment Corporation (Applicant / Respondent) and Woods Property Development Inc. and TDCI Holdings Inc. (Respondents)

John Laskin, M. Rosenberg, Paul Rouleau JJ.A.

Heard: November 18, 2011
Judgment: December 22, 2011
Docket: CA C53496, C54375

Proceedings: reversing *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 2011 CarswellOnt 2380, 75 C.B.R. (5th) 109, 2011 ONSC 3648, 4 R.P.R. (5th) 53 (Ont. S.C.J.); and reversing *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 2011 CarswellOnt 10053, 2011 ONSC 5704 (Ont. S.C.J. [Commercial List])

Counsel: Ronald Slaght, Q.C., John J. Chapman for Appellant, Home Depot Canada Inc.
David P. Preger, Lisa Corne for Respondent
Harvin D. Pitch for Respondent, SF Partners Inc.

Subject: Property; Corporate and Commercial; Insolvency; Estates and Trusts; Evidence; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Real property — Mortgages — Priorities — Between types of creditors — Miscellaneous

Mortgages were registered against property owned by debtor W Inc. in favour of secured creditor R Corp. — H Inc. and debtor entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of property (H Lands) — H Inc. built store on H Lands — Debtor defaulted on mortgage, and receiver was appointed — Receiver partly succeeded in its motion seeking approval of sale of property to purchaser free of any claims by H Inc. — H Inc. unsuccessfully brought cross-motion for various relief regarding property — Motion judge held that secured creditor's interest in property ranked higher in priority to H Inc.'s interest — Motion judge held that H Inc. failed to establish as undisputed fact that secured creditor consented to H Agreement or ground lease such that its mortgage was subordinated to instruments — H Inc. appealed — Receiver and secured creditor cross-appealed — Appeal allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge's application of incorrect standard of proof and his belief that he was not allowed to draw inferences on motion were errors that went to very basis of factual matrix — Errors committed by motion judge were not harmless, as result may have been different — Motion judge excluded possibility of finding implied consent by secured creditor because of his belief that he was prevented from drawing inferences from facts — Motion judge did not look at totality of considerations in weighing equities between parties.

Real property — Mortgages — Priorities — Between types of creditors — Registered mortgagee and equitable interest holder

Mortgages were registered against property owned by debtor W Inc. in favour of secured creditor R Corp. — H Inc. and debtor entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of property (H Lands)

— H Inc. built store on H Lands — Debtor defaulted on mortgage, and receiver was appointed — Receiver partly succeeded in its motion seeking approval of sale of property to purchaser free of any claims by H Inc. — H Inc. unsuccessfully brought cross-motion for various relief regarding property — Motion judge held that mortgage had priority over any equitable lien in favour of H Inc. arising from construction of its store — Motion judge held that H Inc. failed to identify any equitable consideration, other than secured creditor obtaining value of store, that justified imposition of prior lien in absence of secured creditor's consent to construction of store — H Inc. appealed — Receiver and secured creditor cross-appealed — Appeal allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Errors committed by motion judge were not harmless, as result may have been different — Motion judge excluded possibility of finding implied consent by secured creditor because of his belief that he was prevented from drawing inferences from facts — Motion judge did not look at totality of considerations in weighing equities between parties.

Debtors and creditors — Receivers — Conduct and liability of receiver — General conduct of receiver

Mortgages were registered against property owned by debtor W Inc. in favour of secured creditor R Corp. — H Inc. and debtor entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of property (H Lands) — H Inc. built store on H Lands — Debtor defaulted on mortgage, and receiver was appointed — Receiver partly succeeded in its motion seeking approval of sale of property to purchaser free of any claims by H Inc. — H Inc. unsuccessfully brought cross-motion for various relief regarding property — Motion judge held that equities favoured secured creditor, so receiver was entitled to order permitting sale on basis that it vested out H Inc. interests — Motion judge did not approve sale to purchaser until receiver conducted sales process on basis that purchaser would be entitled to acquire property free of any claim of H Inc. — H Inc. appealed — Receiver and secured creditor cross-appealed — Appeal allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Errors committed by motion judge were not harmless, as result may have been different — Motion judge did not look at totality of considerations in weighing equities between parties — Decision as to whether H Inc.'s interest should be vested out could not properly be made until fact-finding process, including drawing reasonable inferences, was complete.

Real property — Mortgages — Right of subrogation

Mortgages were registered against property owned by debtor W Inc. in favour of secured creditor R Corp. — H Inc. and debtor entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of property (H Lands) — H Inc. built store on H Lands — Debtor defaulted on mortgage, and receiver was appointed — Receiver partly succeeded in its motion seeking approval of sale of property to purchaser free of any claims by H Inc. — H Inc. unsuccessfully brought cross-motion for various relief regarding property — Motion judge held that secured creditor had subrogated claim in amount of monies outstanding under earlier mortgages at time of their refinancing, plus interest at rates provided under earlier mortgages — Motion judge held that secured creditor was entitled to assert subrogated claim against property in priority to that of H Inc. based on principles of unjust enrichment — H Inc. appealed — Receiver and secured creditor cross-appealed — Appeals allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Errors committed by motion judge were not harmless, as result may have been different — Motion judge did not look at totality of considerations in weighing equities between parties.

Real property — Registration of real property — Improvements made under mistake of title — Requirements for relief — Mistaken belief

Mortgages were registered against property owned by debtor W Inc. in favour of secured creditor R Corp. — H Inc. and debtor entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of property (H Lands) — H Inc. built store on H Lands — Debtor defaulted on mortgage, and receiver was appointed — Receiver partly succeeded in its motion seeking approval of sale of property to purchaser free of any claims by H Inc. — H Inc. unsuccessfully brought cross-motion for various relief regarding property — Motion judge held that H Inc. was not entitled to lien under s. 37(1) of Conveyancing and Law of Property Act (CLPA) in amount of value by which property had been improved as

result of construction of store — Motion judge held that H Inc. might have unregistered equitable agreement to purchase H Lands, but only if provisions of Planning Act were complied with — Motions judge held that H Inc. did not have sufficient interest in land under H Agreement or ground lease to assert claim under s. 37(1) of CLPA — H Inc. appealed — Receiver and secured creditor cross-appealed — Appeals allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Errors committed by motion judge were not harmless, as result may have been different — Motion judge did not look at totality of considerations in weighing equities between parties.

Bankruptcy and insolvency — Administration of estate — Sale of assets — Sales of asset subject to charge, mortgage, or hypothec

Debtor W Inc. owned property subject to lien by H Inc. — Lien of H Inc. ranked behind interest of secured creditor R Corp. — Receiver obtained order for sale of property, free and clear of interest held by H Inc. — H Inc. and secured creditor began appeal proceedings — Receiver reached agreement for sale of property — Receiver successfully brought motion for approval of sale and vesting order — Order was not stayed pending outcome of appeal proceedings, and H Inc.'s rights in property not preserved — Motion judge held that receiver made sufficient effort to get best price for property and did not act improvidently — Motion judge held that sales process was not unfair — Motion judge held that all other known creditors ranked junior to secured creditor's mortgage — H Inc. appealed — Appeal allowed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Errors committed by motion judge were not harmless, as result may have been different — Motion judge did not look at totality of considerations in weighing equities between parties — Decision as to whether H Inc.'s interest should be vested out could not properly be made until fact-finding process, including drawing reasonable inferences, was complete.

Evidence — Proof — Inferences

Debtor W Inc. owned property subject to lien by H Inc. — Lien of H Inc. ranked behind interest of secured creditor R Corp. — Receiver obtained order for sale of property, free and clear of interest held by H Inc. in first motion — Motion judge held that secured creditor's interest in property ranked higher in priority to H Inc.'s interest — Motion judge held that H Inc. failed to establish as undisputed fact that secured creditor consented to H Agreement or ground lease such that its mortgage was subordinated to instruments — Receiver successfully brought second motion approving sale and vesting order to purchaser — H Inc. appealed both decisions — Receiver and secured creditor cross-appealed first decision refusing to approve sale to purchaser — Appeals allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Motion judge's application of incorrect standard of proof and his belief that he was not allowed to draw inferences on motion were errors that went to very basis upon which court's equitable discretion was exercised, namely, factual matrix — Errors committed by motion judge were not harmless — Motion judge excluded possibility of finding implied consent by secured creditor because of his belief that he was prevented from drawing inferences from facts — There were facts available from which motion judge could have drawn inferences relating to secured creditor's implied consent.

Civil practice and procedure — Trials — Conduct of trial — Powers and duties of trial judge — Miscellaneous

Findings of fact — Debtor W Inc. owned property subject to lien by H Inc. — Lien of H Inc. ranked behind interest of secured creditor R Corp. — Receiver obtained order for sale of property, free and clear of interest held by H Inc. in first motion — Motion judge held that secured creditor's interest in property ranked higher in priority to H Inc.'s interest — Motion judge held that H Inc. failed to establish as undisputed fact that secured creditor consented to H Agreement or ground lease such that its mortgage was subordinated to instruments — Receiver successfully brought second motion approving sale and vesting order to purchaser — H Inc. appealed both decisions — Receiver and secured creditor cross-appealed first decision initially refusing to approve sale to purchaser — Appeals allowed; cross-appeal dismissed — Matter was remitted for new hearing — Motion judge applied incorrect standard of proof — Motion judge's failure to draw reasonable inferences rendered his findings of fact unreliable — Errors committed by motion judge were not harmless,

as result may have been different — Motion judge did not look at totality of considerations in weighing equities between parties — Decision as to whether H Inc.'s interest should be vested out could not properly be made until fact-finding process, including drawing reasonable inferences, was complete.

Table of Authorities

Cases considered by *Paul Rouleau J.A.*:

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall)* 380 N.R. 82, (sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, (sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74 (S.C.C.) — considered

Meridian Credit Union Ltd. v. 984 Bay Street Inc. (2006), 2006 CarswellOnt 4783 (Ont. S.C.J.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc. (2010), 68 C.B.R. (5th) 73, 262 O.A.C. 232, 94 R.P.R. (4th) 1, 2010 CarswellOnt 3658, 2010 ONCA 393 (Ont. C.A.) — considered

Statutes considered:

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34
s. 37(1) — referred to

Land Titles Act, R.S.O. 1990, c. L.5
s. 71(1.1) [en. 1998, c. 18, Sched. E, s. 129] — referred to

s. 111(1) — referred to

Planning Act, R.S.O. 1990, c. P.13
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 37.13(2)(b) — referred to

Words and phrases considered:

inference

Inferences are not undisputed facts and, as a general rule, inferences need only flow reasonably and logically from established facts.

APPEALS by store owner H Inc. from judgments reported at *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 2011 CarswellOnt 2380, 75 C.B.R. (5th) 109, 2011 ONSC 3648, 4 R.P.R. (5th) 53 (Ont. S.C.J.), allowing receiver to sell property but not approving sale to purchaser and not allowing H Inc. to purchase portion of property, and *Romspen Investment*

Corp. v. Woods Property Development Inc. (2011), 2011 CarswellOnt 10053, 2011 ONSC 5704 (Ont. S.C.J. [Commercial List]), approving purchase of property by purchaser; CROSS-APPEAL by receiver and secured creditor from judgment reported at *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 2011 CarswellOnt 2380, 75 C.B.R. (5th) 109, 2011 ONSC 3648, 4 R.P.R. (5th) 53 (Ont. S.C.J.), not approving sale of property to purchaser.

***Paul Rouleau J.A.*:**

Overview

1 The appellant, Home Depot Canada Inc. ("Home Depot"), appeals from two orders. The first order is dated March 17, 2011 and granted, in part, a motion brought by SF Partners Inc., the receiver of Woods Property Development Inc. ("Woods"), (the "Receiver"). It authorized the Receiver to sell the property known as 20 High Street in Collingwood, Ontario (the "Woods Property") free and clear of any lien or claim of Home Depot. The motion judge, however, refused to approve the purchase of the Woods Property by 2204604 Ontario Inc. (the "Purchaser") without further marketing efforts.

2 The first order also dismissed Home Depot's cross-motion requesting an order that it be entitled to purchase a portion of the Woods Property or to lease the Woods Property. Alternatively, Home Depot requested that it be entitled to a statutory lien pursuant to s. 37(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 or an equitable lien ranking prior to the mortgage over the Woods Property held by the respondent, Romspen Investment Corporation ("Romspen").

3 The second order under appeal is dated September 28, 2011. It approved the purchase of the Woods Property by the Purchaser and vested title in the Purchaser.

4 Romspen and the Receiver cross-appeal the first order seeking to set aside the refusal, at that time, to approve the purchase of the Woods Property by the Purchaser and substituting an order approving the purchase. Romspen recognized that the cross-appeal is moot but argues that it raises issues of importance such that this court should exercise its discretion to hear it.

Facts

5 Woods is an Ontario corporation that owns the Woods Property. Romspen is a secured lender to Woods and Woods' sister company, TDCI Holdings Inc. ("TDCI"). Romspen's security includes an approximate $17 million mortgage over the Woods Property, which was used, in part, to discharge earlier mortgages given by Romspen (the "Romspen Mortgage"). The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of the Superior Court of Justice dated November 25, 2008. The Purchaser of the Woods Property is an Ontario corporation owned and controlled by Romspen.

6 These appeals center on a store built by Home Depot on an 8.67 acre parcel of land, which forms part of the larger 43 acre Woods Property (the "Home Depot Lands"). Home Depot constructed the store at a total cost to it of approximately $14.5 million. The issue in the motions under appeal was the fate of that store and the Home Depot Lands. Specifically, whether Home Depot could retain the store and either lease or purchase the Home Depot Lands.

7 On May 19, 2005, Home Depot entered into a purchase agreement with Woods for the purchase of the Home Depot Lands for a purchase price of $3.25 million. Among other terms, the purchase is conditional upon severance of the Home Depot Lands from the Woods Property in compliance with the *Planning Act*, R.S.O. 1990, c. P.13.

8 The purchase agreement between Woods and Home Depot was amended on November 30, 2005 (the "Home Depot Agreement"). Romspen received a copy of the Home Depot Agreement. Home Depot, however, did not register a caution in respect of its rights under the Home Depot Agreement pursuant to s. 71(1.1) of the *Land Titles Act*, R.S.O. 1990, c. L.5.

9 As the Home Depot Agreement is central to these appeals, I will outline the material provisions. The Home Depot Agreement provides as follows:

1) a portion of an industrial building located on the Woods Property is to be demolished to permit construction of the Home Depot store;

2) Home Depot is obligated to apply for a consent under the *Planning Act* to sever the Woods Property;

3) the Home Depot Agreement will be effective to create an interest in land only if the provisions of the *Planning Act* for severance are complied with;

4) Home Depot is entitled to apply to the Town of Collingwood for approval and a building permit to construct the Home Depot store on the Home Depot Lands;

5) if, within 270 days of the date of execution of the Home Depot Agreement, Home Depot fulfills all zoning conditions and obtains all necessary approvals for its proposed store, including a building permit, Home Depot will take possession of an area slightly larger than the Home Depot Lands pursuant to a ground lease (as there is no significance to the slight difference between the area covered by the ground lease and the area of land subject to the purchase agreement, both will be referred to as the "Home Depot Lands");

6) the ground lease is to run for a term of 50 years at a rental of $300,000 per year for the first seven years and thereafter at $100 per year;

7) the ground lease will terminate upon the severance of the Woods Property under the *Planning Act*, at which point, the purchase of the Home Depot Lands by Home Depot will be completed and the rental payments already made will be credited against the purchase price;

8) prior to entering into the ground lease and as a condition thereof, Woods will deliver an acknowledgment of Romspen's agreement to:

(a) permit the demolition of the existing industrial building without acceleration of the Romspen mortgages secured against the Woods Property; and

(b) provide a partial discharge of the Romspen mortgages upon payment of the purchase price of $3.25 million under the Home Depot Agreement, without requiring that the mortgages be in good standing at the time; and

9) Home Depot is entitled to register a caution in respect of its rights under the Home Depot Agreement pursuant to s. 71(1.1) of the *Land Titles Act*.

10 On May 4, 2006, Home Depot entered into the ground lease with Woods as contemplated by the Home Depot Agreement (the "Ground Lease"). Although the Ground Lease contained a provision relating to the registration of a notice of Ground Lease pursuant to s. 111(1) of the *Land Titles Act*, Home Depot did not register the notice nor did it obtain an express postponement or subordination of Romspen's rights as mortgagee.

11 In the Ground Lease, Woods represented that it had obtained the acknowledgement from Romspen contemplated in the Home Depot Agreement to the effect that Romspen had agreed that:

1) the demolition of the portion of the industrial building would not accelerate the Romspen mortgages on the Woods Property at the time so as to allow construction of the Home Depot store; and

2) Romspen would provide a partial discharge of its mortgage should Home Depot purchase the Home Depot Lands.

12 Romspen had agreed to the demolition of a portion of the industrial building but denies that there was any agreement respecting the partial discharge of the mortgage. The materials filed in the motion show that Woods requested that acknowledgment but that Romspen refused to give it. The motion judge simply observed that: "It is unclear on what basis Woods gave the representation".

13 To allow construction of the Home Depot store, Romspen signed a site plan control agreement dated July 20, 2006 to which Woods, Home Depot and the Town of Collingwood were also parties (the "Site Plan Agreement"). The Site Plan Agreement refers to the Home Depot Agreement as well as to the demolition of the portion of the industrial building and the proposed construction of the Home Depot store. It also refers to the existence of the Romspen mortgages and contains an express postponement and subordination by Romspen of its interest in the Woods Property to that of the Town of Collingwood. There is no postponement or subordination by Romspen to Home Depot.

14 Home Depot applied for severance of the Home Depot Lands but the Town of Collingwood will not consent to the severance until a comprehensive plan of subdivision is filed and approved for the entire Woods Property.

15 The Home Depot store was constructed and has been operating since early 2007.

16 Woods first defaulted on the Romspen Mortgage in 2007. Payments ceased on the Romspen Mortgage in early 2008, leading to the Receiver's appointment. The receivership order authorized the Receiver to market the Woods Property. After approximately 10 months, the Receiver accepted the Purchaser's offer dated October 13, 2009 regarding the sale of the Woods Property for a purchase price of $14.1 million (the "Purchase Agreement"). The Purchase Agreement is conditional upon the Woods Property being delivered free and clear of any claims of Home Depot unless arrangements are reached on terms satisfactory to the Purchaser in its sole discretion. No such arrangements were reached. The proceeds of the sale are insufficient to cover the indebtedness owing to Romspen under its mortgage.

17 The Receiver moved for court approval of the Purchase Agreement and for an order vesting title to the Woods Property in the Purchaser. Home Depot took the position that the Receiver could not sell the Woods Property on which the Home Depot store is located free and clear of any interest of Home Depot and argued that it should be entitled to purchase the Home Depot Lands or to a lease or, alternatively, to a statutory or equitable lien ranking ahead of the Romspen Mortgage.

18 In very thorough reasons, the motion judge laid out the factual situation and the relevant case law. He concluded that Home Depot's leasehold interest in the Home Depot Lands ranked after the Romspen Mortgage and, although Home Depot was entitled to an equitable lien against the Woods Property, that lien was subordinate to the Romspen Mortgage. He then considered the equities between the parties in relation to the specific issues and concluded that the equities favoured Romspen.

19 Accordingly, in the first order, he authorized the Receiver to proceed with the sale of the Woods Property free and clear of any lien or claim of Home Depot. That is, he vested out or expunged any interest Home Depot had in the Woods Property. The motion judge, however, refused to approve the Purchase Agreement at that time and ordered the Receiver to conduct a further sales process in respect of the Woods Property.

20 Further efforts at finding a purchaser for the Woods Property were unsuccessful and a new motion was brought seeking the approval of the Purchase Agreement. On September 28, 2011, the motion judge granted the second order approving the sale transaction and vesting the Woods Property in the Purchaser free and clear of any lien or claim of Home Depot.

21 By order of this court, the motion judge's order approving the sale transaction was stayed until the hearing of the appeals or further order of this court.

Issues

22 Home Depot raised several grounds of appeal. In oral submissions, however, Home Depot focused on the following two grounds:

> 1) Did the motion judge apply an incorrect standard of proof? Specifically, did his failure to draw reasonable inferences render his findings of fact unreliable?
>
> 2) Did the motion judge fail to consider the ownership of the Home Depot store separate and apart from the Ground Lease?

23 I need only deal with the first issue as, in my view, it is dispositive of the appeals. The motion judge's misapprehension of the standard of proof requires that the orders be set aside and that the matter be remitted to the Superior Court of Justice for a new hearing. As I would remit the matter for a new hearing, I would dismiss Romspen and the Receiver's cross-appeal of the first order.

Analysis

Applicable Law

24 The parties agree that the criteria to be applied by the court in a receivership sale are those set out by this court in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). At p. 6, this court summarized the factors a court must consider when deciding whether a receiver, who has sold a property, acted properly:

> 1) It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2) It should consider the interests of all parties.
>
> 3) It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4) It should consider whether there has been unfairness in the working out of the process.

25 The central issue raised on the motions and in these appeals is the application of the second criterion, the consideration of the interests of all parties, when deciding whether the court should vest the Woods Property in the Purchaser free and clear of Home Depot's interest. In considering this criterion, the motion judge referred to Ground J.'s statement in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.* [2006 CarswellOnt 4783 (Ont. S.C.J.)], 2006 CanLII 26476, at para. 19, that: "[I]n determining whether to issue a vesting order terminating the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties." The motion judge then set about making the findings of fact necessary to apply these legal principles.

Position of the Parties on Appeal: Standard of Proof in Making Findings of Fact

26 Home Depot argues that the motion judge committed an error of law in the standard of proof he applied when making findings of fact. Throughout his reasons, the motion judge indicates that he is required to make factual determinations "on the basis of undisputed facts" and that he "cannot make findings of fact by way of inference." Home Depot maintains that this is clearly an error and that the failure to apply the correct standard of proof resulted in the motion judge's failure to draw reasonable inferences from the evidence.

27 Home Depot submits that several important inferences were available on the evidence. Specifically, it could be inferred from the evidence that Romspen gave its express or implied consent to the construction of the Home Depot store and to entering into the Ground Lease. Alternatively, Home Depot submits that if there is no express or implied consent, the record is sufficient to draw the inference that, from the outset, Romspen knew about the construction of the Home Depot store, knew about the Ground Lease and knew or ought to have known that Home Depot believed it had Romspen's consent to build the store and enter into the Ground Lease. These and other possible inferences, if drawn, would have been relevant considerations in the exercise of the court's equitable jurisdiction when deciding whether to vest out Home Depot's interest and/or whether to grant Home Depot some form of equitable relief.

28 The respondents could provide no legal basis for the motion judge's statement that factual findings must be made on the basis of "undisputed facts" and that the court could not "make findings of fact by way of inference." It may be that, because this was a motion argued on affidavit evidence, the motion judge understood that he was constrained in this way. In any event, the respondents did not seriously dispute that these constituted errors, rather, they argued that these errors were harmless because:

1) there were no disputed facts;

2) the errors were mere inadvertent slips and, when read as a whole, it is apparent that the motion judge nonetheless applied the appropriate standard of proof;

3) it was clear from the evidence that Romspen's mortgage had legal priority over any interest Home Depot had in the Woods Property;

4) there was insufficient evidence on the record before the motion judge from which actual or implied consent to the Ground Lease or construction of the Home Depot store could be drawn; and

5) even accepting that the court could infer or imply consent, the equities nonetheless favoured Romspen and the vesting out of Home Depot's interest.

Discussion

29 In my view, the appeals must be allowed and the matter remitted to the Superior Court of Justice for a new hearing. I acknowledge that, in granting equitable relief, motion judges have a good deal of latitude and ought to be afforded considerable deference. As set out by this court in *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*, 2010 ONCA 393, 68 C.B.R. (5th) 73 (Ont. C.A.), at para. 20, an order approving a sale by a receiver is discretionary and attracts great deference from appellate courts. Appellate courts will only interfere where the trial judge (or the motion judge) "erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations."

30 In the present case, however, the motion judge's application of an incorrect standard of proof and his belief that he was not allowed to draw inferences on a motion such as this one are errors that go to the very basis upon which the court's equitable discretion is exercised: the factual matrix. As explained by Rothstein J. in *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at para. 40, "there is only one civil standard of proof at common law and that is proof on a balance of probabilities." Therefore, facts in issue are to be proved on a balance of probabilities and, as a general rule, this applies to motions [1] as well as to trials.

31 As I will explain, the errors committed by the motion judge are not, as suggested by the respondents, harmless. Had the motion judge applied the appropriate standard of proof and been willing to draw inferences where appropriate, the result may well have been different. I turn now to the five points raised by the respondents in response to the appeals.

1) There were no disputed facts

32 The respondents argue that the motion judge's adoption of a higher standard of proof — undisputed fact — is a harmless error as there was no dispute as to the facts. It was therefore unnecessary for the motion judge to engage in an assessment of the weight to be given to the evidence or to make credibility findings.

33 The argument put forward by Home Depot, however, is not that it disputed the facts set out in the record, but rather that the motion judge ought to have drawn inferences from the record and the conduct of the parties.

34 Inferences are not undisputed facts and, as a general rule, inferences need only flow reasonably and logically from established facts. By limiting himself to undisputed facts, the motion judge did not assess the landscape of facts presented to him with a view to determining what inferences could appropriately be drawn.

35 The potential importance of inferences is apparent when considering whether Romspen's interest in the Woods Property should be subordinate to the Ground Lease by virtue of Romspen having consented to it. In dealing with this issue, the motion judge set out the law as follows, at para. 142: "[I]f a lease is executed by a mortgagor after the mortgage has been granted, the mortgagee will be bound by the terms of the lease if it is made with his express or implied consent" (footnote omitted).

36 The record did not contain an express consent by Romspen. The relevant question on the issue of subordination was, therefore, whether consent by Romspen to the Ground Lease could be implied. Home Depot argued that the conduct of Romspen and the various documents in the record were more than sufficient to show that consent ought to be implied.

37 The motion judge, however, does not appear to have turned his mind to the issue of implied consent. The motion judge simply stated, at para. 145, that: "Home Depot has failed to establish as an *undisputed fact* that Romspen consented to either the Home Depot Agreement or the Ground Lease" (emphasis added). The motion judge's use of the expression "undisputed fact" clearly reflects his understanding that, absent Romspen expressly acknowledging that it consented to the Ground Lease or it being set out in the written materials, he could not find that Romspen had consented. In effect, the motion judge excluded the possibility of finding an implied consent because of his belief that he was somehow prevented or unable to draw appropriate inferences from the available facts. Inferences are important tools in the fact-finding process and the motion judge erred in refusing to avail himself of that source.

2) The errors were inadvertent slips

38 The respondents argue that the motion judge's references to the need for "undisputed facts" and his inability to "make findings of fact by way of inference" were simply inadvertent slips and that, read as a whole, it was apparent that the motion judge nonetheless applied the appropriate standard of proof.

39 I disagree. A critical portion of the motion judge's reasons is the portion dealing with Romspen's knowledge and alleged consent to the Home Depot Agreement, the Ground Lease and the construction of the Home Depot store. In that portion of his reasons, he repeats, at paras. 40 and 44 of his March 17, 2011 reasons, that the court must make its determination on the basis of "undisputed facts". He also states, at para. 40 of those reasons, that the court "cannot make findings of fact by way of inference." After making these statements, he concludes, at para. 52, that "[t]here is no evidence of any such consent, and it *cannot be inferred* from the existence of the Home Depot Agreement. Nor *can it be inferred* from the existence of the Ground Lease" (emphasis added). The motion judge then goes on to state, at para. 53, that "Home Depot cannot, however, establish as an *undisputed fact* that Romspen's execution of the Site Plan Agreement either constituted, or evidenced, its consent to ... [the] construction [of the Home Depot store]" (emphasis added).

40 However, despite the motion judge having stated that he could not draw inferences, the respondents argue that his statement that he did "not think that ... knowledge [of the Ground Lease] could be inferred" (at para. 42), suggests that he did in fact consider whether inferences could be drawn. I disagree.

41 When that statement is viewed in the context of the entire paragraph, it does not, as the respondents suggest, indicate that the motion judge was applying the correct standard of proof. The balance of the paragraph shows that the motion judge was still operating on the premise that Home Depot had to demonstrate either actual knowledge or knowledge as an undisputed fact.

42 The fact that the motion judge applied the incorrect higher standard of proof is confirmed later in his March 17, 2011 reasons where, at para. 145, he confirms that he has "concluded that Home Depot has failed to establish as an *undisputed fact* that Romspen consented to either the Home Depot Agreement or the Ground Lease" (emphasis added).

43 Further, it was central to Home Depot's case to determine whether knowledge or implied consent of the Ground Lease and construction of the Home Depot store could be inferred from all of the circumstances. Given the motion judge's extensive and comprehensive reasons, I simply cannot accept that, had he understood that he could draw reasonable inferences from all of the facts and circumstances, his analysis of whether to draw the inference would be limited to a single paragraph without reference to the facts both for and against drawing such an inference.

3) Romspen's mortgage has legal priority

44 The respondents submit that the errors are of no consequence because the Romspen Mortgage had clear legal priority over any Home Depot interest and the funds generated from the sale of the Woods Property are not even sufficient to pay off the mortgage debt. Moreover, nothing in the record suggests that Romspen ever intended to waive any of its legal rights.

45 The respondents argue that the motion judge correctly weighed the equities between the parties. More specifically, in granting the Receiver's request for an order vesting out the interest of Home Depot in the Woods Property, the motion judge stated, at para. 187, that:

> [T]he court must consider the equities between the parties in the context of findings that:
>
> (1) Romspen's interest in the Woods Property ranks ahead of that of Home Depot to the extent of the monies secured under the Romspen Mortgage ...;
>
> (2) Home Depot's equitable lien against the [Woods] Property arising as a result of the construction of the Home Depot store does not rank prior to the interest of Romspen in the [Woods] Property; and
>
> (3) Home Depot is unable to establish as an undisputed fact that Romspen consented to the Home Depot Agreement, the Ground Lease or the construction of the Home Depot store in a manner that was intended to affect its rights in the [Woods] Property.

46 There are two problems with this submission. First, although the motion judge appears to view the need, in considering the equities, to look beyond the legal priorities created by the instruments registered on title, he limits his equitable considerations to: (1) a recitation of the legal priorities; and (2) the single additional question of whether there was consent "in a manner that was *intended* to affect its right in the [Woods] Property" (emphasis added). The motion judge had to look beyond these considerations. He had to consider all of the facts and circumstances in order to decide whether consent should be inferred and whether equitable principles, such as estoppel, applied in making the determination to vest out Home Depot's interest.

47 Second, although the motion judge refers to his earlier analysis of the equitable considerations and the need to take them into account in the weighing exercise, that earlier analysis was, as I have explained, tainted by his understanding that he was limited to undisputed facts and could not draw inferences.

4) There was no basis from which to draw the inferences sought by Home Depot

48 In the alternative, the respondents argue that even if the motion judge erred with respect to his ability to draw inferences, this court should find that there was no basis from which the inferences sought by Home Depot could be drawn.

49 As I would remit the matter to the Superior Court of Justice, it would be inappropriate for this court to draw inferences and make findings of fact. In order to address the respondents' submission that there was no basis in the evidence to draw relevant inferences, I must, however, review the record to determine whether facts exist from which a motion judge might draw at least one of the inferences sought by Home Depot. I will focus on Home Depot's submission that the motion judge ought to have inferred that Romspen knew of and by implication consented to the Ground Lease. If such an inference were drawn, it would clearly be a significant fact to be weighed in resolving the issues raised in the motion.

50 In my view, there are several facts from which such an inference might be drawn, for example:

> 1) the earlier Romspen mortgages provided that Romspen could not unreasonably withhold its consent to any lease by Woods;
>
> 2) in November 2005, Romspen received a copy of the Home Depot Agreement which contained the material terms of the contemplated ground lease to Home Depot;

3) the Home Depot Agreement contemplated the construction of a store on the Home Depot Lands within 270 days of the signature of the Home Depot Agreement;

4) the Home Depot Agreement set out the terms of the Ground Lease and contemplated the purchase of the Home Depot Lands by Home Depot if severance had been obtained or the Ground Lease if severance had not been obtained (these broad terms were known to Romspen);

5) although Romspen refused to provide an acknowledgment that it would provide a partial discharge to allow Home Depot to purchase the Home Depot Lands, Woods asked Romspen to sign an acknowledgment that a portion of the industrial building located on the Woods Property could be demolished to allow construction of the Home Depot store without accelerating the Romspen Mortgage. Romspen was asked to provide this acknowledgement so that Home Depot would not "stop moving forward." This acknowledgment was provided in May 2006 and refers to a proposed ground lease between Woods and Home Depot;

6) the Romspen Mortgage included a provision that contemplated that "any land lease payments made by Home Depot pursuant to the Home Depot Agreement ... which in aggregate exceed $250,000 shall be due and payable, on account of principle, upon receipt and [Woods and TDCI] shall direct Home Depot to make such payments directly to [Romspen]";

7) the Site Plan Agreement executed by Romspen made specific reference to the Home Depot Agreement and to the proposed partial demolition of the existing industrial building;

8) under the Site Plan Agreement, Romspen would have known that Home Depot was spending millions of dollars to build a store on the Woods Property and that, pursuant to the Home Depot Agreement, Home Depot was entitled to enter into the Ground Lease; and

9) Romspen's representative testified in cross-examination that, by August 2006, after the Site Plan Agreement had been signed, he was able to draw the inference that Home Depot had received the Ground Lease.

51 These are some of the facts from which an inference might be drawn. Of course, there are many facts that suggest that the inference should not be drawn. I need not list them here. Suffice it to say that a basis does exist from which a relevant inference could be drawn and, contrary to the respondents' submission, I do not view the motion judge's error as being necessarily harmless.

5) Even assuming that the inferences sought by Home Depot could be drawn, the equities still favour vesting out Home Depot's interest in the Woods Property

52 The respondents argue that regardless of the inferences that might be drawn, the equities will still inevitably favour the vesting out of Home Depot's interest. I disagree. The inferences Home Depot argues ought to have been drawn are central to the decision of whether to vest out its interest. This decision therefore cannot properly be made until the fact-finding process, including drawing reasonable inferences, is complete. That fact-finding process is more appropriately done by the Superior Court.

Conclusion

53 I would, therefore, allow the appeals, dismiss the cross-appeal and remit the matter to the Superior Court of Justice for a new hearing. If the parties cannot agree as to costs, they are to make brief written submissions within 20 days hereof.

John Laskin J.A.:

I agree

M. Rosenberg J.A.:

I agree

Appeals allowed; cross-appeal dismissed.

Footnotes

1 A motion judge can, in appropriate circumstances, order the trial of an issue pursuant to rule 37.13(2)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

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