TAB 10

1976 CarswellOnt 383
Supreme Court of Canada

United Trust Co. v. Dominion Stores Ltd.

1976 CarswellOnt 383, 1976 CarswellOnt 404, [1976] A.C.S. No. 99, [1976] S.C.J. No. 99, [1977] 2 S.C.R. 915, 11 N.R. 97, 1 R.P.R. 1, 71 D.L.R. (3d) 72

UNITED TRUST CO. v. DOMINION STORES LTD. et al.

Laskin C.J.C., Judson, Ritchie, Spence and Beetz JJ.

Heard: March 31 and April 1, 1976
Judgment: October 5, 1976

Counsel: *D.T. Stockwood* and *Julia Ryan*, for appellant.
P.S.A. Lamek and *D.J.T. Mungovan*, for respondents.

Subject: Property

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

Headnote

Landlord and Tenant — Renewal of lease — Option to renew — Manner of exercise

Real Property — Registration of land — Land titles — Priorities — Effect of unregistered interest

Landlord and tenant — Whether lease negotiations concluded an enforceable agreement to extend lease or an agreement to agree — Lease with excess of three years to run — Lease not registered — Subsequent purchaser for value with actual notice of lease — Whether purchaser for value with actual notice of unregistered lease takes title subject to the lease — The Ontario Land Titles Act.

Facts:

The respondent D. Ltd. had been a tenant of certain premises under written lease since 1935 and had carried on a supermarket in the premises under the terms of the lease and various renewals thereof. The respondents G. and G. purchased the premises subject to D. Ltd.'s lease in 1946. D. Ltd. exercised its option to renew the said lease from 1970 to 1975 and then entered into negotiations with G. and G. to obtain an option to lease the premises for an additional seven years. A notice of lease was never registered.

In the early months of 1972 there was an exchange of correspondence between D. Ltd. and the landlords, G. and G. and their respective solicitors, confirming terms for a further option agreement. The landlord's solicitors wrote D. Ltd. on 20th April 1972, outlining the terms of the option agreement, stating that their clients were prepared to enter into an agreement expiring in 1982 and suggesting that D. Ltd. prepare the necessary documentation. D. Ltd. prepared an option agreement, but the landlords, on their solicitors' instructions, refused to execute the documents.

In May 1972 the landlords agreed to sell the premises to the appellant, U.T. Co. The agreement was conditional upon U.T. Co. obtaining a surrender of lease from D. Ltd. U.T. Co. then entered into negotiations with D. Ltd. to have them surrender the lease and vacate the premises.

On 15th June 1972, U.T. Co. wrote to G. and G. waiving their rights with respect to obtaining vacant possession of the premises from D. Ltd. and then proceeded to close the sale transaction with G. and G. on 21st June 1972; the offer to purchase provided for closing on or about the 31st July 1972. One day after closing, U.T. Co. changed the locks on the premises and excluded D. Ltd. from the premises. The purchase by U.T. Co. from G. and G. occurred more than three years prior to the expiry of the term of the lease to D. Ltd., apart from any option to extend the lease.

D. Ltd. applied to the Supreme Court of Ontario for relief from forfeiture, re-instatement of its lease and extension of its option agreement for a renewal of the lease. Grant J. granted relief from forfeiture and determined that D. Ltd. was entitled to exercise the option to renew. The appeal to the Court of Appeal from the judgment of Grant J. was dismissed.

Held (Laskin C.J.C. dissenting):

The appeal should be dismissed.

Per Spence J. (Judson, Ritchie and Beetz JJ. concurring)

The landlords' solicitors had instructions to conclude a renewal of the lease on the terms set out in the letter of 20th April 1972, and by that letter, concluded an enforceable agreement to extend the lease on the premises.

In determining the issue as to whether an unregistered interest in land governed by The Land Titles Act may be asserted against a purchaser for value of the freehold of the land who obtains a transfer from the owner on the land titles register with actual notice of the unregistered interest, The Ontario Land Titles Act must be compared with the statutes of other jurisdictions embodying the principles of the Torrens Registration System. The Torrens system statutes contain express provisions making actual notice ineffective to encumber the registered title, whereas notice is not expressly excluded under the Ontario Act. The Ontario Act has not reversed the rule established in *Re Jung and Montgomery*, that the transferee of a freehold estate registered under the Act takes subject to an unregistered leasehold interest of which he had actual notice.

Since neither s. 85(5) of the Act, nor any other section of the Act, expressly exclude the doctrine of actual notice and since such a cardinal principle of propery law should not be found to have been altered by the Legislature except where such alteration is made in the clearest and most unequivocal of terms, the law as enunciated in *Re Jung and Montgomery* has not been affected by legislative act.

Per Laskin C.J.C. (dissenting)

The Ontario Land Titles Act which is modelled on the English Land Transfer Act, and not the Torrens system, should not be construed in light of common law doctrines alien to its purpose.

The purpose revealed in the key sections of the original Act of 1885 was to make the register the sole "mirror" of title and to "curtain" off any unregistered interests regardless of notice. In the present Act, ss. 52 and 91 constitute a code as to the title that is acquired upon first registration and upon a transfer on the register, whereas the supporting provisions show that registration is the method of obtaining protection of claimed interests in registered land. Fraud is an exception to the integrity of the register under the Ontario Act, but D. Ltd. did not establish fraud in this case. While the Torrens system legislation expressly excludes notice, the absence of such express exclusion in the Ontario Act does not create a gap in the Ontario Act leading to the conclusion that notice is an exception to the integrity of the register under the Ontario Act.

The case law in Ontario does not support the contention that actual notice of an unregistered interest in land governed by the Act encumbers the title of a purchaser for value. If, as the terms of the Act stipulate, it is the register that determines where title lies, then the proper interpretation to be placed on the Act is that actual notice is immaterial under the Act unless specifically preserved, rather than the proposition that unless notice is expressly excluded in the legislation, it is deemed to be preserved. S. 85(5) of the Act does not, in effect, affirm the decision in *Re Jung and Montgomery* that the doctrine of notice survives as a qualification of the absolute character of the register. On the contrary, s. 85 and particularly, s. 85(5) reinforce the conclusion that notice of an unregistered interest cannot qualify the registered title of a transferee for value from the registered owner.

Annotation

From an historical perspective, of the two judgments, the dissent of the Chief Justice is the more reasonable. If one follows the path traced by the Chief Justice from the English Land Transfer Act, 1875 (U.K.), c. 87, to the present Ontario Act, it leads one to the conclusion that the purpose of the Act has always been to make the register the sole "mirror" of title. Certainly, the interpretation that reduces the number of exceptions to the integrity of the register is preferable from a practitioner's point of view.

This appeal to the Supreme Court of Canada raised a question of first instance in that Court in respect to The Land Titles Act, R.S.O. 1970, c. 234. As a result of the majority decision, citing with approval the judgments of Grant J. and the Ontario Court of Appeal, it will require a clear enactment by the Legislature, similar to the express provisions to be found in the Torrens system legislation, to change the law as enunciated in *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935, [1955] 5 D.L.R. at 292 (C.A.) and abolish the doctrine of actual notice in regard to The Land Titles Act.

One would expect that the movement for an amendment to the Act, if any, would come from the profession. In this regard, it may be significant that the Forms Committee of the Canadian Bar Association which has been engaged in a review of The Ontario Land Titles and Registry Acts and which has recommended a number of amendments to both Acts to the Provincial Property Registrar, has made no recommendations, to date, on the question of notice under The Land Titles Act.

P.W. Hand

Table of Authorities

Cases considered:

Jung and Montgomery, Re, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935, [1955] 5 D.L.R. at 292 (C.A.) — *approved*

Macdonald (John) & Co. v. Tew (1914), 32 O.L.R. 262 (C.A.) — *referred to*

Pitcher v. Shoebottom, [1971] 1 O.R. 106, 14 D.L.R. (3d) 522 — *referred to*

Skill and Thompson, Re (1908), 17 O.L.R. 186 (C.A.) — *referred to*

Statutes considered:

The Land Titles Act, R.S.A. 1970, c. 198.

The Land Titles Act, 1885 (Ont.), c. 22.

The Land Titles Act, R.S.O. 1970, c. 234, ss. 52, 75, 78 [am. 1972, c. 132, s. 18], 79 [am. 1972, c. 1, s. 43(4); 1972, c. 132, s. 19], 85(5), 91, 94, 115(1).

APPEAL from a judgment of the Court of Appeal for Ontario (sub nom. *Re Dom. Stores Ltd. and United Trust Co.)* 6 O.R. (2d) 199, 52 D.L.R. (3d) 327, dismissing an appeal from the judgment of Grant J., 2 O.R. (2d) 279, 42 D.L.R. (3d) 523.

Laskin C.J.C. **(dissenting):**

1 This appeal raises a question of first instance in this Court in respect of The Land Titles Act, R.S.O. 1970, c. 234, as amended. The question is whether an unregistered interest in land governed by the Act, and not being an overriding interest thereunder, may be asserted against a purchaser for value of the freehold of the land who obtains a transfer from the owner on the land titles register with actual notice of the unregistered interest. Grant J. held that the purchaser's title was subject to the unregistered interest, and this decision was affirmed by the Ontario Court of Appeal. I take a different view. In my opinion, notice, actual or constructive, of unregistered interests cannot qualify the title of a purchaser for value as shown on the register.

2 The unregistered interest in the present case, sought to be asserted against the appellant's freehold title, is a leasehold which had an unexpired term exceeding three years at the time the appellant obtained its land titles transfer. As such it was not a protected or overriding interest under the Act. S. 51(1), para. 4, makes registered land subject to any lease or agreement for a lease for a period yet to run that does not exceed three years where there is actual occupation under it. Hence, where the unexpired term exceeds three years, even if there is occupation under it, The Land Titles Act would seem to require registration of the leasehold interest if it is to be protected against the preclusive claim to the entire freehold interest by a registered transferee for value from the registered owner.

3 Why the respondent lessee, a large food chain, which had first become lessee of the land in 1935, did not register notice of its leasehold interest is unfathomable. It had access to competent legal advice no less than did the appellant. On the argument of the appeal, its counsel contended that, in the circumstances of the case, the admitted notice and knowledge by the appellant of the respondent's outstanding leasehold interest before purchasing the freehold made its purchase through a land titles transfer fraudulent when it sought, on the strength of the transfer, to dispossess the respondent. The basis of this contention by the respondent, a contention which was not raised in its original application to Grant J. for relief from forfeiture and reinstatement of its lease, lies in the course of negotiations between solicitors for the respective parties when the appellant was seeking to obtain a surrender of possession by the respondent concurrently with the carrying out of its intended purchase of the freehold. I would not be justified, on the record in this case, in coming to a conclusion that there had been a deliberate misleading of the respondent. The latter knew of the agreement for purchase of the freehold by the appellant and had ample opportunity to protect its interest. The respondent cannot improve its position by labelling actual notice as fraud. If its position is maintainable, it must be on the ground that The Land Titles Act does not defeat unregistered interests of which a subsequent purchaser for value has actual notice.

4 I have had the advantage of seeing the reasons prepared by my brother Spence sustaining that proposition and affirming the judgments below. I agree with him on the other aspects of the present appeal which, of course, cease to be material if the appellant can succeed on the issue of notice.

5 We face here another instance of a temptation to construe a statute in the light of the common law, to qualify a statute by an equitable doctrine alien to the purpose (a clear purpose in the circumstances underlying its enactment) which the statute sought to achieve. Because notice of unregistered interests was not expressly excluded as a qualifying consideration, the integrity of the land titles register is shaken by the judgment in appeal, although the scheme and language of The Land Titles Act are, in my opinion, adequate enough to show the irrelevancy of such notice. A system of registration of title is treated, in respect of the effect of notice of unregistered interests, as if it were a system of registration of documents, such as exists under The Registry Act, R.S.O. 1970, c. 409, as amended, an Act now qualified by The Certification of Titles Act, R.S.O. 1970, c. 59, as amended.

6 If fairness from a common law standpoint was the dominant consideration, irrespective of legislative policy, irrespective of the circumstances which brought title registration systems into being, there could be less quarrel with the decision of the Courts below. We are not, however, concerned with the common law, but rather with a complete break from it through a choice of legislative policy reflected in some countries and in some Canadian Provinces by adoption of the Torrens system, and in England and Ontario by the adoption of a related system of title registration.

7 The Ontario Land Titles Act, first enacted by 1885 (Ont.), c. 22 is modelled not on the Torrens system, which got its start in South Australia in 1857, but on the English Land Transfer Act, 1875 (U.K.), c. 87. There had been a Royal Commission on Registration of Title in England which reported in 1857 but this report, although adopted by Parliament, was not carried out in ensuing legislation, the Land Registry Act, 1862 (U.K.), c. 53. Why this Act failed and was supplanted by a new Act in 1875 is briefly told in Curtis and Ruoff, Registered Conveyancing (2nd ed. 1965), at pp. 5-6:

> ... Unfortunately, however, the 1862 Act did not apply the principles elaborated by the Commissioners. The system established by parliament attempted to achieve perfection. The disregard of what was practicable brought about a failure so catastrophic that, only four years after the passing of the Act, a Royal Commission was set up to inquire into the reasons for it. This Commission reported in 1870 that the failure of the registration system could be attributed to three fundamental departures from the principles advocated by the Royal Commission of 1857. They were:
>
> (1) That the title shown to land before it could be registered must be impeccable, with all technical imperfections cured and that the registrar had no discretion to ignore blemishes which were of no practical consequence;
>
> (2) That the boundaries of every piece of land had to be determined to the last inch by notice to adjoining owners and that this caused disputes over trifles and great expense and delay;
>
> (3) That partial interests, such as life interests, must be registered instead of confining the register to the ownership of the entirety and that this prevented the register from simplifying titles.
>
> As a result of this report, a further Act was passed in 1875. This Act practically repealed the 1862 Act and established a new registry, which is in fact the Land Registry of today, with an entirely different system of registration modelled, this time, on the recommendations of the Royal Commission of 1857. Under this new system the registrar was given a wide discretion as to the titles he might accept for registration and power to hear and determine objections instead of having to refer them to the court. It was no longer necessary to fix the boundaries of properties down to the last inch and registration was confined to the ownership of the full legal freehold or leasehold estate in the land.

8 The 1857 Report, an extensive canvass of the considerations supporting a title registration system as opposed to a system of registration of deeds or documents, was one of a series of inquiries into real property problems which had earlier come under examination by the Real Property Commissioners in reports of 1829 and 1830. The Report of 1857 considered, inter alia, the question of notice of unregistered interests and said this about it (in para. 73):

> We propose that fraud in obtaining a transfer of the registered ownership shall defeat the title of the person who becomes registered owner by fraud, but that notice of unregistered rights shall not merely as notice have any such effect. We think that though the purchaser in the course of his inquiries, or before he concludes the purchase, has notice of any claims upon the estate, it will not be unjust to deprive the parties interested in such claims of their rights in favour of such purchaser, if their rights are not protected upon the register. We do not agree that any attempt to exclude the application of the doctrine of notice would prove abortive. We are aware that it has been said that the judges would, notwithstanding any law to the contrary, in the course of time contrive some means of neutralizing any enactment which went to exclude the doctrine of notice, just as our Courts of old contrived to prevent the Statute of Uses having the effect intended by the legislature; and that to abolish the doctrine of notice altogether would be contrary to every principle of justice and equity. After full consideration, however, we cannot adopt these views, but, on the contrary, we concur generally in the reasons adduced by the Real Property Commissioners in their Second Report (pp. 37-40), in favour of excluding the interference of Courts of equity on the ground of notice.

9 The reference in this passage to what the Real Property Commissioners had to say in their Second Report, made in 1830, is a reference to the following observations of those Commissioners:

> The reasons in favour of excluding the interference of Courts of Equity on the ground of notice, may be thus stated.
>
> If the public good require that a purchaser, to have the protection of the Law, should comply with a form, and that form be made simple and easy, a purchaser omitting the form has no just ground of complaint that the protection is not given. If the omission were not wilful, he should still blame only his own want of care, or that of his agents. It is greatly for the public good, that civil rights should be capable of being ascertained without difficulty, and for this purpose the Law on which they depend should as far as possible be general, and not varying in different circumstances, which would lead to mistakes; they should be supported by evidence, not open to doubt, and as little as possible exposed to falsification. For these reasons, it has been thought necessary in most Countries to require the title of land to be proved by written documents, and thereby prevent attempts to enforce pretended claims by parol testimony or circumstantial evidence. A registered title possesses the advantages of certainty and security in a high degree, but they will be impaired, if preference be given to an unregistered over a registered deed, on the ground of notice. The fact of notice will in every case be possible and in many probable; there will be a temptation therefore to the unregistered claimant to commence a suit, in the hope that the other claimant may confess notice, or circumstances from which it may be implied; and there may also be a temptation to support the suit so commenced by false evidence.
>
> The mischiefs of letting constructive notice have been so strongly felt, that some Equity Judges have held it excluded under the present Registry Acts; but no provision which can be made for denying effect to constructive notice will be effectual, because the distinction between actual and constructive notice cannot be defined, and must therefore often fail to be justly drawn either by a Court or a Jury; and cases of individual hardship might lead to a course of decisions which would encroach of the spirit of the Act, and impair its benefits.
>
> The exclusion of interference on the ground of notice will very rarely prevent the jurisdiction of a Court of Equity, in case of actual fraud. In all cases in which priority may be given to a registered over an unregistered deed by means of fraud, although notice must be one of the ingredients to prove the existence of the fraud, there will usually be other circumstances by which, independently of the notice, a fraudulent intention will be manifested. Any conspiracy or improper conduct, for preventing or impeding the registration of one deed in order to give effect to another, may always be avoided as fraudulent; and in other cases, fraud will be shown by inadequacy of price, or the circumstances under which the subsequent deed was executed. Where a party suffers from his own negligence, or from not requiring a caveat, which would have protected him against any superior activity in another, he will have relied upon confidence in the parties instead of the protection afforded by the Law, and will have no just cause of complaint.

10 The key sections of the Ontario Act of 1885, following the text of similar sections in the English Act of 1875, were ss. 35, 38, 54(1), (2), (3) and 99. These sections (which, in the present Act, are respectively ss. 91, 94, 75, 78(1) (the original 54(3) and 174) read as follows:

> 35. A transfer for valuable consideration of land registered with an Absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:
>
> (1) To the incumbrances, if any, entered on the register; and
>
> (2) To such liabilities, rights, and interests, if any, as are by this Act declared for the purposes of the Act not to be incumbrances (unless the contrary is expressed on the register),
>
> But free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors, which are within the legislative jurisdiction of this Province ...

38. A transfer of land registered under this Act, made without valuable consideration shall, so far as the transferee is concerned, be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, have the same effect as a transfer of the same land for valuable consideration ...

54. (1) The registered owner alone shall be entitled to transfer or charge registered land by a registered disposition.

(2) But, subject to the maintenance of the estate and right of such owner, any person, whether the registered owner or not of any registered land, having a sufficient estate or interest in the land, may create estates, rights, interests and equities in the same manner as he might do if the land were not registered.

(3) And any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered owner, by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned ...

99. Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.

11 The purpose disclosed in these provisions to make the register the sole "mirror" of title and to "curtain" off any unregistered interests regardless of notice (the terms in quotation marks come from Ruoff, An Englishman Looks at the Torrens System (1957), at p. 8) was fortified by an amendment in 1893 (Ont.), c. 22, s. 11 enacting what is now s. 79(1) of the Act. The original s. 54(3), now s. 78(1) was also fortified by 1972 (Ont.), c. 132, s. 18 by adding s. 78(2). The importance of ss. 78 and 79(1) in the light of s. 91 makes it desirable that I should set them out in full, and they are as follows:

78. — (1) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the director of titles.

(2) Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through him, excepting owners of encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein.

79. — (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry ...

12 Section 51 [am. 1972, c. 132, s. 13] of the present Act lists the overriding interests, as for example, taxes, existing easements, dower, certain leasehold interests as previously mentioned, and rights of expropriation, to which registered land may be subject, and s. 52 expresses the position as to title upon the first registration of ownership. S. 52 reads as follows:

52. The first registration of a person as owner of land, in this Act referred to as first registered owner with an absolute title, vests in the person so registered an estate in fee simple in the land, together with all rights, privileges and appurtenances, free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario, but subject to the following:

1. The encumbrances, if any, entered on the register.

2. The liabilities, rights and interests that are declared for the purposes of this Act not to be encumbrances, unless the contrary is expressed on the register.

3. Where the first registered owner is not entitled for his own benefit to the land registered, then as between him and any persons claiming under him, any unregistered estates, rights, interest or equities to which such person may be entitled.

13 From its beginning, the Act provided and still provides for the registration of charges (an updated designation of the mortgage) and for protecting claimed interests in registered land by the registration of a caution: see ss. 26 and 58 of the original Act, now ss. 98 [am. 1972, c. 132, s. 23] and 143. The Master of Titles plays, of course, a key role in the administration of the Act, and there is an assurance fund to back up what is in effect a government guarantee of the title as shown on the register. Registration is not automatic, but must pass administrative scrutiny and be in compliance as to required forms and otherwise with the prescriptions of the Act.

14 I do not need to descend into further detail as to the provisions of the Act to support my view that notice of an unregistered interest by a purchaser for value who buys the title as shown on the register cannot qualify that title. This appears to have been the view taken also of the English Land Transfer Act, 1875 by virtue of s. 49 thereof, the equivalent of s. 75 of the Ontario Act (which was originally s. 54(1), (2) and is quoted above): see 24 Halsbury (1st ed. 1912), at p. 320, s. 591. No doubt the Legislature could have added to what it said about the primacy of the register by referring even more expressly to notice than it did in ss. 78 and 79, as was done in England in the revision of its title registration legislation by the Land Registration Act, 1925 (U.K.), c. 87, s. 59(6) and as is the case in Torrens system legislation but that, in my view, would have merely exaggerated an existing sufficiency.

15 To repeat myself, I am unable to appreciate how there can be any escape from the force of ss. 52 and 91 of the present Act which constitute a code as to the title that is acquired upon first registration and upon a transfer on the register. The supporting provisions, especially ss. 75, 78 [am. 1972, c. 132, s. 18] and s. 79(1), show that registration is the method of obtaining protection of claimed interests in registered land and that only fraud is an external qualifying consideration.

16 In one respect, the English Land Registration Act gives protection to unregistered interests which is given in only a limited fashion by The Ontario Land Titles Act, and that is protection for the "rights of every person in actual occupation of the land or in receipt of the rents and profits thereof" unless the rights are not disclosed upon inquiry. As Megarry and Wade, The Law of Real Property (4th ed. 1975), say, at p. 1066, "equitable owners in possession even though they have not lodged cautions or other entries in the register [are safeguarded and protected] even when their occupation is not obvious to a purchaser"; and, again, "a tenant in possession of registered land under a mere agreement for a lease, for example, or who has an option to renew the lease or to purchase the freehold will be in no danger of losing his rights to a later purchaser, if, as will often happen, he fails to protect his rights by entry on the register". Such a provision in the Ontario Act would have protected the respondent in the present case, and it is worth considering its introduction into that Act.

17 A good deal of argument was addressed by counsel for the parties to Torrens system case law. The main value of the cited cases for the present case is the dissociation of notice and fraud, the rejection of the notion that a person with notice of an unregistered interest can be charged with fraud: see, for example, the Australian case of *Friedman v. Barrett*, [1962] Qd. R. 498. The importance of the distinction is underlined in Torrens system legislation by the express exclusion of notice and by making fraud an exception to the integrity of the register. In some jurisdictions, the legislature has gone further by providing that knowledge of an unregistered interest was not itself to be imputed as fraud. Such a provision existed in the New Zealand Land Transfer Act, 1915, which was considered by the Privy Council in *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101, but was not part of the Queensland legislation which came under examination in *Friedman v. Barrett*. Its absence did not, however, dissuade the Courts from distinguishing mere notice from fraud and from protecting the registered owner against an unregistered claim of an interest of which he had notice. Cases on this question go back to the pioneer judgment of the Privy Council in *Assets Ltd. v. Mere Roihi*, [1905] A.C. 176 at p. 210.

18 Fraud is, of course, an exception to the integrity of the register under the Ontario Act (see s. 174), but since this Court is agreed that the respondent has not made out a case of fraud, there is only the question of notice to consider, a question which the respondent contends must be answered in its favour because, despite what the various provisions of the Act referred to in these reasons may indicate, notice has not been expressly excluded under the Ontario Act as it is under Torrens system legislation.

19 The respondent points to such express exclusion in the New Zealand legislation which was before the Privy Council in the *Waimiha Sawmilling* case, supra, a case upon which the appellant relied. The reliance was based on the fact that the Judicial Committee, in its reasons upholding the title of a registered purchaser as being free from an unregistered agreement of which it had notice, appeared to proceed on the strength of that provision of the New Zealand statute which was comparable to s. 91 of the Ontario Act. Its only reference to the New Zealand provision, which was s. 197, excluding notice was to that part of it which stated that knowledge of the existence of an unregistered interest was not itself to be imputed as fraud. However, the whole of s. 197 was quoted, and I agree with the respondent that the appellant cannot draw much comfort from the *Waimiha Sawmilling* case.

20 This does not mean, in my view, that there is necessarily a gap in the Ontario Act. We are dealing with different albeit related systems of title registration, and I do not think that the presence of an express provision in Torrens system legislation is evidence of a gap in the Ontario Act or, indeed, in the comparable English legislation of 1875. Especially is this so when the consequence is said to be the importing of a doctrine which denies the central policy of the Ontario Act. Of course, an express exclusion of notice as a qualifying consideration in respect of title as shown on the register might have obviated this litigation, but so too would registration of notice of its lease by the respondent pursuant to s. 115 [am. 1972, c. 132, s. 24] of The Ontario Land Titles Act.

21 So much for legislative history and for the legislation itself. I wish to deal now with such case law as there is on the question at issue. The reasons of the Ontario Court of Appeal in the present case are the only reported reasons of an Ontario appellate Court holding that previous notice of an unregistered interest may qualify the title of a purchaser for value acquired by a transfer from the owner as shown on the register. Yet those reasons, subject to a matter to be mentioned in a moment, merely rest on *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935, [1955] 5 D.L.R. at 292 where the Ontario Court of Appeal, without written reasons, affirmed a judgment of Duranceau D.C.J. Speaking in the present case for himself and for Brooke J.A., Jessup J.A. was candid enough to say that (and I quote his words) "if I were approaching the problem in the state of the statute as it was when *Re Jung* was decided, I would have doubt whether that case was correctly decided, particularly in view of the terms of what is now s. 91 of the statute". Jessup J.A. felt, however, that the enactment in 1960 of what is now s. 85(5) of The Land Titles Act must be taken as an affirmation for *Re Jung and Montgomery* as holding that notice of an unregistered interest will qualify a title taken by a purchaser for value on the faith of the register. I shall come later in these reasons to s. 85(5), upon which both parties relied; but I address myself now to what was before Duranceau D.C.J. in *Re Jung and Montgomery* and to what he decided in that case.

22 Jung had purchased certain premises under a land titles transfer of 26th June 1953 which was registered on 30th June 1953. At that time Montgomery was a tenant of part of the premises under a five year lease running from 1st April 1950 to 31st March 1955. Notice of the lease was not registered, but Jung himself had been a tenant of another part of the premises before purchasing the freehold and after his purchase Montgomery continued as tenant of Jung, paying rent which Jung accepted. Montgomery's lease contained an option to renew for three years on giving three months' notice and Montgomery gave proper notice of renewal on 8th November 1954. On 9th February 1955 Jung served a notice to quit on Montgomery, and on the latter's refusal to leave he brought proceedings for possession.

23 Duranceau D.C.J. found as a fact that Jung was aware of Montgomery's lease and of the option therein for renewal before he purchased the premises. So far as the remainder of Montgomery's original term was concerned, it was protected as an overriding interest, being an unexpired term not exceeding three years and with actual occupation. The renewal term presented a different situation. It did not exceed three years but there could be no actual occupation under it until it began, and this could not be before 1st April 1955. Duranceau D.C.J. treated the option as creating a separate interest to be considered on its own terms, and hence it could not be an overriding interest within s. 51(1), para. 4. It does not appear that any argument was made for treating the option as a covenant running with the land, in which event no separate registration would be required: cf. Di Castri, Law of Vendor and Purchaser (2nd ed. 1976), p. 427. For present purposes, however, it is unnecessary for me to determine whether a "covenant" view of the option would be correct. Although the reasons of Duranceau D.C.J. are not explicit on the point, I take it that 9th February notice to quit served on Montgomery was a notice to him to quit at the end of his five year term.

The issue between the parties was whether Jung could insist on dispossessing Montgomery after 31st March 1955 or whether Montgomery had a valid renewal term of three years from that time.

24 There are indications in the reasons of Duranceau D.C.J. that because Jung recognized Mongomery's lease by accepting rent under it, he was bound to its terms. The reasons do not indicate whether any remonstrance was made by Jung when the notice of renewal was given on 8th November 1954, three months before Jung gave notice to quit. This could have been enough to dispose of the case without introducing notice into The Land Titles Act. In affirming Duranceau D.C.J., the Court of Appeal is reported as having dismissed the appeal without calling on the respondent tenant and to have agreed with the judgment at first instance. Perhaps it also agreed with all the reasons for judgment, which clearly included reliance on notice, and this was certainly the view taken of *Re Jung and Montgomery* by both Grant J. and the Ontario Court of Appeal in the present case.

25 After citing Magee on Land Titles (1940), pp. 43, 93, 104, to the effect that the doctrine of notice is foreign to The Ontario Land Titles Act and noting that no cases are cited in support, Duranceau D.C.J. refers to a line of cases which he says support the contrary view. Some of these cases are clearly inapplicable to the issue of notice as it arises here; and equally unacceptable is his apparent equating of notice with fraud. Two decisions which were relied on by him and which were cited to this Court on the appeal here may, however, be mentioned. They are *Re Skill and Thompson* (1908), 17 O.L.R. 186 (C.A.) and *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262 (C.A.). Neither, in my opinion, is of any assistance on the question of notice in relation to The Land Titles Act.

26 *Re Skill and Thompson* ran the gamut of Ontario's then superior Court system; it was heard first by Riddell J. in Chambers, then on appeal by the Divisional Court and on further appeal by the Ontario Court of Appeal. It arose out of the dismissal by the Master of Titles under The Land Titles Act of an application to remove or vacate a caution registered against certain land by Thompson who claimed the interest therein as against Skill, the owner shown on the title register. Skill had purchased from one Sears in whose name the title had stood before the transfer to Skill, but Thompson claimed under a previous option to purchase given by Sears and of which Skill allegedly had notice. Riddell J.'s view was that the register was controlling and, moreover, since Thompson had begun an action for specific performance against Sears and Skill, there was no justification for maintaining the caution; hence, he vacated it. The Divisional Court restored the order of the Master of Titles, holding that to remove the caution before the action for specific performance was tried anticipated the result of the action in which it would be open to the plaintiff to establish fraud, in that the transfer from Sears to Skill was not intended to be registered. There may be here an equating of notice with fraud, but the Divisional Court judgment is not clear on the issue of notice as such. When the case came before the Ontario Court of Appeal, two of its five members gave reasons dismissing the appeal; the other three members simply agreed in that result. Osler J.A. proceeded on the ground that the Master of Titles had jurisdiction, which was properly exercised, to maintain the caution and it was not for him to try the rights of the parties summarily. Nothing in his reasons touches the question of notice unless it be in his recital of the facts as involving a claim by Thompson that the transfer by Sears to Skill was in fraud of Montgomery's rights under his exercised option.

27 It is on the reasons of Meredith J.A. that Duranceau D.C.J. in *Re Jung and Montgomery* and the respondent in the present appeal rely. Regrettably, Duranceau D.C.J. in quoting those reasons stops short of placing the quotation in context, that being supplied by a following passage which is not quoted in *Re Jung and Montgomery*. The following two passages from the reasons of Meredith J.A. are the ones quoted [17 O.L.R. at pp. 194 and 195]:

> The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.
>
> Its main purpose is to assure the title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect a registered owner against his own obligations, much less against his own fraud: see sec. 124.

28 Section 124 of the Act, as it then was (the provision is now s. 174), protects against fraud in the following terms (previously quoted in its original form as s. 99):

> Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration any disposition of land or of a charge on land which, if unregistered, would be fraudulent and void shall, notwithstanding registration, be fraudulent and void in like manner.

29 Having referred to this provision, Meredith J.A. went on to say this [17 O.L.R. at p. 195]:

> In this case the respondent contends — and it is so plainly alleged in the statement of defence of the defendant Sears in the action — that the appellant acquired title to the land in question from the registered owner, not only with notice of, but expressly subject to, a prior right, which the respondent had, to purchase it, and that he is substantially in the same position as if he had himself agreed to sell it to the respondent. If this be so, how can the Act prevent an enforcement of such a right? But for the registered caution, a transfer by the appellant to a subsequent registered owner, would, under the Act, give a good title to such an owner, but why should it, and how can it, cut out the obligation of the appellant whilst the title remains in him? The purpose of the Act is to protect the registered owner, who buys on the faith of the registry. But if fraud were necessary to support a claim against the appellant, having regard to the Act, it is, at the least, a reasonable question whether the registration of a transfer, for the purpose of defeating a legal obligation, would be, against him who commits the act, a fraud under the section which I have mentioned. I do not, of course, intimate that the respondent will be able to establish his contentions; it is enough to say that such contentions are reasonably made, in good faith, and are the subject of a pending action.

30 What this passage indicates is that there was more than mere notice alleged against Skill; that he was, in effect, party to an arrangement that any title he acquired would be subject to Thompson's prior claim. Of course, this was mere allegation; the issues were still to be tried. I think Magee on Land Titles (1940) at p. 110 was substantially correct in treating *Re Skill and Thompson* as determining how far the jurisdiction of the Master of Titles extended in dealing with a registered caution. I do not, therefore, regard *Re Skill and Thompson* as settling for any inferior Court that notice as opposed to fraud will be effective against a registered title.

31 The *Tew* case, supra, in 1914 is even less relevant to the issue in this appeal. What is relied on is a general statement of Mulock C.J. Ex., sitting as one of four Judges in appeal, as follows (at p. 265 of 32 O.L.R.):

> The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: *National Bank of Australasia v. Morrow* (1887), 13 V.L.R. 2; *Jellett v. Wilkie* (1896), 26 S.C.R. 289.

32 The litigation arose out of a claim by a mortgagee of land for priority against an assignee for the benefit of creditors who obtained the assignment from the mortgagor after the mortgage but who registered his assignment on the land titles register. The mortgage had been made pursuant to The Short Forms of Mortgages Act and it was not as such registrable on the land titles register. By the time the mortgagee obtained a proper land titles transfer, the assignment had been registered. The trial Judge held that the mortgage should have priority, and this was obviously correct since the assignee was not a purchaser for value who could claim the protection of the land titles register. S. 45 of the Act as it then stood (it is now s. 94) provided that "a transfer of registered land, made without valuable consideration, is subject, so far as the transferee is concerned, to any unregistered estates, rights, interests or equities subject to which the transferor held the same ...". The only difference among the four Judges who heard the appeal was as to the form of the judgment to enable the mortgagee to have effective relief.

33 So much for the case law. The logic of The Land Titles Act is perfectly plain. If, as its terms stipulate, it is the register that determines where title resides, then actual notice becomes immaterial unless it is preserved, as fraud is preserved and as certain other interests called overriding interests, are preserved. To say that because notice is not expressly excluded (as it is excluded ex abundanti cautela in Torrens systems legislation) it is deemed to be preserved, is no less a pronouncement of policy than that which I espouse. The question then becomes one of determining which policy is more consistent with the Act, with its spirit

as well as its letter. A succinct statement of the policy will be found in the Ontario Law Reform Commission's Report on Land Registration, issued in 1971, in which it summarizes the land titles system as follows (at p. 14):

> The land titles system was established in Ontario in 1885. It is essentially an affirmation by the province of the ownership of interests in land. Local offices have again been established — at present there are 30 — and a separate record is kept in these offices for each parcel governed by the system. The record includes an affirmation of the existence and ownership of interests — the fee simple and charges, and some leases and easements. Interests about which affirmations of existence and ownership are not made may be protected against loss of priority by registration of notices and cautions.
>
> A search is essentially an examination of the record and, usually, of some documents referred to in the record. The system imposes a larger degree of administrative supervision of conveyancing than the registry system does, and forms that must be used are specified for many transactions. If an interest is extinguished as a consequence of the making of an affirmation, the owner of the interest is entitled to compensation from a fund established for this purpose. A claim that does not appear in the record is of no effect against a purchaser unless the purchser has acted fraudulently.

34 When The Land Titles Act was first introduced in Ontario, there was already experience in the province with a system of registration of deeds, and the policy thereunder of priority of registration subject to actual notice was clearly expressed: see The Registry Act, R.S.O. 1877, c. 111, ss. 74, 78 and 80. To import actual notice in a title registration system without its express preservation is to change the basic character of the system. It is impossible, in my view, to adhere to the principle of the primacy of the register and at the same time to make it yield to a doctrine of notice.

35 I come now to s. 85(5), referred to in the reasons of the Court of Appeal in this case as a governing consideration in its decision. This provision reads as follows:

> (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, notwithstanding any express, implied or constructive notice, are entitled to priority according to the time of registration.

36 I do not agree with the view expressed in the Court of Appeal that this provision is, in effect, an affirmation of the survival of notice as a qualification of the absolute character of the register (fraud, of course, apart). The Court dwells on the words in s. 85(5) "notwithstanding any express, implied or constructive notice" for its view, but I am unable to appreciate how the express inclusion of these words supports the conclusion that actual notice of an unregistered interest is still effective against title shown on the register.

37 If it is a provision that operates at large, it obviously excludes notice of an unregistered interest as a limitation of the title shown on the register. Treating s. 85(5) as operating at large, I cannot see how it can be construed to exclude the effect of notice where the notice is of a claim to the same interest as that purchased by another for value on the faith of the register, but not to exclude it where the notice is of a claim to a subordinate interest, as is the case here. Arnup J.A. in his concurring reasons in the Court of Appeal conceded the illogicality of a situation where a person would be better off claiming against a registered transferee through notice than by registering his interest, but he concluded that the Legislature must take responsibility for such a result. I think rather that the Courts must take responsibility, since it would be their interpretation, by no means a compelled one, which produces it.

38 In my view, if s. 85(5) be taken in the context of the whole of s. 85 it is capable of explanation without treating it as applicable at large, but yet reinforcing the indefeasibility of the register and of title according to the register, subject only to overriding interests and to fraud.

39 Section 85 deals with the procedure for registration and with the effectuation of registration. It begins with a provision requiring that the day, hour and minute of the receipt of instruments presented for registration must be noted by the attending officer or clerk. Then follow subsections (2) and (3) which I reproduce here in full:

(2) Subject to the rules, an instrument received for registration shall be registered in the order of time in which it is so received, unless before registration is completed it is withdrawn or the proper master of titles decides that it contains a material error, omission or deficiency or that there is evidence lacking that he considers requisite or declines registration for any other reason, and notifies the parties or their solicitors accordingly within twenty-one days after being so received and allows a period of time not less than seven and not more than thirty days from the date of such notification for correction of the error, omission or deficiency or for furnishing evidence and, when the error, omission or deficiency is corrected or evidence furnished within the time allowed, the instrument has priority as if it had been correct in the first instance, but, if the error, omission or deficiency is not corrected or if evidence is not furnished within the time allowed or if the person desiring registration fails to appeal successfully from the decision, the proper master of titles may proceed with other registrations affecting the land as if the instrument had not been presented for registration, and the proper master of titles shall be deemed not to be affected with notice of the contents of the instrument.

(3) Registration of an instrument is complete when the entry in the proper register and particulars of registration thereof on the instrument are signed by the proper master of titles, his deputy or a signing officer, and the time of receipt of the instrument shall be deemed to be the time of its registration.

40 What these provisions show is that entry on the register in fact may take place some time after receipt of an instrument tendered for registration but, nonetheless, the registration will be effective as of the time of receipt of the instrument. As s. 85(2) shows, entry may be held up pending correction of errors or deficiencies in the tendered instrument and yet may be accorded priority as against an intervening tender of another competing instrument which appears to be in correct form. When s. 85(5) speaks of priority "in respect of or affecting the same estate or interests in the same parcel of registered land" according to the order of entry in the register, it is dealing with competing instruments in the light of the provisions of s. 85(2) and (3). It appears to me to be an unnecessary punctuation of the obvious, but it could be said to emphasize the import of s. 85(2) that where an error or deficiency is corrected (as contrasted with the case where it is not) the intervening instrument is not entitled to priority merely because there is notice of it before the error or deficiency in the other one is corrected even if the intervening instrument was created first.

41 I do not regard s. 85(5), in the context in which it exists, as modifying the effect of ss. 52 and 91, any more than their effect is modified by the incongruous terms of s. 157(3) of the Act respecting tax sale purchasers. It appears that the reference to actual notice in s. 157(3), introduced in an amendment to the Act by 1914 (Ont.), c. 24, s. 2, was designed to establish a special rule for tax sales in conformity with the situation under The Registry Act, since there is an included reference to the relevant section of that Act in the 1914 amendment. The amendment is discussed by Magee, Notice under The Ontario Land Titles Act (1933), 11 Can. Bar Rev. 245 with reference also to the judgment of Meredith C.J.C.P. in *Re Lord and Ellis* (1914), 30 O.L.R. 582, 19 D.L.R. 809 decided shortly before the 1914 amendment was passed. However, all this apart, I do not see this special situation as governing the operation of the central feature of the Act.

42 In summary, I am satisfied that ss. 78(1), (2), 79(1), 91 and 94 of The Land Titles Act make it abundantly clear that notice of an uregistered interest cannot qualify the registered title of a transferee for value from the registered owner, and that this conclusion is reinforced by s. 85 as a whole and by s. 85(5) in particular. In the result, I would allow the appeal, set aside the judgments below and dismiss the application of the respondent Dominion Stores Limited, with costs to the appellant throughout.

***Spence J. (Judson, Ritchie* and *Beetz JJ.* concurring):**

43 This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on 25th October 1974. By that judgment, the Court of Appeal dismissed an appeal from the judgment of Grant J. pronounced on 15th October 1973. The respondent, Dominion Stores Limited, had applied to the Supreme Court of Ontario for relief from forfeiture and reinstatement of its lease upon certain premises known as 418 Spadina Road, in the City of Toronto, for an extension of its option agreement for a renewal of the said lease and for an injunction to restrain the three respondents from any future interference with the applicant under its lease and extension or option agreement.

44 Grant J. did grant relief from forfeiture and "ordered and determined" that the applicant **Dominion Stores** Limited was entitled to exercise its option to renew the lease until 30th June 1982.

45 Grant J. further ordered that the respondent **United Trust** Company be restrained from further excluding **Dominion Stores** Limited from possession of the said premises so long as **Dominion Stores** Limited complied with the terms of the said lease.

46 At the opening of the appeal, I pointed out that no leave to appeal had been obtained and that, therefore, the appeal was governed by the provisions of s. 36 [re-en. R.S.C. 1970, c. 44 (1st Supp.), s. 1; repealed 1974-75, c. 18, s. 3] of the Supreme Court Act, R.S.C. 1970, c. S-19 which at the appropriate time gave an appeal as of right on a question that is not a question of fact alone from a final judgment of the highest Court of final resort for a province in judicial proceedings where the amount or value of the matter in controversy in the appeal exceeds $10,000 while the order of Grant J. confirmed by the Court of Appeal contained no reference to any monetary amount and simply granted the injunction and declaration applied for. Counsel for the appellant referred to the affidavit of Grant Edwardh, and appraiser who deposed that the rental upon the premises was $2.18 per square foot and that the firm market or economic rent was $6.25 per square foot, a difference of $4.07 per square foot per year. Even in one year, the difference between the rent reserved in the lease and the economic rent would exceed $10,000, and such affidavit could have been filed with the notice of appeal to bring the appeal within the provisions of the said s. 36 of the Supreme Court Act as it then existed. Under these circumstances, this Court determined that if leave to appeal were necessary it should be granted.

47 **Dominion Stores** Limited had been tenants of the said premises under written lease from 5th September 1935 and had carried on a supermarket in the said premises under the terms of the said lease and various renewals thereof. The respondents Geller and Granatstein became the owners of the said premises subject to such lease in 1946. The last renewal of the lease was dated 12th September 1967 and was to have terminated on 30th November 1970. The said renewal contained an option in favour of **Dominion Stores** to renew such lease for a further period from 1st December 1970 to 30th November 1975, upon the same terms and conditions except that the rental was increased to $475 per month and also subject to the usual clause as to increase to cover real estate taxes. **Dominion Stores** gave due notice of the exercise of such option. Desiring to make extensive repairs to the premises and to devote them to a specialty shop rather than to a supermarket, **Dominion Stores** Limited entered into negotiations with the owners for a longer term of leasing. Such negotiations continued from February 1971 until the early months of 1972.

48 On 12th April 1972, **Dominion Stores** Limited, over the signature of its real estate manager, one J.A. Munro, wrote to the landlords' solicitor confirming the arrangement which it was alleged had been orally arrived at prior thereto. I quote that letter in full:

> Dear Sir:
>
> *Re: 418 Spadina — Option to Lease*
>
> Pursuant to our discussion yesterday please find attached a copy of the letter received from Simpsons Contract Division covering the cost of renovations required to bring this building in line with Health, Building, Fire and Labour Department regulations.
>
> The existing **Dominion** lease for this location expires November 30th, 1975. It is understood the owners are now prepared to grant an option to **Dominion Stores** Limited for the period from December 1, 1975 to June 30th, 1982, at the same rental, terms and conditions as contained in the existing lease. As discussed with you it is the intention for **Dominion Stores** Limited to proceed with a sublease of these premises at the earliest possible date to Quintana **Stores** Limited.
>
> On receipt of your clients written acceptance of the option to lease and the proposed sublease, we will have our legal department draw the necessary documentation for execution. Your early attention to this matter will be greatly appreciated.

49 On 20th April 1972, the landlords' solicitor replied to that letter as follows:

Attention: Mr. J.A. Munro

Real Estate Manager

Dear Mr. Munro:

Re: 418 Spadina — Option to Lease

We acknowledge receipt of your letter dated April 12th, 1972, and wish to advise that our clients would be prepared to enter into an option agreement with your company for the period from December 1st, 1975 to June 30th, 1982, at the same rental, terms and conditions as contained in the existing lease.

It is clearly understood that the option agreement will contain a condition that renovations must be made by your company to the building in the minimum amount of $15,000 or else the agreement would be terminated. It is also understood that the renovations would be commenced and completed within a reasonable period of time after the execution of the option agreement.

We would suggest that you draw the documentation which is required and if the form and substance meet with our approval we shall submit it to our clients for their immediate execution.

50 On 28th April 1972, **Dominion Stores** Limited, over the signature of J.R. Morrison, a solicitor in its legal department, again wrote to the solicitor for the landlords a letter which read:

Attention: Mr. Lawrence S. Crackower

Dear Sirs:

```
Re: Your File No. 72-10835
    Molly Geller & Bella Granatstein
    418 Spadina Road, Toronto
```

Further to your letter of April 20th last addressed to the attention of our Mr. J.A. Munro, we have prepared and enclose herewith option agreement in accordance with the understanding reached, and if it meets with your approval we shall be obliged if you will have same executed by your clients and return all three copies to us for execution by **Dominion Stores** Limited, following which we shall return to you one fully executed copy.

As the remainder of the current term and the renewal term total more than ten years we may wish to register a Notice of Lease, and will be much obliged if you could let us have a legal description of the property or if not the lot and plan numbers.

Yours very truly,

J.R. Morrison,

Solicitor,

Legal Department

51 The learned trial Judge, after a careful consideration of the evidence and documents which I have recited and of the appropriate law, came to the conclusion that by the letter of 20th April 1972, there had been concluded an enforceable agreement to extend the lease on the premises until the year 1982. The learned trial Judge then considered the situation if his determination had been in error and that the correspondence properly construed expressed the intention that the agreement between the parties would be subject to the preparation and execution of a new agreement which met the approval of the landlords' solicitors. Again,

after an examination of the evidence and the case law, he came to the conclusion that the solicitors for the landlords did not act judiciously in the matter and that they withheld their approval in bad faith. The learned trial Judge, therefore, granted the order which I have recited above determining that **Dominion Stores** Limited was entitled to exercise its option to renew the lease until 30th June 1982.

52 Jessup J.A. disposed of this issue in the Court of Appeal in the following short paragraph [6 O.R. (2d) at p. 202]:

> The appellant also argues that the agreement in question here for the extension of a lease was only an agreement to agree but I do not think that contention is supported by a fair consideration of the entire correspondence between the landlord's solicitor and the tenant.

53 Arnup J.A., in his reasons, said [6 O.R. (2d) at p. 203]:

> The other points raised by the appellant and mentioned by Jessup J.A., were in my view correctly disposed of by Grant J.

54 I have come to the conclusion that upon this issue the judgment of the learned trial Judge confirmed by the Court of Appeal was the correct one and I need add little to his carefully considered reasons.

55 There is only one point dealt with in the argument before this Court which requires particular mention and that is that the agreement with **Dominion Stores** Limited was arrived at by a letter from the solicitors for the landlords and that there is nothing over the signature of the landlords themselves, and further that although the solicitors are and were in this case authorized to negotiate whether the lease should be renewed and the terms of such renewal, they were not authorized to conclude an agreement for the renewal. I am of the opinion that the actual language of the solicitors' letter of 20th April which I have quoted above clearly indicates that they had instructions from the landlords to conclude a renewal on the terms set out in the said letter and that they were simply carrying out their instructions and acting properly as the communicator for their clients.

56 This application was presented to Grant J. upon affidavit evidence. There is no affidavit from either of the respondents Molly Geller or Bella Granatstein and no affidavit from any member of the firm of solicitors who acted for them and who wrote the letter of 20th April. Under such circumstances, I am entitled to conclude, as were the Courts below, that the letter of 20th April was written upon instructions of the clients and bound the clients as if it had been signed by them personally.

57 I turn to a much more difficult question, and in order to deal with it resume the outline of the facts.

58 The respondent **United Trust** Company had been negotiating with the respondents Geller and Granatstein for the purchase of the premises known municipally as 418 Spadina Road and on 17th May 1972 submitted a written offer to purchase to the said Geller and Granatstein. This offer was accepted by the said Geller and Granaestein on the same day. One term thereof provided:

> This offer is conditional for a period of thirty days from the date of acceptance herein upon the purchaser obtaining a surrender of lease from **Dominion Stores** Limited which will allow the purchaser vacant possession of the premises herein on the date of closing and should such surrender not be obtained within thirty days from the date of acceptance herein then this offer shall be null and void at the purchaser's option and all deposit monies shall be returned forthwith upon demand without any deductions whatsoever.

59 The **United Trust** Company then entered into negotiations with **Dominion Stores** Limited in an attempt to have them surrender their lease and vacate the premises. These negotiations continued until on or about 15th June when two solicitors for **United Trust** met with an officer and the solicitor for **Dominion Stores** Limited in what the solicitor for **United Trust** Company described as being "a bona fide attempt to settle the matter which is now before the court". The said solicitor in his affidavit continued:

> 5. It was agreed that I would discuss with my clients the amount of rent which they would be prepared to accept from **Dominion Stores** should **Dominion Stores** lease the premises from them. As an alternative path to settlement, Mr. Shaw agreed that Mr. Morrison would determine the amount of compensation which **Dominion Stores** would accept to reimburse them for the alleged out-of-pocket expenses incurred and for the loss of the location.

60 The representatives of the two parties parted on that basis and no further negotiations seem to have taken place but on the same 15th June 1972 the **United Trust** Company, not its solicitor, wrote to Mrs. Geller and Mrs. Granatstein the following letter:

> Dear Mrs. Geller and Mrs. Granatstein:
>
> *Re: 418 Spadina Road, Toronto*
>
> This letter will confirm that we intend to waive our rights with respect to the condition about obtaining vacant possession of the above property from **Dominion Stores** Limited as set out in the agreement between **United Trust** Company and yourselves dated May 17th, 1972.
>
> Therefore, we have instructed our solicitors, Goodman & Goodman to proceed to close the transaction.
>
> I would like to take this opportunity to thank you for the courtesy extended to us by reducing the interest rate on the mortgage back to 8%.

61 It was quite apparent therefore that rather than continue to negotiate with **Dominion Stores** Limited, **United Trust** Company were ready to waive the condition in the accepted offer to purchase of 17th May 1972 which made the transaction dependent upon its success in obtaining a surrender of the **Dominion Stores** lease. The final paragraph of that letter is also most noteworthy. The offer to purchase which I have recited above provided for interest at the rate of 9 per cent per annum. On the basis that the **United Trust** Company was not going to be able to obtain possession of the premises free from lease, it succeeded in reducing the interest on the mortgage back by 1 per cent per year.

62 It was only on 25th May 1972 that the solicitors for the respondents Geller and Granatstein replied to the **Dominion Stores**' letter of 28th April which I have quoted above, and that reply read:

> *Attention: Mr. J.R. Morrison, Solicitor, Legal Department*
>
> Dear Mr. Morrison:
>
> Further to your letter to us of April 28th, and further to our recent telephone conversation with Mr. Munro, please be advised that our clients have instructed us to advise you that they have no intention of executing the documents which you have forwarded as the said documents do not meet with the approval of the writer nor our clients in their form and substance.
>
> At this time, we are returning your draft Agreements to you.

63 Although the offer to purchase provided for closing "on or before the 31st of July 1972", the transaction was closed between the respondents Geller and Granatstein as vendors and the **United Trust** Company as purchasers on 21st June 1972, and the following day, without any notice to **Dominion Stores** Limited, **United Trust** Company placed a new door with a new lock on the premises at 418 Spadina Road and excluded **Dominion Stores** Limited from the premises, although **Dominion Stores** had paid rent for the period up to and including 30th June 1972. On the same 21st June 1972, the solicitors for **United Trust** Company wrote to the **Dominion Stores** Limited a letter which read:

> Dear Nat:
>
> Re: **United Trust**
> 418 Spadina Road
> Geller and Granatstein
> ---

> Subsequent to our meeting last Thursday we met with the vendors' solicitors to attempt to obtain an extension of the time for the fulfillment of the condition in the contract, to enable us to further explore the possibility of a settlement with **Dominion Stores** Limited.
>
> The vendors refused to grant an extension and accordingly our client had no alternative other than to close the transaction which was completed today. Notwithstanding, I am instructing our client to provide us with the information as per our discussion so that we can, without prejudice to the legal rights of either party, attempt to settle this matter.

64 The first paragraph of this letter is rather interesting. It refers to a meeting on "last Thursday". 21st June would appear to have been a Wednesday. If so, the previous Thursday would have been the 15th, but on 15th June, **United Trust** Company was writing to Mrs. Geller and Mrs. Granatstein waiving the condition which entitled them to a surrender of the **Dominion Stores**' lease before they could be required to close the transaction and purchase the premises. It is difficult to understand how there could have been any negotiation at the time specified in that letter other than one to reduce the cost to **United Trust** Company and such negotiation was in fact successful when the rate on the interest was reduced. Such rejection was, of course, on the basis that **United Trust** would have to take the title to the premises subject to the lease and the solicitors for the respondents Geller and Granatstein accepted this understanding when they wrote to the solicitors for the **United Trust** Company on 19th June 1972 saying in part:

> Since your clients have now agreed to waive the condition in the said Agreement of Purchase and Sale, it now appears that your clients have agreed *to assume the tenancy obligations with **Dominion Stores Limited.***

(The italics are mine.)

65 On 7th July 1972, the solicitors for **Dominion Stores** Limited delivered to the solicitors for the **United Trust** Company a letter demanding that possession be returned and on 10th July 1972 the same solicitors for **Dominion Stores** Limited delivered to the same solicitors for **United Trust** Company a letter enclosing a cheque dated 7th July 1972. The cheque was returned. The **Dominion Stores** Limited, therefore, commenced these proceedings.

66 The title to the premises at 418 Spadina Road, Toronto, is under the provisions of The Land Titles Act, R.S.O. 1970, c. 234 as amended.

67 The appellant **United Trust** Company admits it had full actual notice of the lease which the respondent **Dominion Stores** Limited held on the premises and indeed it could not say otherwise as its officers had engaged in long negotiations with the officers of **Dominion Stores** Limited in an attempt to obtain a surrender of that lease and the offer to purchase made by the appellant **United Trust** Company to the respondents Geller and Granatstein was originally subject to the condition that such surrender of lease could be obtained from the respondent **Dominion Stores** Limited. It is the contention, however, of the appellant that under the provisions of The Land Titles Act the lease to **Dominion Stores** Limited never having been registered on the title in accordance with the provisions of that Act the purchaser took free of any encumbrances created by that lease. Put baldly, this contention is that under The Ontario Land Titles Act, apart from fraud, actual notice of a non-registered instrument is ineffective to put the burden of the encumbrance resulting therefrom upon a purchaser for value.

68 It should first be noted that by the express provisions of The Land Titles Act, R.S.O. 1970, c. 234, i.e., s. 51(1), para. 4, any lease for a period with less than three years to run is protected despite lack of registration by providing that the title is subject to such a lease which for the purpose of the Act should be deemed to be not an encumbrance and, therefore, not requiring registration. As pointed out by Grant J., the lease to **Dominion Stores** Limited, apart from any right of or option of extension, did not expire until 30th November 1975 and the **United Trust** Company closed the purchase from the respondents Geller and Granatstein on 21st June 1972, more than three years prior to the expiry of the term and, therefore, the lease was not protected by the provisions of s. 51(1), para. 4.

69 The appellant submits, in support of its contention, the provisions of ss. 52, 75, 78 [am. 1972, c. 132, s. 18], 79 [am. 1972, c. 1, s. 43(4); 1972, c. 132, s. 19], 85(5), 91 and 115(5) [repealed 1972, c. 132, s. 24] of The Land Titles Act. S. 52 deals with a first registration and is not applicable upon the present appeal. I set out the other sections cited by the appellant:

> 75. — (1) No person, other than the registered owner, is entitled to transfer or charge registered freehold or leasehold land by a registered disposition.
>
> (2) Subject to the maintenance of the estate and right of the registered owner, a person having a sufficient estate or interest in the land may create estate, rights, interests and equities in the same manner as he might do if the land were not registered ...
>
> 78. — (1) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the director of titles.
>
> (2) Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through him, excepting owners and encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein ...
>
> 79. — (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel or land or that have been duly entered in the books of the office kept for the entry of instruments received or are in the course of entry.
>
> (2) For the purposes of subsection 1, the Highways register mentioned in clause *c* of section 182 shall be deemed to be a book kept for the entry of instruments.
>
> (3) Subject to the regulations, the Trans-Canada Pipe Line register established under clause *c* of section 182 shall be deemed, for the purposes of this Act, to be a register of the title of land or interests therein, including easements, owned by Trans-Canada Pipe Lines Limited ...
>
> 85. — (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, notwithstanding any express, implied or constructive notice, are entitled to priority according to the time of registration ...
>
> 91. A transfer for valuable consideration of land registered with an absolute title, when registered, confers on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances, subject to,
>
> (*a*) the encumbrances, if any, entered or noted on the register; and
>
> (*b*) the liabilities, rights and interests, if any, as are declared for the purposes of this Act not to be encumbrances, unless the contrary is expressed on the register,
>
> and to such rights, privileges and appurtenances, subject also to any qualifications, limitation or encumbrance to which the same are expressed to be subject in the register, or where such rights, privileges and appurtenances are not registered, then subject to any qualification, limitation or encumbrance to which the same are subject at the time of the transfer, but free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario ...
>
> 115 — (1) A lessee or other person entitled to or interested in a lease or agreement for a lease of registered land may apply to the proper master of titles to register notice of the lease or agreement in the prescribed manner ...

70 I shall deal with these sections hereafter.

71 It is the appellant's argument that the enactment of the Torrens land titles system in the Province of Ontario made applicable in that province the main theory of a Torrens title registration system, to wit, the absolute authority of the register, and that it is the effect of such a principle that actual notice, no matter how clearly proved so long as encumbrances do not appear on the register, does not affect the clear title of the purchaser for value. I am ready to agree that this is a prime principle of the Torrens system and that it had been referred to as such by various text writers which I need not cite in support thereof.

72 The Torrens Registration System was the brainchild of a Mr. Robert Torrens of South Australia and, due to his perseverance, a statute embodying the principles of his land titles system was enacted in South Australia in 1857. Similar statutes based on the same principles and using the same technique were enacted in rapid succession in Queensland in 1861, in Tasmania, Victoria and New South Wales in 1862, in New Zealand in 1870, and in Western Australia in 1874. Use of the system spread to Canada and a like statute was enacted in the Colony of Vancouver Island in 1861, and then in the Province of British Columbia in 1869. The Land Titles Act was enacted in Ontario in 1885. At that time, the Legislature in Ontario had before it as models all these previous enactments which I have listed. In every case, those enactments contained an express provision making actual notice ineffective to encumber the registered title.

73 The subsequent enactment of Land Titles Acts in Alberta, Saskatchewan and Manitoba contained like provision. In Ontario, no such provision appeared. The respondent **Dominion Stores** Limited submits that this omission is crucial and certainly could not be considered to be an accident.

74 Counsel for the respondent **Dominion Stores** Limited submits, and I agree with him, that the many cases cited by counsel for the appellant for the proposition that actual notice is ineffective, including some cases which bear an almost exact resemblance to the present, are cases which depend upon the statutory provisions in the various jurisdictions containing such express provision and, therefore, are irrelevant in considering the situation in Ontario which lacks such a provision. I have read the authorities cited by the appellant and I do find that in each of those cases there is express reference to such a section. As an example, may be cited the provisions of s. 203 of The Land Titles Act, R.S.A. 1970, c. 198, which I quote:

> 203. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied, or constructive, of any **trust** or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding, and the knowledge that any **trust** or unregistered interest is in existence shall not of itself be imputed as fraud.

75 There is no doubt that when such a term appears in the governing statute, the result is that unregistered encumbrances fail in any way to affect the title of the purchaser for value.

76 Lord Buckmaster said in *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101 at 106 (P.C.):

> The first of these sections provides in plain language that, except in the case of fraud, the registered proprietor of land holds it freed from everything except what is notified on the register, subject to the three exceptions, not one of which is relevant for the present purpose; *while s. 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud.*

(The italics are mine.) and adopted the definition of "fraud" given by Lord Lindley in *Assets Co. v. Mere Roihi*, [1905] A.C. 176 (P.C.) at 210:

> ... by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

77 However, in Ontario, only a few years after the enactment of The Land Titles Act, the Courts have expressed a disinclination to imply such an extinction of the doctrine of actual notice. There is no doubt that such doctrine as to all contractual relations and particularly the law of real property has been firmly based in our law since the beginning of equity. It was the view of those Courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms. Such a provision, as I have said, does appear in all the other statutes cited by the appellant.

78 The view of the Ontario Courts was expressed by Meredith J. in *Re Skill and Thompson* (1908), 17 O.L.R. 186 (C.A.). There, a Master of titles had made an order in which he refused to expunge from the register a caution which was registered by a person claiming under an agreement to purchase from the person who had been the owner and who had, despite such agreement to purchase in the hands of the person, conveyed to one who became the registered owner on the title. Riddell J. allowed an appeal from the Master of titles and ordered that the caution be expunged. Thompson appealed to the Divisional Court composed of Meredith C.J.C.P. and Anglin and Mabee JJ. and Mabee J. gave the reasons for the Divisional Court in reversing Riddell J. Skill then appealed to the Court of Appeal composed of Moss C.J.O. and Osler, Garrow, and Maclaren JJ.A. In the Court of Appeal, Meredith J.A. alone dealt with the point and his statement has been quoted ever since as expressing the Ontario view as to the effect of actual notice. It was [17 O.L.R. at p. 194]:

> The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.
>
> Its main purpose is to assure the title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect a registered owner against his own obligations, much less against his own fraud ...

79 Some years later, in 1914, in *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262 (C.A.), Mulock C.J. Ex. said at 265:

> The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: *National Bank of Australasia v. Morrow* (1887), 13 V.L.R. 2; *Jellett v. Wilkie* (1896), 26 S.C.R. 289.

80 Now it is true that in *Macdonald v. Tew*, supra, Mulock C.J. Ex. was dealing, as he said, with a person who as assignee for creditors was not a purchaser for value but his statement as to the effect of The Land Titles Act upon the common law rights of an owner of land to mortgage, or to lease, is indicative of the view held by Ontario Courts.

81 The next decision in Ontario to which I wish to refer is *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, affirmed [1955] O.W.N. 935 [1955] 5 D.L.R. at 292 (C.A.). There, Duranceau D.C.J. had considered a landlord's application for possession. The landlord and a tenant had both been the tenants of adjoining parcels of land held under The Land Titles Act. The landlord purchased the parcel which he had previously leased and the parcel leased by Montgomery. Montgomery's lease, including the option to renew, ran for more than three years. Jung, the new registered owner, had full knowledge of Montgomery's tenancy at the time he purchased from the previous owner. After having closed the transaction, Jung continued to accept rental from Montgomery but later made application for possession. This latter fact, in my view, could have determined the case simply on the basis that Jung had accepted Montgomery as his tenant and was saddled with Montgomery's lease. The learned District Court Judge, however, mentioned this point only at the close of his reasons and devoted the main portion thereof to a consideration of the question of whether Jung's actual notice of Montgomery's lease prior to his having closed

the transaction of purchase resulted in him having to take title subject to Montgomery's lease and held that it did so relying particularly on *Re Skill and Thompson* and *Macdonald v. Tew* which I have cited above. Jung appealed to the Court of Appeal and the disposition there is set out in the report in these words:

> The Court dismissed the appeal at the conclusion of the appellant's argument and orally expressed its agreement with the judgment appealed from.

82 In [1955] O.W.N. at p. 936, a similar notation appears.

83 Shortly thereafter, in 1960, The Land Titles Act was amended by the addition of s. 54(5). That amendment now appears as s. 85(5) of The Land Titles Act which I have cited above.

84 In *Pitcher v. Shoebottom*, [1971] 1 O.R. 106, 14 D.L.R. (3d) 522, Lieff J. considered a case where the plaintiff had entered into an oral agreement to buy certain lots from the defendant. Prior thereto, the defendant had approached the real estate agent for the purpose of selling his land. As a result of that agent's endeavours, an agreement had been entered into between the defendant and one Block for the sale of part of the lands in November 1960. That transaction was closed in 1960. The plaintiff took action against the defendant for specific performance of the agreement made in 1958 relying on *Re Jung and Montgomery*, supra. The defendant pleaded the provisions of what is now s. 85(5) of The Land Titles Act. Lieff J. said at p. 112:

> At the time the agreements of purchase and sale were entered into there seems to be no doubt that actual notice of an unregistered interest was sufficient to defeat a registered purchaser's claim to priority over the unregistered interest. That this was the situation at the time the agreements were entered into is supported by *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, where the Court of Appeal dismissed an appeal from the judgment of Duranceau D.C.J., for the reasons given by him ...
>
> It is argued by the corporate defendants that the Land Titles Amendment Act [now s. 85(5)] has the effect of eliminating the doctrine of actual notice from the Land Titles Act. If this is so, and the proper law to apply in the present case is the statute as amended, the effective date of which was January 1, 1960, then this would necessarily be an end to the matter with respect to the doctrine of actual notice.

85 Lieff J. found it unnecessary to decide this point as he held, as a matter of fact, that the purchaser had not notice of the unregistered interest.

86 In the present case, both Jessup J.A. and Arnup J.A. considered s. 85(5) in giving the reasons for the Court of Appeal, as had Grant J. upon the hearing of the application. Jessup J.A. was of the opinion that by the enactment of s. 85(5) the Legislature had disclosed the intent of the statute and that it was the intent found in the decision of *Re Jung and Montgomery*, noting [6 O.R. (2d) at p. 201]:

> ... The subsection does not purport to repeal generally the law is laid down in *Re Jung and Montgomery* and therefore was not enacted simply for the purpose of such repeal.

87 As an alternative reason for the conclusion, Jessup J.A. pointed out that s. 85(5) dealt with "... registered intruments in respect of or affecting the same estate or interest in the same parcel of registered land" while the issue considered was a freehold estate in the purchaser **United Trust** Company and a leasehold estate in **Dominion Stores** Limited.

88 Arnup J.A., in his reasons, dealt with the argument in this term [6 O.R. (2d) at p. 202]:

> The appeal narrows down to the question whether the enactment of s. 80(5) in R.S.O. 1960, c. 204 (now s. 85(5), R.S.O. 1970, c. 234), changed the law by abolishing the "doctrine of actual notice". If this is what the Legislature intended, the amendment was put in a very peculiar place, having regard to the context of s-ss. (1) to (4) of s. 85.

89 With respect, I am in complete agreement with that comment. It is difficult to understand why the Legislature, faced with a decision approved in the Court of Appeal that actual notice was still in Ontario effective to encumber the registered titleholder's

estate, should have attempted to eliminate such a conclusion by the enactment of a subsection in a section dealing with details of registration when an appropriate amendment in plain words of s. 52 as to first registration or s. 91 as to subsequent transfers would have been appropriate. The form was available as it already appeared in many other provincial Land Titles Acts. Again, I agree with Arnup J.A. when he said that the law of real property should not be found to have been altered by the Legislature except where such alteration had been made by clear or appropriate words.

90 Arnup J.A. was of the view that s. 85(5) would have applied between registered instruments even if one were a transfer of the freehold and the other a lease, being of the opinion that the latter affected the former but found it unnecessary to so determine. In view of his opinion, with which, with respect, I agree, s. 85(5) did not affect the law as enunciated in *Re Jung and Montgomery*.

91 I am in accord with the reasons set out by Jessup J.A. and Arnup J.A. in the Court of Appeal to that effect and I, therefore, am not required to consider the issue of whether the circumstances which occurred in this appeal, and which I have outlined with some detail above, could result in a finding of fraud against the appellant.

92 In *Zbryski v. Calgary* (1965), 51 D.L.R. (2d) 54 (Alta.), Farthing J. considered circumstances which, although they do not resemble the present circumstances, had much the same tenor and found that such circumstances did constitute actual fraud as against the holder of the unregistered interest but he did so after a trial and after witnesses had given viva voce evidence and were cross-examined extensively.

93 The present appeal arose upon an application for relief against forfeiture and for an injunction. The application was considered upon the basis of affidavit evidence and documents with a limited amount of transcript of examination upon the affidavits. The application itself did not contain any allegation of fraud. In my view, the well-established principle that fraud must be strictly alleged and strictly proved would not justify a finding of fraud on this kind of a record and, therefore, I have not come to any conclusion as to whether the respondent **Dominion Stores** Limited could have established its case upon the basis of actual fraud.

94 For the reasons which I have given, I would dismiss the appeal with costs and affirm the judgment of the Court of Appeal for Ontario.

Appeal dismissed.

End of Document

TAB 11

2000 CarswellOnt 2807
Ontario Superior Court of Justice

Durrani v. Augier

2000 CarswellOnt 2807, [2000] O.J. No. 2960, [2000] O.T.C. 607, 190 D.L.R. (4th) 183, 36 R.P.R. (3d) 261, 50 O.R. (3d) 353, 98 A.C.W.S. (3d) 1323

Asad Khan Durrani and Zaib Durrani, Plaintiffs and Gideon McGuire Augier, Melanie Lisa Zettler, Sophia Nicole Zettler and Royal Bank of Canada, Defendants

Epstein J.

Heard: January 17-20, 27-28, 2000
Judgment: August 4, 2000
Docket: 95-CU-89941

Counsel: *A. Irvin Schein*, for Plaintiffs.
Gideon McGuire Augier, in person.
Richard H. Parker, for Defendants Zettler.
Bernard B. Gasee, for Royal Bank of Canada.

Subject: Property

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

Headnote

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

During course of credit check conducted when plaintiffs attempted to purchase lawnmower, plaintiffs learned of judgment registered against title to their home — Plaintiffs discovered that as result of alleged fraud perpetrated upon them by personal defendant, their home had been sold by series of transactions that included mortgage in favour of defendant bank — Personal defendant sold title to plaintiffs' home to defendant purchasers — Plaintiffs brought action against defendant bank and personal defendant and defendant purchasers in fraud — Action was allowed in part — Personal defendant fraudulently registered security interest against plaintiffs' title and fraudulently transferred title of property to himself — Personal defendant never acquired legitimate interest in plaintiffs' property — As result of irregularities associated with sale of plaintiffs' property and defendant purchasers' recognition of irregularities, agent of defendant purchasers had notice of fraud and were not bona fide purchasers — Actual notice of agent was imputed to defendant purchasers — Defendant bank had no actual notice of fraud and was bona fide mortgagee.

Real property --- Registration of land — Land titles — Assurance fund

During course of credit check conducted when plaintiffs attempted to purchase lawnmower, plaintiffs learned of judgment registered against title to their home — Plaintiffs discovered that as result of alleged fraud perpetrated upon them by personal defendant, their home had been sold by series of transactions that included mortgage in favour of defendant bank — Personal defendant sold title to plaintiffs' home to defendant purchasers — Plaintiffs brought action against defendant bank and personal defendant and defendant purchasers in fraud — Action was allowed in part — Defendant bank had no actual notice of fraud and was bona fide mortgagee — Compensation had to be sought through Assurance Fund rather than through courts.

Real property --- Registration of land — Land titles — Practice and procedure — General

During course of credit check conducted when plaintiffs attempted to purchase lawnmower, plaintiffs learned of judgment registered against title to their home — Plaintiffs discovered that as result of alleged fraud perpetrated upon them by personal defendant, their home had been sold by series of transactions that included mortgage in favour of defendant bank — Personal defendant sold title to plaintiffs' home to defendant purchasers — Plaintiffs brought action against defendant bank and personal defendant and defendant purchasers in fraud — Action was allowed in part — Personal defendant fraudulently registered security interest against plaintiffs' title and fraudulently transferred title of property to himself — Personal defendant never acquired legitimate interest in plaintiffs' property — Defendant's actions were motivated by greed and malice and his oppressive and high-handed conduct offended sense of decency — Plaintiffs were awarded $25,000 in punitive damages.

Annotation

The *Durrani* case has been used to showcase the effects of fraud under the Ontario *Land Titles Act* (see e.g. Brian Bucknall's excellent article, "Fraud and Forgery under the *Land Titles Act*", The Six Minute Real Estate Lawyer - 2000, The Law Society of Upper Canada Continuing Legal Education, November 28, 2000, c. 4). While *Durrani* has been popular as a segue to a modern discussion of the competing doctrines of "immediate indefeasiblility of title" and "deferred indefeasibility of title" (phrases initially coined by Marcia Neave in her seminal piece, "Indefeasibility of Title in the Canadian Context" (1976) 26 *University of Toronto Law Journal* 173), *Durrani* is an even better showcase of the continuing applicability of the doctrine of actual notice under the *Land Titles Act*.

The facts in *Durrani* are simple. A rogue acquires title through forgery. The rogue then sells the property to a purchaser which the court found had actual notice of the rogue's invalid title. That purchaser, in turn, finances the purchase by mortgaging the property to a mortgagee which had no actual notice of the infirmity of the rogue's title. Under such circumstances, Madam Justice Epstein identifies two innocents: the original landowner (whose title had been, in effect, stolen), and the mortgagee (who was granted the charge based on the registered title without notice that the chain of title contained a forgery). By way of corollary, the court identifies two non-innocents: of course, the original forger, but also the purchaser who takes with notice of the title infirmity

As between the two innocents, the early common law doctrine of *nemo dat quod non habet* would have seen the title revert to the original owner, free from the claims of the forger, its purchaser and the purchaser's mortgagee. By operation of the strict reading of the *Land Titles Act*, however, the title would have passed from the original owner through the forger to the purchaser, and through the purchaser to the mortgagee. Because of *Dominion Stores Ltd v. United Trust Co.* (1976), [1977] 2 S.C.R. 915, 71 D.L.R. (3d) 72, 1 R.P.R. 1, 11 N.R. 97 (S.C.C.), however, the purchaser cannot assert her title under the *Land Titles Act* because she had actual notice of the impropriety of the title through which she took. Accordingly, she was not an "innocent" *per se* and could not rely on the registers to invoke the deemed title normally afforded by the *Land Titles Act* (for a general discussion of the continuing role of the doctrine of actual notice under the Ontario Land Titles system, see also Lem and Angelini, Annotation on *DeGasperis Muzzo Corp. v. 951865 Ontario Inc.* (2000), 35 R.P.R. (3d) 243 (Ont. S.C.J. [Commercial List])).

In *Durrani*, the mortgagee (who was a true innocent relying on the registers without notice of impropriety) ultimately kept its charge on the property, with the fee being stripped from the purchaser and reverting to the original owner (together, presumably, with a claim by the original owner against the compensation fund maintained under the *Land Titles Act* in the all too likely event that the mortgage debt is not paid by the purchaser).

Furthermore, it is somewhat interesting to note that the court in *Durrani* did not actually find that the purchaser had actual notice of the forgery itself. Instead, the purchaser merely had actual notice of " . . . simply too many irregularities . . . not to have had concerns about the validity of [the forger's] interest". Historically, at least, constructive notice (what the purchaser ought to have reasonably known) was never quite enough to vitiate the operation of the deemed title (for the Ontario position, see generally *Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd.* (1996), 9 O.R. (3d) 350,

3 R.P.R. (3d) 174, 5 O.T.C. 69 (Ont. Gen. Div.)). In *Durrani*, such actual notice on the part of the purchaser was obtained by having marketed the property herself, as well as through a brief phone call she made to the true owner on the day before closing. It may be of some interest that the court considered the phone call itself to have been "key" to establishing actual notice on the part of the purchaser.

Jeffrey W. Lem

Eric R. Angelini

Table of Authorities

Cases considered by *Epstein J.*:

Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd. (1996), 29 O.R. (3d) 350, 3 R.P.R. (3d) 174, 5 O.T.C. 69 (Ont. Gen. Div.) — considered

Denise Construction Ltd. v. Shaddock (1983), 31 R.P.R. 44 (B.C. S.C.) — referred to

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

Fort Garry Trust Co. v. Sutherland (1980), 14 R.P.R. 270, 59 N.S.R. (2d) 298, 125 A.P.R. 298 (N.S. T.D.) — referred to

Irving Oil Ltd. v. S & S Realty Ltd. (1983), 20 B.L.R. 288, 44 N.B.R. (2d) 602, 116 A.P.R. 602 (N.B. Q.B.) — referred to

Irving Oil Ltd. v. S & S Realty Ltd. (1983), 48 N.B.R. (2d) 1, 126 A.P.R. 1 (N.B. C.A.) — referred to

MacDonald v. Canada Kelp Co., [1973] 5 W.W.R. 689, 39 D.L.R. (3d) 617 (B.C. C.A.) — referred to

McDougall v. MacKay, 64 S.C.R. 1, [1922] 3 W.W.R. 191, 68 D.L.R. 245 (S.C.C.) — referred to

Mutual Trust Co. v. Creditview Estate Homes Ltd. (1994), 28 C.B.R. (3d) 208, 41 R.P.R. (2d) 217 (Ont. Gen. Div.) — considered

Mutual Trust Co. v. Creditview Estate Homes Ltd. (1997), 34 O.R. (3d) 583, 149 D.L.R. (4th) 385, 12 R.P.R. (3d) 1, 49 C.B.R. (3d) 113, 102 O.A.C. 246 (Ont. C.A.) — referred to

Pitcher v. Shoebottom (1970), [1971] 1 O.R. 106, 14 D.L.R. (3d) 522 (Ont. H.C.) — referred to

R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — considered

Toronto (City) v. Rudd, [1952] O.R. 84, [1952] 2 D.L.R. 578 (Ont. Master) — referred to

Whiten v. Pilot Insurance Co., [1999] I.L.R. I-3659, 170 D.L.R. (4th) 280, 117 O.A.C. 201, 42 O.R. (3d) 641, 32 C.P.C. (4th) 3 (Ont. C.A.) — considered

Statutes considered:

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

Pt. IX — referred to

Pt. X — referred to

s. 25 — considered

s. 78(4) — considered

s. 87 — considered

s. 155 — considered

s. 159 — considered

s. 160 — considered

Land Transfer Act, 1875 (38 & 39 Vict.), c. 87
Generally — referred to

Real Estate and Business Brokers Act, R.S.O. 1990, c. R.4
s. 30 — referred to

ACTION by plaintiffs in fraud.

***Epstein J.*:**

Reasons for Decision

1 In June of 1995, the plaintiffs (the "Durranis") went out to purchase a lawnmower. In the course of a routine credit check they were shocked to learn about a sizeable judgment that had been registered against title to their home known municipally as 1 Gilroy Drive, in Scarborough Ontario registered under the *Land Titles Act*, R.S.O. 1990, c. L-5 (the "Act"). This was the beginning of what can only be described as a nightmare for the Durranis. They went on to learn that as a result of a fraud perpetrated upon them by someone who they had never met, their home had been sold out from under them in a series of transactions that included a mortgage being placed on the property in favour of the Royal Bank of Canada (the "Bank"). This action involves the competing claims to the Durranis' home (the "property") arising from this fraud.

The Facts

2 The Durranis have been married to each other for 38 years and have 3 children, a son who is 37, a son, Auran who is 35, and a daughter Fawzia who is 30. Mr. and Mrs. Durrani are, for the most part, retired after having worked in the travel business for many years. They are people of modest means. The home that is the subject of this action is one in which they have lived for 28 years. It is their primary asset and forms the security for their retirement.

3 Mr. Durrani is not well. He is an insulin dependent diabetic. In 1994, he had a stroke and then in 1998, suffered a heart attack. Although he was in the courtroom for much of the trial, he did not testify due to his obviously weakened condition.

4 At some point, probably in about January 1992, Auran Durrani was introduced to the defendant Gideon Augier. Auran Durrani was advised that Mr. Augier could assist him with the incorporation of a company that Auran Durrani required for his business interests. The two men discussed a fee of $10,000 for the services to be rendered by Mr. Augier. Following an initial meeting draft articles of incorporation were prepared that Auran Durrani signed. There is no evidence that Mr. Augier did any other work to assist Auran Durrani in respect of this venture. As far as Auran Durrani is concerned his signing the draft articles of incorporation for a company in a project that never moved forward marked the end of his business relationship with Mr. Augier.

5 Auran Durrani, consistent with his evidence that no work was ever done beyond preparing the draft articles of incorporation, denied ever making out a cheque in favour of Mr. Augier. Mr. Augier, on the other hand, testified that based on the work that was done Auran Durrani gave him a cheque for $10,000 but the cheque was dishonoured. Other than this testimony there was no evidence to support a finding that Auran Durrani ever acknowledged owing any money to Mr. Augier or having given him any cheque. Mr. Augier brought to my attention a document that purported to relate to a dishonoured cheque but there was nothing to connect this document to Auran Durrani or to anything else relevant to this action.

6 Whatever the situation between Auran Durrani and Mr. Augier may have been, it is clear that in February of 1992, Mr. Augier sued Auran Durrani and, curiously, also sued his own company with respect to the alleged agreement to pay $10,000. Default judgment was obtained against Auran Durrani although he denies having been served with the statement of claim.

7 Early in 1995, 3 years later, Augier tried to locate Auran Durrani and contacted the Durrani household. Fawzia Durrani testified that she received a telephone call from someone who identified himself as "Augier". The caller indicated that he wanted to speak to Auran Durrani about the repayment of a debt. In response to her refusing to provide details about her brother's whereabouts, the caller uttered a threat to the effect that she would "see what happens". While Mr. Augier denies the threat, I accept the evidence of Ms. Durrani. I find, given my overall impression of Mr. Augier throughout the trial and the extent to which he was prepared to compromise the truth, he is perfectly capable both of lying and of trying to take advantage of people. This contact and the accompanying threat were the start of Mr. Augier's assault on the Durrani family.

8 The next move in Mr. Augier's attack involved the creation of a document entitled a "Collateral Loan Agreement" bearing the date of January 3, 1992. This document was based on certain information Mr. Augier had been able to obtain as a result of his contact 3 years earlier with Auran Durrani. This information related to the address of the property and the names of those connected with it. The document purports to set out a loan agreement between Mr. Augier in trust as lender, and Auran Durrani and several companies, including Durrani Travel Services Inc., as borrowers of $158,000.00 in U.S. currency. The Collateral Loan Agreement is stated to grant the lender various forms of security for the loan including a charge in 1 Gilroy Drive. It is purportedly signed by Auran Durrani, as borrower and guarantor, and witnessed by Mr. Augier. On March 23, 1995 Mr. Augier arranged to have notice of the Collateral Loan Agreement registered on title to the property as a notice of security interest identified as instrument number C940459.

9 Two weeks later Mr. Augier commenced an action for foreclosure and for a writ of possession in relation to the property based on the Collateral Loan Agreement. On May 3, 1995 Mr. Augier obtained default judgment.

10 During this time Mr. Augier was actively trying to dispose of his alleged interest in the property. He listed it for 2 weeks with Ms. Bilar, an agent with Homelife Champion Real Estate agency. In fact, by May 15, 1995 Mr. Augier believed he had found a purchaser. While the prospective purchaser identified at that point in time did not end up purchasing the property, the evidence demonstrates that Mr. Augier was very anxious to secure a purchaser who was prepared to close quickly.

11 However, in the course of all of this Mr. Augier discovered a problem. His lawyer, Mr. Newbury performed a subsearch on the property and found out that Mrs. Durrani had an interest in it. To remedy the problem Mr. Augier "found" a rather curious document entitled an "Additional Security Addition" that was purportedly executed by Mrs. Durrani on January 16, 1992. Based on an alleged default under this document Mr. Augier, through the assistance of Mr. Newbury, amended the statement of claim to add Mrs. Durrani as a defendant. On June 13, 1995 Mr. Augier obtained a second default judgment, this one against Mrs. Durrani as well.

12 By profession, Mr. Augier has held himself out to be a paralegal and at other times a member of the clergy. The evidence is that he was and may still be associated with a firm of paralegals called McGuire, Lewis and Associates. The web site indicates that this paralegal operation provides services such as immigration legal services, business promotion and "arranging marriages with Russian women". Mr. Augier's connection with this business explains several things. It explains his knowledge of and access to the litigation system in a manner, I might add, currently free of any form of regulation. It also explains his ability to gain access to the information he needed to perpetrate the fraud on the Durranis.

13 It would appear that Mr. Augier's income earning activities were not limited to his work with the paralegal firm. Mr. Augier also sold security that he held on various properties in Ontario. This "security" included mortgages on properties, mortgages that were subsequently found to be forgeries.

14 Mr. Augier impressed me as being very intelligent. He is also an ambitious man but one with no scruples. This combination makes him dangerous. His admitted criminal record is the best evidence of this. In May 1987, Mr. Augier was convicted of one count of fraud and in September of that year he was again convicted of two counts of fraud. In 1991 he was convicted of a far more serious fraud involving holding himself out to be a qualified mortgage broker. Part of Mr. Augier's sentence for the 1991 conviction involved the restitution of moneys lost to the victims. It is undisputed that these moneys were never paid. In 1998, Mr. Augier pled guilty to 3 counts of fraud involving the falsification of mortgages. The facts behind the 1998 convictions suggest that Mr. Augier forged certain mortgages with the intention of defrauding his victims of their interest in their properties. Again, part of his sentence was a form of restitutionary payment. Again, Mr. Augier did not make the payment. On December 6, 1999, Mr. Augier was convicted of the offence of attempting to defraud Dr. Dehmoubed and of uttering a forged document, being a collateral loan agreement. At the time of the trial before me Mr. Augier was awaiting sentencing in respect of these most recent convictions.

15 In all circumstances where Mr. Augier's evidence was in conflict with that of the Durrani's, I accept that of the Durranis. Mr. Augier's entire story was quite unbelievable. As an example one need only turn to the chronology of events. There is something incongruous about Mr. Augier's position that in January of 1992 he advanced a substantial amount of money on behalf of a friend and took no steps taken to formalize the security provided. Then, if one were to accept Mr. Augier's evidence, 3 years later for some unexplained reason, he awakens to the situation involving the Durranis' failure to honour this sizeable debt and registers the security interest provided for in the Collateral Loan Agreement against title to the property. The hiatus is even more incredible given Mr. Augier's testimony that during this 3 year period Auran Durrani allegedly became indebted to him as a result of the $10,000 dishonoured cheque. The registration of the security interest was followed by an inexplicable flurry of activity involving enforcement steps taken at what only could be classified as breakneck speed.

16 Mr. Augier's specific version of events flies in the face of common sense. In general, his testimony can only be characterized as displaying an evident disregard for the truth.

17 I accept the evidence of Mrs. Durrani and Auran Durrani that no one in the Durrani family borrowed money from or through Mr. Augier that was secured by the property. There is no reliable evidence to suggest otherwise. Further, there is no credible evidence to support a finding that any member of the Durrani family signed either of the 2 documents. I find that it is beyond doubt that both the Collateral Security Agreement and the Additional Security Addition to be forgeries created by Mr. Augier in order to defraud the Durranis.

18 This finding is further supported by the fact that Mr. Augier had used the format of these documents in previous fraudulent activities most notably those involving Dr. Dehmoubed. The doctor testified at trial to the effect that the circumstances giving rise to his being defrauded in respect of land owned by him were very similar to those experienced by the Durranis. He identified 2 documents entitled a Collateral Loan Agreement and an Additional Security Addition that had been improperly registered against title to his property and testified that his signature had been forged on each of them.

19 It is of note that the documents in the Dehmoubed matter are strikingly similar in wording to the 2 documents in question in this action. Evidence of similar facts is admissible when it is logically probative or relevant to a material issue in the case, and

it is not unduly oppressive or unfair to the other side: J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada* 2nd ed. (Toronto: Butterworths, 1999) at 602. When a real and substantial connection exists between the act or allegation made and the previous transaction, the previous transaction is admissible to rebut a defence such as lack of intent, or accident or to prove the fact of the act or allegation made: *MacDonald v. Canada Kelp Co.* (1973), 39 D.L.R. (3d) 617 (B.C. C.A.). In this case, it is clearly relevant and probative to know that there are other cases in which Mr. Augier has used documents and conducted transactions bearing close resemblance to the documents and transactions at issue here. A real and substantial connection clearly exists in the documents used and strategies employed by Mr. Augier between the Dehmoubed transaction and the Durrani transaction. This connection supports my finding that the Durrani charge and related documents were fraudulent.

20 I return to the chronology. Mr. Augier's activities finally came to the attention of the Durranis in the course of their investigating why they had a problem with their credit. They consulted a lawyer by the name of Mr. McGee and learned that a person by the name of Gideon Augier had registered a judgment against their property. This they could not understand. The evidence is that except for a mortgage associated with the purchase of the property, a mortgage that had been paid off, the Durranis had never encumbered their home. On June 23, 1995, Mr. McGhee put Mr. Newbury on notice that his clients disputed the validity of the judgment and had instructed him to move to set it aside. Mr. McGhee's letter of June 23, 1995 reads as follows:

> June 23, 1995
>
> VIA FAX NO. (905) 362-4049
>
> R. Geoffrey Newbury
>
> Barrister & Solicitor
>
> Suite 1002
>
> 95 Wellington Street West
>
> Toronto, Ontario
>
> M5J 2V4
>
> Dear Mr. Newbury:
>
> This is to confirm our telephone conversation of today. I have been retained by Mr. Asad Khan Durrani, Mrs. Zaib Durrani and their company Durrani Travel Services Ltd. with respect to proceedings that you are conducting against them on behalf of Gideon McGuire Augier, in trust.
>
> I understand that you may have obtained a default judgment against my clients based on an alleged mortgage foreclosure. These proceedings only just came to my clients' attention as a result of a routine credit check.
>
> I have obtained some documents from the court file which my clients have reviewed, including the pleadings and affidavits of service. They inform me that they contain many serious misrepresentations and matters they have no knowledge of.
>
> I am in the process of obtaining further information with respect to the involvement of Auran Durrani and hope to be in touch with you shortly. I can assure you that Mr. and Mrs. Durrani are business people of complete integrity, that they have operated Durrani Travel Ltd. for many years, and that their son Auran co-signed any mortgage on his behalf. If you have any other or different information, would you please convey it to me immediately. In particular, I would like to see a copy of the mortgage referred to in the statement of claim.
>
> I hereby place you on notice that the action and judgment are ill-founded as against my clients and I will be taking steps to set aside these proceedings and any judgment you have obtained. I will also be requesting that the police investigate what is apparently a fraudulent claim or at least a claim based on fraudulent documents.

In the meantime, I understand that your client has entered into a purchase and sale agreement with respect to the Durrani's property. This too will have to be set aside if necessary. I would ask you to take no further steps to enforce the judgment or complete the sale until all matters have been clarified.

I look forward to receiving the mortgage document and any other information you may have at your very earliest convenience.

Yours truly,

David McGhee

21 It is of considerable significance that Mr. McGhee's advice to Mr. Newbury concerning the dispute over the validity of the judgment did not deter Mr. Augier from his efforts to dispose of the property. A prospective purchaser by the name of Mr. Garda wanted to purchase Mr. Augier's interest with the intention of flipping it to Mr. Mangos for $190,000. Mr. Mangos' agent on this proposed transaction was Joanna Jones a real estate agent with the same firm as Ms. Bilar. When Ms. Bilar's 2 week listing expired, Ms. Jones became actively involved in trying to sell the property.

22 The transaction contemplated between Mr. Augier and Mr. Garda did not come to fruition as Mr. Augier could not provide Mr. Garda the opportunity to inspect the property.

23 Ms. Jones then arranged for Mr. Augier to sell the property directly to Mr. Mangos for $176,000. The agreement of purchase and sale concerning this intended transaction provided for a commission of 7% to be paid to Ms. Jones personally and not to the real estate company with which she was associated. This transaction failed to close as well and shortly thereafter Mr. Augier entered into an agreement to sell the property to the defendants Melanie and Sophia Zettler for $116,000. This sale closed on August 17, 1995.

24 The Zettler sisters are Ms. Jones daughters and were, at the time, in their late teens. While the Zettlers are formally named as defendants, it is clear that their only connection is that they are the registered owners of the property. There is no evidence that they actively participated in any of the dealings involving the property other than to execute various documents associated with the purchase, no doubt on the instructions of their mother.

25 I note as well that at the time the Zettlers purchased the property Mr. Newbury was acting for them in an estate matter.

26 The purchase and sale agreement signed by the Zettlers and Mr. Augier and witnessed by Ms. Jones included a Schedule "A" that, among other things, made the transaction conditional on the purchasers' solicitor being satisfied as to the validity of the foreclosure judgment and the writ of possession obtained and the removal of a caution that had been put on title by Mr. Garda relating to his earlier interest in purchasing the property. As well, the parties to the transaction entered into a "Side Agreement" in which the challenges having to do with obtaining vacant possession were addressed and in which the purchasers acknowledged having been provided with full particulars concerning all 'proceedings' involving the property. I note that little if any evidence was adduced concerning the circumstances surrounding the preparation and execution of Schedule "A" or the Side Agreement.

27 The Zettlers paid the deposit of $25,000 from their inheritance. Ms. Jones approached the Royal Bank to assist in financing the purchase. As a result, an $87,000 mortgage on the Durrani property, with the Royal Bank as mortgagee and the Zettlers as mortgagors, was registered on the title to the Durrani property on August 17, 1995 as instrument number C97775.

28 It is clear that for the purpose of obtaining the mortgage, Ms. Jones gave the Bank a different agreement of purchase and sale than the one signed with Mr. Augier. Specifically, the copy of the agreement Ms. Jones provided to the Bank did not include a copy of Schedule "A". Predictably, Ms. Jones also did not provide the Bank with a copy of the Side Agreement.

29 As previously indicated, all of this transpired after Mr. McGhee had advised Mr. Newbury that he had instructions to set aside the default judgment. The motion was originally returnable on July 31, 1995 and was then adjourned to August 14.

Shortly before that dates the Durranis changed lawyers and Minden, Gross, Grafstein & Greenstein became solicitors of record. The return date for the motion was again adjourned as new counsel wanted to conduct cross-examinations.

30 The evidence of Mr. Augier does not accord with that of Mr. Newbury concerning the decision to close in the face of the pending motion. Mr. Augier testified that Mr. Newbury assured him he could proceed with the sale as long as counsel other than Mr. Newbury represented him. Mr. Newbury denied having given Mr. Augier this advice. His evidence was that he told Mr. Augier not to proceed with the sale and he had no further involvement. There was no specific evidence led that directly linked Mr. Newbury to the sale to the Zettlers.

31 In any event shortly before the closing, Mr. Augier did change lawyers and retained Mr. Easterbrook to represent him in the sale of the property. I find that Mr. Augier well knew that it was totally improper for him to complete the sale in light of the pending motion. His actions in proceeding with the sale in light of his experience as a paralegal, what he knew about title to the property and the pending motion are nothing less than outrageous. Given that the motion materials had been served, Mr. Augier also knew that using the services of Mr. Newbury on the sale would be highly problematic and that is why he retained Mr. Easterbrook. I also find that Mr. Newbury either knew that Mr. Augier was proceeding to sell the property to Ms. Jones or that he turned a blind eye to it. Either way, the conduct of Mr. Newbury was, at the very least, questionable.

32 I also note that Mr. Easterbrook and Mr. Augier had done business together on previous occasions. Specifically, Mr. Easterbrook's office had been involved in a number of the other transaction in relation to which Mr. Augier had been convicted of fraud.

33 The sale to the Zettlers closed on August 17, 1995. It is an admitted fact that even though the agreement of purchase and sale and the deed show the Zettlers as purchasers, the Zettlers took title to the property on behalf of or in trust for their mother, Ms. Jones. On the same day, Mr. Augier, through the offices of Mr. Easterbrook, took steps to amend the register to reflect Mr. Augier's interest arising from his amended judgment and the writ of foreclosure.

34 The evidence of Ms. Durrani is that early that morning she received a telephone call from a woman who identified herself as Ms. Jones. The caller announced that she was "buying the house". Ms Durrani responded by saying that her home was not for sale and that there had been acts of fraud the result of which was that the matter was before the Courts. Ms. Durrani's testimony is that she suggested to the caller that she contact Mr. Schein, the lawyer at Minden Gross with carriage of the matter. To that the caller apparently replied that, no, she was buying the property and hung up. Ms. Jones disputes Ms. Durrani's testimony concerning this call. Ms. Jones said that some time after the closing she asked her lawyer to exercise on the writ of possession. In that context she telephoned Ms. Durrani and said I have purchased the house. According to Ms. Jones the purpose of the call was to enable the Durranis to vacate "with dignity".

35 Mrs. Durrani's evidence concerning the telephone call was not successfully challenged on cross-examination. Mrs. Durrani impressed me as a sincere person, somewhat beleaguered by the demands of trying to recover unencumbered title to her home and looking after her ailing husband. Later in these reasons I comment upon my impression of Ms. Jones. I find, in all of the circumstances, that Ms. Jones did place the telephone call as described by Mrs. Durrani. While the timing may appear somewhat curious, Ms. Jones' conduct throughout was consistently marked by questionable judgment.

36 A factual issue in dispute is Ms. Jones' state of mind at the time of closing concerning the irregularities associated with the sale. A finding must be made concerning what Ms. Jones knew about Mr. Augier's alleged interest in the property and the validity of his purported entitlement to be in a position to sell it.

37 I find that Ms. Jones knew, prior to closing, at least that there was a serious dispute with respect to Mr. Augier's interest in, and therefore his right to sell, the property. There were simply too many irregularities associated with the listing of the property for an experienced real estate agent such as Ms. Jones not to have had concerns about the validity of Mr. Augier's interest. As well there is the telephone call that I find Ms. Jones made on the morning of August 17, 1995.

1. There was an initial unexplained 2-week listing followed by a frenzy of activity all with the intent of securing a quick sale.

2. Ms. Jones purchased the property without ever seeing, let alone inspecting, the inside. Ms. Jones' response to the questions put to her as to why she did not simply go up to the front door of the property and ask to see it, were quite improbable.

3. The price was low compared to demonstrable market value. The explanation offered by Ms. Jones concerning why she was able to purchase the property at such a low price is not credible. Ms. Jones was well aware that this was a 'steal', not a 'deal'.

4. The documentation surrounding the sale was suspicious. As previously indicated, the copy of the agreement of purchase and sale Ms. Jones gave to the Bank is dated August 17, 1995 was not the original agreement signed by all parties. Schedule "A" that formed part of the agreement Mr. Augier and the Zettlers signed was not attached to the copy of the agreement given to the Bank. Clearly, Ms. Jones had to have known that editing the documents relating to the transaction was improper. Then there was the Side Agreement clearly entered into with the intent of keeping part of the deal confidential. The combination of the altered agreement of purchase and sale and the existence of the Side Agreement indicates not only an awareness that this sale was problematic but also a willingness to conceal the problems associated with title, at least from the Bank and perhaps others as well.

38 To complete the chronology, by order dated August 30, 1995 Justice John MacDonald enjoined the Zettlers from taking any steps further to the writ of possession. Then on November 8, 1995 Justice Lane set aside the $10,000 judgment and the foreclosure judgment.

The Issues

These startling facts give rise to the following issues.

1. Did Mr. Augier ever have a legitimate interest in the property that formed the basis of his writ of foreclosure?

2. Did Ms. Jones and the Zettlers obtain a legitimate interest in the property and acquire an indefeasible interest under the *Land Titles Act*?

3. Does the Royal Bank have a valid charge on the property?

4. What relief is available under the *Land Titles Act* for any party found to have a valid interest in the property?

Analysis

39 Since much of the analysis depends on the affect of the land titles legislation on the competing interests in the property, a review of the land titles system may provide a helpful background.

40 The land titles system was established in Ontario in 1885, and was modeled on the English *Land Transfer Act* of 1875. It is currently known as the *Land Titles Act*, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

41 The essential purpose of land titles legislation is to provide the public with security of title and facility of transfer: Di Castri *Registration of Title to Land* vol. 2 looseleaf (Toronto: Carswell, 1987) at 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

42 The philosophy of a land titles system embodies three principles; namely, the mirror principle, where the register is a perfect mirror of the state of title, the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register, and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These

principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at 174.

Indefeasibility of title has been defined as:

> [A] convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve the registered proprietor being protected against any claim whatsoever .... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him. *Frazer v. Walker*, [1967] A.C. 569 (P.C.) at 580-81.

43 Several important sections of the *Act* clearly contemplate providing some form of indefeasibility of title to those who register land and instruments affecting land. For example, section 78(4) provides that an instrument, when registered, is deemed to be effective according to its nature and intent. Section 87 provides that a transfer for valuable consideration of registered land, when registered, confers on the transferee an estate in fee simple in the land transferred, subject to encumbrances noted on the register or provided by statute.

44 I now turn to the particular sections of the *Act* relevant to the issues raised by the facts of this case. Those are the sections pertaining to fraud and rectification of the register found in parts IX and X.

45 The part of the *Act* entitled Fraud has only 3 sections. It starts with section 155 that provides as follows.

> S. 155 Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.

46 The part then goes on to make certain fraudulent acts offences and gives the land registrar powers to address the fraud in various ways most notably through rectification of the register.

47 This takes me to the next part of the *Act*, part X, that is entitled Rectification of the Register. This part provides that the land registrar, and in some circumstances the court, has the power to correct errors and to determine what damages, if any, may be paid to any person claiming to have been injuriously affected by the correction.

48 The jurisdiction of the court in this regard is set out in sections 159 and 160 that provide as follows.

> S. 159 Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.
>
> S. 160 Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

49 It is significant that both sections dealing with the power of the court to rectify the register start with the words "subject to any estates or rights acquired by registration under this Act". These words relate back to the concept of indefeasibility of title and to the fundamental objectives of the land titles system discussed earlier. Their import is as follows. Where a bona fide purchaser for value succeeds in becoming a registered owner, the fact of registration is conclusive. Indefeasibility of title is a consequence or incident of that registration. Accordingly, the court does not have jurisdiction to rectify the register if to do so would interfere with the registered interest of a bona fide purchaser for value in the interest as registered.

50 In *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.) the plaintiffs had a charge registered against land registered under the *Act*. A forged cessation of the charge was later registered. Then the Royal Bank of Canada registered a mortgage against the land. The plaintiffs sued to have their mortgage recognized in priority over that of the bank despite the forged cessation of their charge. The Court of Appeal held that the Royal Bank had a valid mortgage, and its interest in the land prevailed over that of the plaintiffs. Goudge J.A. noted that section 155 of the *Act* modifies the common law rule that a forged document is a nullity and is void, making this rule subject to the provisions of the *Act*, which in keeping with the principle that the register is a mirror of the state of the title, deems an instrument, once registered, effective according to its nature and intent, where registered dispositions for valuable consideration are involved. He concluded that the forged cessation of charge was effective as against the bank. The Royal Bank retained its interest despite the forgery because it was a bona fide purchaser for value who relied on the cessation of charge on the register.

51 As far as the court is concerned, when it comes to dealing with competing interests of innocent parties affected by registration, the interests shown in the registrar prevail and there is no jurisdiction to rectify the title even when, as in the matter before me, the result may appear to be inequitable.

52 This is not to say that equity has no application to claims governed by the *Act*. The importance of equity has been noted by the Supreme Court of Canada in *Dominion Stores Ltd. v. United Trust Co.* (1976), 71 D.L.R. (3d) 72 (S.C.C.), at 98 in rejecting the proposition that the *Land Titles Act* in Ontario had abrogated the equitable principle of actual notice. The Ontario Court of Appeal also recognized the continued application of equitable principles in affirming the decision of Adams J. in *Mutual Trust Co. v. Creditview Estate Homes Ltd.* (1994), 41 R.P.R. (2d) 217 (Ont. Gen. Div.) affirmed, (1997), 34 O.R. (3d) 583 (Ont. C.A.), that the equitable doctrine of subrogation was not abrogated by the *Land Titles Act* in Ontario.

53 In *Mutual Trust*, *supra* a second mortgage had been negotiated to refinance the first mortgage, and the second mortgagee had registered the discharge of the first mortgage and the new mortgage without confirming that the respondent would subordinate a certificate of pending litigation it had filed in relation to an action to recover from an indemnity agreement. Adams J. applied the equitable doctrine of subrogation in order to allow the second mortgagee to subrogate into the position of the first mortgagee, thus attaining priority over the holders of the certificate, despite the fact the certificate had been registered first. Adams J. noted s. 159 of the *Act* acknowledges the power of the Court to apply equitable principles *subject to the rights acquired by registration under the Act* and found that applying the doctrine of subrogation did not prejudice the rights that the certificate holder had acquired through registration. The certificate had been registered second to a mortgage against the property and through subrogation, the current mortgagee would simply take the place of that mortgagee and the certificate holder would remain second to a mortgage. The opposite result would in fact cause the certificate holder to receive a windfall rather than the rights they acquired by registration. [emphasis added]

54 The significance of all of this is that while principles of equity remain relevant to the determination of issues under the *Act*, the opening words of sections 159 and 160 cannot be overlooked. In keeping with the overall objectives of the legislation, the court's ability to invoke or apply equitable doctrines is limited by the rights innocent people acquire under the *Act*.

1. Mr. Augier's Interest in the Property

55 The Durranis acquired the property for valuable consideration and were the registered owners of the land in fee simple with an absolute title prior to Mr. Augier's fraudulent registration of a security interest and his eventual fraudulent transfer of the title of the property to himself as instrument number C961567. This instrument would be absolutely void if unregistered, since it is fraudulent. While it would create a good root of title to a bona fide purchaser for value, the registration does not give Mr. Augier an interest in the property when he has none.

56 Mr. Augier never had and never acquired a legitimate interest in the property.

2. Do the Zettlers Have Right to Title in the Property?

57 While Mr. Augier's transfer of title to himself was fraudulent and cannot form the basis for any legitimate claim to title on his part, it is necessary to determine whether it can form the root of good title for the Zettlers, the subsequent purchasers of the property. At common law their title would be void since it was based on Mr. Augier's fraudulent transfer of title. Nevertheless, the Zettlers' title to the property would be protected under s. 155 of the *Act* if their registered transfer was pursuant to a registered disposition for valuable consideration: See *R.A. & J., supra.*

58 It is always a necessary precondition for valid title that the purchaser or mortgagee be a bona fide or good faith purchaser for value without notice. As has already been observed, the Supreme Court in *United Trust Co., supra*, held that the *Land Titles Act* in Ontario has not abrogated the principle of actual notice. Mr. Justice Spence made this clear in the following paragraph found at page 98:

> However, in Ontario, only a few years after the enactment of the Land Titles Act, the Courts have expressed a disinclination to imply such an extinction of the doctrine of actual notice. There is no doubt that such doctrine as to all contractual relations and particularly the law of real property has been firmly based in our laws since the beginning of equity. It was the view of those Courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms.

59 The equitable principle that only a bona fide purchaser for value without notice will receive the interest bargained for is also embodied in section 87 of the *Act* which holds that a transferee only receives an estate in fee simple upon registration (subject to other registered interests), where it is a transfer for valuable consideration of registered land with absolute title. Section 155 of the *Act* has the same limitation where the common law rule that a forged document is a nullity and is void is only modified by the *Act* in respect of registered dispositions for valuable consideration: See *R.A. & J., supra* at para.16.

(a) actual notice

60 The Zettlers contend they are bona fide purchasers for value without notice. Whether the Zettlers had actual notice of a competing interest in the property is a question of fact. The burden of proving the absence of notice is on the person alleging that he or she is a purchaser for valuable consideration without notice: *McDougall v. MacKay* (1922), 64 S.C.R. 1 (S.C.C.), at 7; *Toronto (City) v. Rudd,* [1952] O.R. 84 (Ont. Master); *Pitcher v. Shoebottom* (1970), [1971] 1 O.R. 106 (Ont. H.C.); *Fort Garry Trust Co. v. Sutherland* (1980), 14 R.P.R. 270 (N.S. T.D.), at 284.

61 Actual notice is knowledge, not presumed knowledge as in the case of constructive notice. The concept of actual notice has most often been discussed in the context of the *Registry Act*, the second form of land registration in Ontario. Recently Salhany J. in *Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd.* (1996), 29 O.R. (3d) 350 (Ont. Gen. Div.) reviewed the authorities on the definition of actual notice and concluded that the term "actual notice":

> [M]eans actual notice (as opposed to constructive notice) of the nature of the prior agreement and its legal effect. There is no requirement that there be actual notice of the precise terms of the agreement, such as the amount of the consideration passing between the parties or the term of the agreement. The test, in my view, is whether the registered instrument holder is in receipt of such information as would cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument.

62 Thus, a person has actual notice if he or she is aware of the existence of a legal right. It is not necessary that the person have knowledge of the precise details of that legal right. In circumstances that involve the transfer of title, a purchaser does not need to have actual knowledge of the particular person who is in fact the true owner or holder of title of the property. It is sufficient for actual notice that the purchaser is aware that the person with whom they are dealing as the vendor does not have a legitimate claim to the title. This follows, since the logical inference to draw from the knowledge that the vendor with whom the purchaser is dealing does not have a legitimate right to the title is that someone else is, in fact, the true owner.

63 Did Ms. Jones have actual notice of the invalidity of Mr. Augier's interest in the property or was she a bona fide purchaser for value without notice? I find that prior to the day of closing Ms. Jones recognized a shady deal. Notwithstanding, she was

prepared to go ahead. She clearly had motivation to do this. Given what she knew about the earlier offers compared to the price for which she was able to purchase the property, she believed she had an opportunity to make a quick profit. She was not only prepared to go along with what she knew had to be a questionable transaction but also to take steps to protect the transaction from close scrutiny by entering into the Side Agreement and then failing to provide the full documentation to the Bank. She also took steps to protect herself from personal liability by putting title in the names of her young daughters.

64 I have already identified the various irregularities associated with the listing and sale of the property, irregularities that should have alerted anyone, particularly an experienced real estate agent to the fact that something was very wrong. Further, I do not accept any of the explanations provided by Ms. Jones for her conduct in this sale. I had a great deal of trouble accepting Ms. Jones's testimony. Her own evidence was illogical and simply did not make sense when considered in light of other independent evidence I accepted as valid. She was evasive and when she did actually answer a question much of her evidence contradicted other sworn evidence, some of it her own in this and other proceedings.

65 As well, Ms. Jones clearly demonstrated her willingness to participate in unethical behaviour as evidenced by her preparedness to accept a personal commission on the deal with Mr. Mangos, an agreement in direct violation of section 30 of the *Real Estate and Business Brokers Act*, R.S.O. 1990, c. R.4. The fact that, throughout the trial until argument, Ms. Jones vehemently denied that there was anything wrong with this commission agreement had a further negative impact on my ability to accept her version of the facts.

66 Key to the issue of actual notice is, of course, the telephone call that I have found was made on the morning just prior to the closing of the transaction. Ms. Jones, if not before, certainly at that point had actual notice of the problems associated with Mr. Augier's claim to the property.

67 Ms. Jones has failed to discharge her burden of establishing that she was a bona fide purchaser for value without notice.

(b) agency

68 It was admitted by the Zettlers that they took title in the property on behalf of, or in trust for, their mother. Ms. Jones was acting as agent for her daughters in the sale of the Durrani property.

69 Ordinarily, the knowledge of the agent is attributed to the principal. The principal has constructive notice of things the agent is under a duty to make known to him or her, and the principal is estopped from denying knowledge of the matters in question. Notice to the agent constitutes notice to the principle. *Denise Construction Ltd. v. Shaddock* (1983), 31 R.P.R. 44 (B.C. S.C.); *Irving Oil Ltd. v. S & S Realty Ltd.* (1983), 44 N.B.R. (2d) 602 (N.B. Q.B.); reversed on other grounds (1983), 48 N.B.R. (2d) 1 (N.B. C.A.): *CED*, Volume 1, Title 4, section 360.

70 Here Ms. Jones, while acting as the real estate agent for Mr. Augier on the sale also participated in the transaction as agent and trustee of the Zettlers. Ms. Jones had actual notice of the invalidity of Mr. Augier's title to the property and, as such, that notice is imputed to the Zettlers. I note that no separate case was advanced on behalf of the Zettlers that would support a finding that they had no notice.

(c) Conclusion with respect to the interest of the Zettlers in the Property

71 Clearly, the protection that the statute gives is to innocent persons transacting on the faith of the register. In no way can it be said that the Zettlers fall into this category. They, directly or through their agent and trustee, Ms. Jones, had actual notice of the fact that the vendor, Mr. Augier's title was not legitimate. Accordingly, they are not bona fide purchasers for value without notice.

72 I therefore conclude that at no time did the Zettlers acquire an interest in the property.

3. The Royal Bank's Mortgage

73 There is no evidence that the Bank was aware of any irregularities with the title to the property. As such, the Bank is a bona fide mortgagee for value without notice.

74 The Act is designed to protect parties such as the Bank, parties that are innocent and have relied on the register as reflecting valid title.

4. Relief Available under the Land Titles Act

(a) Rectification

75 While, as previously indicated, the court's power to order rectification is limited by rights acquired by registration under the Act, neither Mr. Augier nor the Zettlers acquired any rights by registration. I am therefore entitled to do what equity demands and that is to rectify the register to show that the Durranis have title to the property.

76 By reason of my finding that the Bank is a bona fide encumbrancer for valuable consideration without notice I do not have the authority to order rectification of the register in relation to the Bank's mortgage. While this may seem unfair to the Durranis who are innocent people who have lived in their home for a long time and have done absolutely nothing to deserve this injustice, the Bank is also an innocent party that relied on the register. The Bank therefore continues to have a valid charge against the property in the form of its mortgage registered as instrument number C961569.

77 Herein lies the conundrum. The Durranis are entitled to unencumbered ownership of the property. The Bank is entitled to its mortgage registered against the property. This situation is exactly the type of problem that the *Act* is designed to resolve.

(b) Land Titles Assurance Fund and Inability of the Court to Order Compensation

78 Through the doctrine of deferred indefeasibility of title, the land titles registration system reflects a policy choice to protect the security of title of those who are innocent parties who rely on the title. If follows that there may be those who will be deprived of legitimate interests in land under the operation of the *Act*.

79 The innocence principle of a title registration system is recognized in Ontario by the establishment and maintenance of the Land Titles Assurance Fund (the "Fund") as a means of compensating persons prejudiced by the operation of the *Act*. Generally, the way the Fund is designed to work is as follows. First, the person wrongfully deprived of an interest in land by reason of an entry on the register is entitled to recover what is just from the party responsible for the wrong. Where the individual wrongfully deprived of land is unable to recover just compensation for the loss by other means the person is entitled to have the compensation paid out of the Fund. Such a claim must be made to the Director of Titles and the liability of the Fund for compensation and the amount of compensation shall be determined by the Director subject to a right of appeal.

Disposition

80 The Durranis are entitled to a declaration that the Transfer from Mr. Augier to the Zettlers registered as instrument number C961568, the Application to Amend the Register as instrument number C961567 and the Notice of Security Interest registered as instrument number C961569 are void and unenforceable. The Transfer and the Application to Amend the Register and the Notice of Security Interest are hereby set aside. It follows that the Durranis are entitled to a declaration that they own the property as joint tenants.

81 Pursuant to section 25 of the *Act* I direct the Registrar of the Land Titles Division of Metropolitan Toronto (No.66) to rectify the register with respect to the title to the property by expunging from the register the Transfer, the Application to Amend and the Notice of Security Interest.

82 The Durranis have claimed punitive damages against Mr. Augier. In my view, if there is any conduct worthy of the most severe sanction of the court it is the despicable conduct of Mr. Augier. Motivated by greed he used the knowledge he gained from experience as a paralegal with his obvious intelligence to defraud two hard working innocent elderly people. This wrong

and the accompanying conduct was so malicious and oppressive and high-handed that it offends anyone's sense of decency. Accordingly, the two requirements for an award of punitive damages as stated by Laskin J.A. in *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.) have been met, I award punitive damages in favour of the Durranis against Mr. Augier in the amount of $25,000. I make no comment about whether this amount is one that can properly be claimed from the Fund.

83 The Zettlers counterclaimed against the Durranis for various forms of relief including a declaration that they are the rightful owners of the property and for occupation rent. For the reasons set out above the counterclaim is dismissed in its entirety. It is dismissed with costs to the Durranis.

84 The Zettlers also crossclaimed against Mr. Augier for damages for fraud or for repayment of their purchase monies. Since I have found that the Zettlers were not bona fide purchasers for value without notice from Mr. Augier, the crossclaim is dismissed but given the nature of Mr. Augier's conduct, the dismissal is without costs.

85 The Bank has counterclaimed for a declaration that it has a valid and binding mortgage. For the reasons given it is entitled to such a declaration. However, it has also claimed judgment against the Durranis for the balance owing under the mortgage or for leave to issue a writ of possession. The Bank's claim for judgment against the Durranis for the amount owing under the mortgage is dismissed without costs. The Bank does not, in the circumstances, have a monetary claim against the Durranis. I do not have to deal with what enforcement rights the Bank may have under the mortgage as the Bank, to its credit, has given its counsel instructions not to enforce its rights against the Durranis until matters have been resolved with the Fund. Based on this undertaking any enforcement proceedings under the mortgage are stayed pending the resolution of matters by the Director of Titles or further order of this court.

86 The Bank has crossclaimed against Mr. Augier and the Zettlers for relief pursuant to the mortgage. For the reasons given the Bank is entitled to judgment against the Zettlers for the full amount owing under the mortgage with costs. I anticipate that counsel will be able to agree as to the exact amount of the judgment. The Bank's crossclaim against Mr. Augier is dismissed without costs.

87 I have awarded the Durranis costs against Mr. Augier and the Zettlers. I have also awarded the Bank costs against the Zettlers. In my view, given the nature of Mr. Augier's conduct this is a proper case for the Durranis to be awarded solicitor and client costs against Mr. Augier. I have been provided with a Bill of Costs. There was no opposition to my fixing costs and so I award costs in favour of the Durranis against Mr. Augier fixed in the amount of $ 100,000.00. The Durrani's costs against the Zettlers will be on a party and party basis fixed in the amount of $15,000. The Bank is also entitled to solicitor and client costs against the Zettlers by reason of the conduct of Ms. Jones and based on the terms of the mortgage having to do with the costs of collecting on the debt secured by the mortgage. I am entitled to fix costs and having reviewed the Bank's Bill of Costs I fix the Bank's costs to be paid by the Zettlers in the amount of $ 25,000.

88 The end result of all of this is that the Durranis have title to the property and are also entitled to possession notwithstanding the fact that the property is subject to a mortgage in favour of the Bank that is currently substantially in arrears. The Durranis also have a sizeable judgment against Mr. Augier for punitive damages and solicitor and client costs and a judgment against the Zettlers for costs. The Bank is left wth its mortgage against the property as well as a judgment against the Zettlers for the full amount of the mortgage outstanding as of today's date together with solicitor and client costs.

89 The anomaly created by the interests of the Durranis and the Bank in the property as well as amounts that may be paid by way of compensation is a matter to be dealt with by the Director of Titles in the Director's jurisdiction over the Fund and over matters of title. In the circumstances I would urge the matter to proceed before the Fund expeditiously.

Action allowed in part.

End of Document

TAB 12

2014 ONSC 4570
Ontario Superior Court of Justice

Vieira v. Breg Trading Ltd.

2014 CarswellOnt 11611, 2014 ONSC 4570, 244 A.C.W.S. (3d) 231

Fernando Vieira and Martina Reid, Plaintiffs and Breg Trading Ltd., Ronald Groshaw, Lutz Alexander Von Bogen, Rui Edgar Gomes, Manuel Sousa, Re-Max West Realty Inc., Mary Alves and Bank of Montreal, Defendants

Chapnik J.

Heard: July 15, 2014
Judgment: August 5, 2014
Docket: CV-11-439534

Counsel: Alfred Schorr, for Plaintiffs / Respondents
F. Teixeira, for Defendant / Moving Party, Rui Edgar Gomes

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

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

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiffs resided in property they had purchased — Disputes arose in relation to property — Property was sold to defendant purchaser under power of sale proceeding — Defendant purchaser brought motion for summary judgment — Motion dismissed — Defendant purchaser failed to carry his burden to show, on balance of probabilities, that he was innocent purchaser of property for value and without notice — Given nature of issues and evidence, court could not apply appropriate legal principles or make necessary findings of fact to reach just and fair determination in matter — In any event, plaintiffs' claims against other defendants would proceed to trial — It would not be in interests of justice to grant summary judgment in these particular circumstances, since partial judgment might run risk of duplicate proceedings or inconsistent findings of fact — There were significant triable issues related to motion that required trial for their resolution — Trial was more proportionate, expeditious and less expensive means to achieve just result.

Table of Authorities

Cases considered by *Chapnik J.*:

Air Canada v. M & L Travel Ltd. (1993), 1993 CarswellOnt 994, 1993 CarswellOnt 568, 15 O.R. (3d) 804 (note), 50 E.T.R. 225, 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1, 159 N.R. 1 (S.C.C.) — referred to

Bank of Montreal v. Smith (2008), 2008 CarswellOnt 3473, 71 R.P.R. (4th) 52 (Ont. S.C.J.) — referred to

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — followed

Cybernetic Exchange Inc. v. J.C.N. Equities Ltd. (2003), 2003 CarswellOnt 4762, 15 R.P.R. (4th) 74 (Ont. S.C.J.) — 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.) — referred to

Durrani v. Augier (2000), 190 D.L.R. (4th) 183, [2000] O.T.C. 607, 36 R.P.R. (3d) 261, 50 O.R. (3d) 353, 2000 CarswellOnt 2807 (Ont. S.C.J.) — followed

Hamilton (City) v. Equitable Trust Co. (2013), 303 O.A.C. 147, 30 R.P.R. (5th) 1, 361 D.L.R. (4th) 114, 8 M.P.L.R. (5th) 1, 114 O.R. (3d) 602, 2013 CarswellOnt 2504, 2013 ONCA 143 (Ont. C.A.) — considered

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.) — referred to

McCormack v. Ciampanelli (2012), 2012 CarswellOnt 6259, 2012 ONSC 1702, 19 R.P.R. (5th) 162 (Ont. S.C.J.) — referred to

Stoimenov v. Stoimenov (1985), 50 O.R. (2d) 1, 7 O.A.C. 220, 44 R.F.L. (2d) 14, 35 R.P.R. 150, 1985 CarswellOnt 234 (Ont. C.A.) — considered

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

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

Mortgages Act, R.S.O. 1990, c. M.40
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20.04(2) — considered

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

R. 57.01 — considered

MOTION by moving defendant for summary judgment.

***Chapnik J.*:**

1 The defendant Rui Edgar Gomes ("Gomes" or "Gomes Jr.") moves for summary judgment with respect to the sale to him of 50 Little Boulevard in Toronto ("the Boulevard Property") in 2011 under a power of sale proceeding.

Overview

a. The parties

2 The plaintiffs, Fernando Vieira and Martina Reid, are common law spouses who reside with their children in the Boulevard Property, which they purchased and have occupied since at least 2004. Vieira is an auto body mechanic.

3 Defendant Breg Trading Ltd. ("Breg Trading") is an Ontario company. It sold the Boulevard Property to Gomes in 2011 under a power of sale proceeding. Gomes financed the purchase in part through a mortgage from defendant Bank of Montreal ("BMO").

4 Breg Trading's principal is defendant Ronald Groshaw. Defendant Lutz Alexander Von Bogen ("Von Bogen") is a Toronto lawyer who has represented Breg Trading and who employs defendant Mary Alves.

5 Defendant Manuel Sousa ("Sousa") is a real estate agent in Toronto and works for defendant Re-Max West Realty, Inc., a real estate broker.

b. The mortgage transactions between the plaintiffs and Breg Trading

6 In 2005, pursuant to discussions between Vieira and Sousa, the plaintiffs purchased a commercial property located at 2 Rosemount Avenue in Toronto ("the Commercial Property") from a third party for $625,000.

7 The circumstances surrounding the purchase of the Commercial Property are disputed. However, it is clear that the plaintiffs entered into the following mortgages in connection with the sale:

1. A $550,000 first mortgage was placed on the Commercial Property, in favour of four individuals who are not parties to this action. How they came to be mortgagees is not apparent from the record.

2. A $100,000 second mortgage was placed on the Commercial Property, in Breg Trading's favour.

3. A $16,000 third mortgage was placed on the Commercial Property, in Breg Trading's favour.

4. Collateral mortgages in the same amounts and in favour of the same parties were taken out on the plaintiffs' residence (the Boulevard Property). However, each mortgage held a priority position that was one degree lower because TD Canada Trust already had a first mortgage in place.

8 Three months after the plaintiffs purchased the Commercial Property, the two Breg Trading mortgages on each property were discharged and replaced with a single $150,000 mortgage in Breg Trading's favour on each property.

9 Vieira intended to operate an auto body shop at the Commercial Property. This business was unsuccessful and the Commercial Property was sold for $740,000. All of the mortgages on the Commercial Property and the $550,000 mortgage on the Boulevard Property were discharged. However, according to Breg Trading and as disputed by the plaintiffs, the proceeds from the sale of the Commercial Property were insufficient to discharge the $150,000 mortgage in favour of Breg Trading on the Boulevard Property. This mortgage will hereinafter be referred to as the "Breg Trading mortgage."

10 The plaintiffs defaulted on the Breg Trading mortgage and, in September 2009, Breg Trading served on the plaintiffs notice that it intended to sell the Boulevard Property under power of sale if the default was not cured by December 2009.

11 This was not done and Breg Trading commenced an action against the plaintiffs in January 2010 to recover the unpaid balance on its mortgage and for possession of the home ("the 2010 action"). The plaintiffs counterclaimed to set aside the

mortgage. The within action was commenced by the plaintiffs in November 2011, claiming collusion and conspiracy among the defendants to obtain possession of the Boulevard Property ("the conspiracy action"). In December 2012, Master Hawkins ordered the two claims to be tried together one after the other.

12 The plaintiffs continued to reside at the Boulevard Property throughout this time.

c. Rui Gomes' involvement — his purchase of the Boulevard Property

13 In 2011, Gomes was 21 years old, living with his parents and working for the family grocery business. Gomes stated in examination on discovery that in the summer of 2011, he was in the very early stages of buying his first home. That is, he looked at newspaper advertisements and other listings for home sales, but he never went to an open house, visited a property or spoke with an agent.

14 On September 1, 2011, Breg Trading and Sousa (the realtor) entered into a listing agreement to sell the Boulevard Property under power of sale. Though Breg Trading was the seller of the property, Sousa dealt only with the company's lawyer, Von Bogen, and never with the company directly.

15 Von Bogen instructed Sousa to search for a buyer without listing the property on an MLS service. He also told Sousa that the property was being sold under a power of sale and that the seller could not provide vacant possession to the buyer. Sousa did not ask why this was the case. According to him, this was not unusual given his experience with other sales via power of sale. Sousa did not ask any questions about Breg Trading's authority to sell the property.

16 Sousa and Gomes' father ("Gomes Sr.") testified that they had met briefly once before September 2011. At some point that month, Sousa told Gomes Sr. that the Boulevard Property was for sale by way of power of sale. Gomes Sr. passed along Sousa's tip to the defendant Gomes (hereinafter referred to as "Gomes Jr."). Both of the Gomeses state that Gomes Sr. did not assist his son in the housing search apart from passing along this tip and providing some funds to purchase the property.

17 On September 22, 2011, Gomes Jr. made an offer on the property for $300,000 and, after one round of price negotiation, entered into a purchase agreement for $315,000. Sousa acted as the agent for both the buyer (Gomes Jr.) and the seller (Breg Trading) in the transaction.

18 At the time he made the offer, Gomes Jr. knew extremely little about the property. He had viewed the residence from the outside but had inquired no further. He never went inside or looked in the windows. He did not ask about the property's state of repair. He did not know how many bedrooms and bathrooms it contained. He never asked his real estate agent (Sousa) what the agent knew about the property. Sousa testified that though he observed Von Bogen flip through some court papers, which he assumed related to the power of sale, he had no knowledge of the 2010 action.

19 The day after Breg Trading accepted Gomes Jr.'s offer, counsel for Breg Trading in the 2010 action informed the plaintiffs' counsel that the 2010 action had been settled. The plaintiffs were unaware of a settlement and their counsel advised Breg Trading's lawyer that he was mistaken.

20 The transaction with Gomes Jr., as purchaser of the Boulevard Property closed on October 7, 2011, and a transfer under power of sale ("the Transfer") was registered on title the same day. In connection with the closing, Gomes Jr. was represented by a lawyer who had acted for the Gomes family in the past.

21 Gomes Jr. financed the purchase in part with a $20,000 deposit that he says he accumulated from "work and savings," $40,000 from his parents and a $252,000 mortgage on the property from BMO. The BMO mortgage was registered on title on the date of closing.

22 On October 14, 2011, Von Bogen, the lawyer for Breg Trading, informed the plaintiffs of the sale.

23 Gomes Jr. testified during discovery that he expected to receive possession once he closed on the property, though Sousa disputes making such a representation. According to Sousa, "Everybody knew it wouldn't be a vacant possession on closing."

24 Gomes Jr. did not, in fact, receive the keys to the house at closing and has never taken possession. Since October 2011, the plaintiffs have continued to reside at the Boulevard Property. They have not paid occupation rent to Gomes Jr., although he has never made a demand for rent or possession directly to the plaintiffs. Instead, Gomes Jr. states that he has paid the mortgage, insurance and taxes on the property, despite not being in possession and with no assistance from his parents. More specifically, he moved out of his parents' home in April 2013 and now, in addition to the $1,131.59 monthly mortgage payment on the Boulevard Property, pays $1,100 in rent on an apartment in a building owned by his parents. He continues to work for his father and receives a salary of approximately $3,500 per month.

25 Notwithstanding the significant problems his son has allegedly encountered with respect to the Boulevard Property, Gomes Sr. has used Sousa as his real estate agent on at least two occasions since October 2011.

d. The present litigation

26 As noted above, the plaintiffs commenced the present action in November 2011 and, subsequently, filed a caution against the property. In the statement of claim, the plaintiffs seek an order setting aside the Transfer on the grounds that it was "collusive, not at arms[']' length, fraudulent and inequitable"; an order requiring the defendants to cause the discharge of the BMO mortgage; the issuance of a certificate of pending litigation; damages; and other relief.

27 Gomes has filed a counterclaim for damages, slander of title, a writ of possession or an order for occupation rent and a declaratory judgment that his purchase of the Boulevard Property was in accordance with the *Mortgages Act*, R.S.O. 1990, c. M.40. He also filed a cross-claim against Breg Trading and its principal, Ronald Groshaw, for contribution for any amounts he may be ordered to pay.

The Issues and the Positions of the Parties

28 The core issue raised in Gomes Jr.'s motion for summary judgment is whether he is a *bona fide* purchaser for value without notice. It is a prerequisite to every ground of relief sought by Gomes Jr. and, if successful, would negate the plaintiffs' claims against him.

29 Gomes Jr. submits that he is a *bona fide* purchaser for value without notice. As a result, he seeks to be dismissed as a defendant from the plaintiffs' action and to recover on his counterclaim. Gomes Jr. denies having any information at the time of the sale that would have put him on notice that the plaintiffs were contesting the Breg Trading mortgage and, as a result, Breg Trading's right to sell the Boulevard Property by power of sale.

30 The plaintiffs submit that Gomes Jr.'s behaviour in purchasing the house, along with his father's connection to Sousa, belies his claim that he was a *bona fide* purchaser. They point as well to the conduct of the other defendants before Gomes Jr. entered the picture, though this has little probative value on this motion except to call into question the testimony of Sousa, who was the realtor for all parties on all relevant transactions. The plaintiffs also argue that granting summary judgment would be inappropriate in the circumstances because the remaining parties will be proceeding to trial on the conspiracy and collusion allegations and a finding in Gomes Jr.'s favour might result in inconsistent verdicts.

The Relevant Law

a. The standard for summary judgment

31 A court must grant summary judgment if it is "satisfied that there is no genuine issue requiring a trial with respect to a claim or defence": *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2). As explained by the Supreme Court in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) [hereinafter Hryniak], at para. 49, no genuine issue requiring a trial will exist

when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

32 As part of the analysis, the court may weigh the evidence presented on a summary judgment motion, evaluate the credibility of a deponent and draw any reasonable inference from the evidence, "unless it is in the interest of justice for such powers to be exercised only at a trial"; rule 20.04(2.1).

b. A bona fide purchaser for value without notice

33 "The burden of proving the absence of notice is on the person alleging that he or she is a purchaser for valuable consideration without notice": *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.), at para. 60. See also *Manias v. Norwich Financial Inc.*, 2008 ONCA 532, 76 R.P.R. (4th) 81 (Ont. C.A.), at para. 10 (as between mortgagees). Epstein J., as she then was, in *Durrani* summarized the law with respect to the interpretation of "notice" in these circumstances, at paras. 61-62:

> Actual notice is knowledge, not presumed knowledge as in the case of constructive notice....
>
> Thus, a person has actual notice if he or she is aware of the existence of a legal right. It is not necessary that the person have knowledge of the precise details of that legal right. In circumstances that involve the transfer of title, a purchaser does not need to have actual knowledge of the particular person who is in fact the true owner or holder of title of the property. It is sufficient for actual notice that the purchaser is aware that the person with whom they are dealing as the vendor does not have a legitimate claim to the title. This follows, since the logical inference to draw from the knowledge that the vendor with whom the purchaser is dealing does not have a legitimate right to the title is that someone else is, in fact, the true owner.

34 The plaintiffs submit that constructive notice is also sufficient to defeat the claim of a *bona fide* purchaser for value. They rely on *Stoimenov v. Stoimenov* (1985), 50 O.R. (2d) 1 (Ont. C.A.), to support this proposition. In my view, however, *Stoimenov* is not applicable. It concerned language in the *Family Law Act* that distinguished between "notice" and "actual notice", and the court found that when the word "notice" appeared on its own, it could include constructive as well as actual notice. In contrast, the defence on which Gomes Jr. relies is the equitable doctrine of actual notice, which survived the enactment of the *Land Titles Act* in Ontario: see *Dominion Stores Ltd. v. United Trust Co.* (1976), [1977] 2 S.C.R. 915 (S.C.C.), at pp. 952-57. In that doctrine, constructive notice is not enough: see *McCormack v. Ciampanelli*, 2012 ONSC 1702, 19 R.P.R. (5th) 162 (Ont. S.C.J.), at paras. 44-45; and *Bank of Montreal v. Smith* (2008), 71 R.P.R. (4th) 52 (Ont. S.C.J.), at paras. 47-53 (relying on *Durrani* to reject the claim that constructive notice can defeat the claim of a *bona fide* purchaser for value).

35 In the case of *Hamilton (City) v. Equitable Trust Co.*, 2013 ONCA 143, 114 O.R. (3d) 602 (Ont. C.A.), after a sale of the property to a new owner, the City attempted to claim priority of rents in order to satisfy a claim against the prior owner of the property. After rejecting the City's claim, the Court stated, at para. 43:

> A *bona fide* purchaser for value takes the land free and clear of all such claims, in the absence of fraud or of actual notice amounting to fraud: see *Anger & Honsberger*, at pp. 30-18 to 30-22; *Land Titles Act*, s. 87; and *Farah v. Glen Lake Mining Co.* (1908), 17 O.L.R. 1 (C.A.), at pp. 19-20.

In that case, there was no suggestion of fraud on the part of the new owner, nor anything in the record to indicate the new owner had actual notice that the City had exercised its rights in regard to the rental flows on the property.

36 It is evident that one cannot resort to wilful blindness to avoid actual knowledge: see e.g. *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.), at p. 811; and *Cybernetic Exchange Inc. v. J.C.N. Equities Ltd.* (2003), 15 R.P.R. (4th) 74 (Ont. S.C.J.), at paras, 232-33, 236. Further, the knowledge of an agent, including a real estate agent, is imputed to the principal: *Durrani*, at paras. 69-70.

Analysis

37 The evidence presented by the parties raises significant questions of credibility. On the one hand, Gomes Jr., Gomes Sr. and Sousa have all testified that Gomes Jr. entered into the transaction without knowledge of the dispute over whether Breg Trading had the right to sell the property by way of power of sale. Further, there is no direct evidence of Gomes Jr.'s involvement in any alleged conspiracy. On the other hand, the circumstances surrounding the transaction are highly questionable, to say the least.

38 According to the plaintiffs, it is remarkable that a young man who had never before owned any real estate would buy a house "as is" without even knowing how many bedrooms or bathrooms it contained. That he would not ask his real estate agent about the property. That he would buy a house through a power of sale without inquiring from his lawyer or realtor about how the current occupants could be removed. That he would enter into this complex and risky transaction without discussing it with his parents, with whom he lived, for whom he worked and through whom he first learned that the property was for sale. That his real estate agent would disclose nothing about the property's history to him even though the agent had acted for the parties on the Commercial Property transaction and was well acquainted with the seller's counsel. That the father would continue to do business with the real estate agent despite the admittedly "unhappy" situation his son is now in.

39 These are only some of the peculiar features the plaintiffs allege are inherent in the Boulevard Property transaction. They are sufficient, however, to demonstrate that there are genuine issues requiring a trial and that summary judgment is not appropriate in the circumstances.

40 This is not to say that Gomes Jr. was or was not a part of any alleged conspiracy. Rather, in my view, Gomes Jr. has failed to carry his burden to show, on a balance of probabilities, that he was an innocent purchaser of the Boulevard Property for value and without notice.

41 I am aware that, under rule 20.04(2.2), the court has the power to hear oral evidence to assist in the resolution of a summary judgment motion. This could assist the court in resolving the questions of credibility that I have identified above. However, I would decline to exercise this discretionary power in the circumstances of this case: see *Hryniak*, at paras. 51, 60-65. The factual issues to be determined on Gomes Jr.'s motion are too intertwined with the plaintiffs' claims against the remaining defendants. A hearing of oral evidence on the motion would quickly devolve into a full trial and would not satisfy the principles of proportionality and fairness set out in *Hryniak*.

42 Finally, the plaintiffs argue that granting judgment in Gomes Jr.'s favour would create the risk of inconsistent verdicts. That is, it would be inconsistent for the court to conclude that Gomes Jr. was a *bona fide* purchaser for value without notice and then, after trial, that there was a conspiracy among two or more of the defendants to defraud the plaintiffs. While such an inconsistency would not be inevitable — for example, one might conclude that there was a conspiracy but that Gomes Jr. was not in any way involved or aware of it — this is a consideration that weighs against granting summary judgment at the present time. Moreover, if the court were to conclude that Sousa were a part of the alleged conspiracy, this knowledge might well be imputed to Gomes Jr.

43 This matter is quite unlike the situation in the *Hamilton* case, *supra*, where there was no suggestion of fraud on the part of the new owner of the property in question.

Conclusion

44 In this case, given the nature of the issues and the evidence presently before the court, I am unable to apply the appropriate legal principles or make the necessary findings of fact to reach a just and fair determination in the matter before me. In any event, the plaintiffs' claims against the other defendants would proceed to trial. In my view, it would not be in the interests of justice to grant summary judgment in these particular circumstances, since partial judgment may run the risk of duplicate proceedings or inconsistent findings of fact.

45 There are significant triable issues related to this motion that require a trial for their resolution. Having reached that conclusion, I wish to emphasize that I make no comment whatsoever on the merits of the case, or on the substantive issues bearing on the motion. Quite simply, I am unable to reach a fair and just determination on the merits at this time, and in the

interests of justice, find that a trial in these circumstances is a more proportionate, expeditious and less expensive means to achieve a just result.

46 Accordingly, this motion for summary judgment is dismissed. Considering the parties' submissions and the factors set out in rule 57.01, it is my view that a costs award in favour of the plaintiffs in the sum of $15,000 is fair, reasonable and within the reasonable expectations of the parties. Costs are therefore awarded to the plaintiffs/respondents on the motion, assessed on a partial indemnity scale, in the all-inclusive sum of $15,000.

Motion dismissed.

End of Document

TAB 13

2013 ONSC 1986
Ontario Superior Court of Justice

Canada Mortgage and Housing Corp. v. Gray

2013 CarswellOnt 5150, 2013 ONSC 1986, [2013] O.J. No. 1969, 229 A.C.W.S. (3d) 333, 2 C.B.R. (6th) 23

In the Matter of the Bankruptcy of Evan Peter Gray of the City of Toronto in the Province of Ontario

Canada Mortgage and Housing Corporation Creditor v. Evan Gray Debtor

H.J. Wilton-Siegel J.

Heard: April 04, 2013
Judgment: April 30, 2013
Docket: Toronto 31-1594404

Counsel: Matthew Diskin for Creditor
Trung S. Nguyen for Debtor

Subject: Insolvency; Property; Corporate and Commercial; Civil Practice and Procedure; Contracts; Torts

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

Headnote

Bankruptcy and insolvency --- Discharge of bankrupt — Refusal of discharge

Applicant creditor was insurer of mortgages for approved lenders — Respondent was approached by friend, who asked him to co-sign mortgage to help another individual — Respondent was assured that all mortgage payments would be made, and mortgage and title assumed after one year — Respondent and friend purchased property as tenants in common with $516,370 mortgage, insured by applicant — Mortgage went into default — Bank obtained default judgment against respondent and friend for $524,577, took possession, sold property and applied $331,875 net proceeds to debt — Bank assigned judgment to applicant — Respondent's wages were garnished, leading to his bankruptcy — Applicant sought declaration pursuant to s. 178 Bankruptcy and Insolvency Act that debt would not be released by discharge, and order lifting stay to permit applicant to enforce judgment — Application dismissed — Mortgage arose from fraudulent scheme, but s. 178(1)(e) did not apply as respondent did not make fraudulent misrepresentations, had no knowledge of those made by friend, and was not wilfully blind — Respondent was part-owner of property and liable for default, which was what bank bargained for — Respondent did not represent that he would occupy property and personally make payments, nor did applicant expressly state it intended standard charge term document to be deemed representation under s. 178 — There was no evidence that respondent ever received documentation or had actual knowledge of representations or covenants contained within — While respondent did not ask to meet individual or verify information, he explained that he had no prior experience and arrangements seemed normal to him, and that he trusted his friend — It was at least probable that respondent's evidence was credible — Friend joined respondent as co-mortgagor and respondent had no reason not to trust him — Fact that respondent was bank employee was not sufficient to trigger s. 178(1)(d); respondent was acting in capacity as borrower, not as employee.

Real property --- Mortgages — Change of ownership — Mortgage debt — Assignment by mortgagee — Equities to which assignment subject — Fraud

Applicant creditor was insurer of mortgages for approved lenders — Respondent was approached by friend, who asked him to co-sign mortgage to help another individual — Respondent was assured that all mortgage payments would be made, and mortgage and title assumed after one year — Respondent and friend purchased property as tenants in common with $516,370 mortgage, insured by applicant — Mortgage went into default — Bank obtained default judgment against respondent and friend for $524,577, took possession, sold property and applied $331,875 net proceeds to debt — Bank assigned judgment to applicant — Respondent's wages were garnished, leading to his bankruptcy — Applicant sought declaration pursuant to s. 178 Bankruptcy and Insolvency Act that debt would not be released by discharge, and order lifting stay to permit applicant to enforce judgment — Application dismissed — Mortgage arose from fraudulent scheme, but s. 178(1)(e) did not apply as respondent did not make fraudulent misrepresentations, had no knowledge of those made by friend, and was not wilfully blind — Respondent was part-owner of property and liable for default, which was what bank bargained for — Respondent did not represent that he would occupy property and personally make payments, nor did applicant expressly state it intended standard charge term document to be deemed representation under s. 178 — There was no evidence that respondent ever received documentation or had actual knowledge of representations or covenants contained within — While respondent did not ask to meet individual or verify information, he explained that he had no prior experience and arrangements seemed normal to him, and that he trusted his friend — It was at least probable that respondent's evidence was credible — Friend joined respondent as co-mortgagor and respondent had no reason not to trust him — Fact that respondent was bank employee was not sufficient to trigger s. 178(1)(d); respondent was acting in capacity as borrower, not as employee.

Table of Authorities

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

Berger, Re (2010), 70 C.B.R. (5th) 225, 2010 CarswellOnt 5774, 2010 ONSC 4376 (Ont. S.C.J.) — considered

Fiorillo v. Krispy Kreme Doughnuts Inc. (2009), 98 O.R. (3d) 103, 2009 CarswellOnt 3344, 60 B.L.R. (4th) 113 (Ont. S.C.J. [Commercial List]) — considered

Parna v. G. & S. Properties Ltd. (1970), [1971] S.C.R. 306, 1970 CarswellOnt 208, 1970 CarswellOnt 208F, 15 D.L.R. (3d) 336 (S.C.C.) — considered

Perdue v. Myers (2005), 2005 CarswellOnt 3981, 35 R.P.R. (4th) 304 (Ont. S.C.J.) — considered

Phillips, Re (1994), 27 C.B.R. (3d) 126, (sub nom. *Phillips (Bankrupt), Re)* 156 A.R. 123, 1994 CarswellAlta 349 (Alta. Q.B.) — followed

R. v. Briscoe (2010), 483 W.A.C. 86, 477 A.R. 86, 2010 CarswellAlta 589, 400 N.R. 216, 22 Alta. L.R. (5th) 49, [2010] 1 S.C.R. 411, 210 C.R.R. (2d) 150, [2010] 6 W.W.R. 1, 316 D.L.R. (4th) 577, 73 C.R. (6th) 224, 253 C.C.C. (3d) 140, 2010 CarswellAlta 588, 2010 SCC 13 (S.C.C.) — considered

Ste. Rose & District Cattle Feeders Co-op v. Geisel (2010), 255 Man. R. (2d) 45, 486 W.A.C. 45, 68 C.B.R. (5th) 163, 2010 MBCA 52, 2010 CarswellMan 185, [2010] 11 W.W.R. 251, 319 D.L.R. (4th) 694 (Man. C.A.) — considered

411397 B.C. Ltd. v. Granmour Holdings Ltd. (1996), 1996 CarswellBC 1187 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 178 — pursuant to

s. 178(1) — referred to

s. 178(1)(d) — considered

s. 178(1)(e) — considered

Canada Mortgage and Housing Corporation Act, R.S.C. 1985, c. C-7
Generally — referred to

Land Registration Reform Act, R.S.O. 1990, c. L.4
s. 8(1) — referred to

s. 9 — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

s. 4 — considered

s. 12 — referred to

s. 16(1)(a) — considered

s. 16(1)(b) — considered

APPLICATION by creditor for declaration that debt of bankrupt respondent would not be released by discharge, and for order lifting stay to permit enforcement of judgment.

H.J. Wilton-Siegel J.:

1 On this application, Canada Mortgage and Housing Corporation ("CMHC") seeks (1) a declaration, pursuant to section 178 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), declaring that the outstanding amount of the Debt (as defined below) due to CMHC from Evan Gray ("Gray") will not be released by an order of discharge made in respect of Gray's bankruptcy; and (2) an order lifting the stay of proceedings to permit CMHC to take steps to enforce the Judgment (as defined below) by taking any proceedings CMHC may deem appropriate.

Background

2 The moving party, CMHC, is a corporation pursuant to the *Canada Mortgage and Housing Corporation Act*, R.S.C. 1985, c. C-7, as amended. CMHC carries on business as an insurer of mortgages for approved lenders.

3 The responding party, Gray, is an individual residing in the City of Toronto. Gray graduated from high school in 1999 and spent two years in a community college before entering the workforce, initially working for a collection agency. Since February 2005, Gray has worked for the Royal Bank of Canada ("RBC"). From February 2005 to March 2011, Gray was employed as a collections officer. Since March 2011, Gray has been employed as a commercial client service representative. In addition, Gray has had a second, part-time job as a disc jockey in Toronto area nightclubs.

4 Gray says that he was introduced to a John Roberts ("Roberts") in the fall of 2005 through a common acquaintance. Gray says he first met Roberts at a Toronto nightclub. Shortly after he met Roberts, in the spring of 2006, Roberts asked Gray if he would be willing to co-sign a mortgage to assist someone whom Roberts said was a new immigrant to Canada.

5 Gray says that Roberts told him the following regarding the mortgage transaction:

> 1. The mortgage was for a new immigrant to Canada who was unable to obtain a mortgage because he or she lacked sufficient credit history;
>
> 2. This person would occupy the property and would sign a written agreement to confirm that he or she would be responsible for making all mortgage payments;
>
> 3. After a year, this person would assume the mortgage and take title to the property;
>
> 4. There was no risk to Gray because, even if the occupant defaulted, the property could be sold easily in the event of default and, given the robust real estate market in 2006, a profit was assured; and
>
> 5. This person would pay Gray $2,500 to co-sign the mortgage.

Roberts also advised Gray that he would not be doing this if he thought there was any risk.

6 When Gray agreed, Roberts introduced Gray to an individual who introduced himself as Mike ("Mike") and held himself out to be a mortgage broker. At Mike's request, Gray completed a form that he understood allowed Mike to check his credit history.

7 Soon after this meeting, Mike and Roberts asked Gray to attend at a Century 21 office to sign an agreement of purchase and sale regarding the purchase by Roberts and Gray of a property known municipally as 100 Monteith Crescent, Vaughan, Ontario (the "Property"). While Gray was signing the documentation, a woman walked into the room and introduced herself as Kavita Naik ("Naik"). Naik told Gray that she was one of the two owners of the Property and the vendor in the transaction. This was the first time that Gray had ever met Naik. Gray recalls Naik telling him at that time something to the effect of "thank you for helping me".

8 Shortly thereafter, Mike asked Gray to attend at an RBC branch to sign a mortgage application. Mike and Gray met with Don Economakis ("Economakis"), whom Gray understood to be an RBC mortgage representative. Roberts was not in attendance. Economakis provided Gray with documents to sign, which Gray understood to be the mortgage application. Gray says nothing was explained to him regarding the mortgage application. Economakis also emailed Gray a few days after the meeting to request his most recent pay statement, which Gray believes he faxed to him. Gray was not provided with a copy of the document that he signed at the meeting and there is no evidence that he ever received a copy. Similarly, there is no evidence that he received a copy of the Standard Charge Terms of RBC (the "Standard Charge Terms") forming part of the Mortgage (defined below).

9 Roberts and Mike next asked Gray to attend at the office of William Ash ("Ash"), counsel to both the vendors and purchasers in the transaction. Ash provided Roberts and Gray with documents to sign, and explained that they were documents to finalize the purchase of the Property. Ash explained that, upon closing, $5,000 was to be paid to the mortgage broker, Mortgage Intelligence. Ash subsequently provided Gray with a copy of the closing documents in respect of the purchase of the Property.

10 A few days later, Mike asked Gray to attend with him at Ash's office, where Gray was given a lawyer's trust cheque, which Gray recalls was in the amount of approximately $5,000 and was made payable to Gray. Mike told Gray that it was common for people to request additional financing on their mortgage loans above and beyond the value of the property in order to fund expenses such as renovations on the property and that the funds were being used for this purpose. Mike then drove Gray to the RBC branch at Steeles Avenue and Lauraleaf in North York where, at Mike's request, Gray cashed the cheque and gave all of the funds to Mike. It is unclear whether this event occurred before or after the closing of the transaction, although Gray says Ash had explained to him at the meeting in Ash's office that such a cheque would be delivered at closing.

11 The transaction closed on April 6, 2006. On that day, Roberts and Gray purchased the Property as tenants in common and RBC extended a mortgage loan in the principal amount of $516,370.13 (the "Mortgage") to Gray and Roberts in respect of the Property. Title to the Property shows a transfer of the Property on that date from Naik and a John Webber ("Webber") to Roberts and Gray. The Mortgage was insured by CMHC.

12 About two months later, Gray received a call from RBC advising that the first mortgage payment was late. Gray immediately called Roberts and Mike, who he says were both extremely apologetic. Mike offered to pick Gray up in his car and go directly to an RBC branch to make the payment. Gray agreed to Mike's suggestion because he says that he believed that this was the only way that he could be sure Mike would make the payment.

13 The next day Mike picked Gray up as agreed. Gray says that, when he entered the car, he was surprised to see the previous owner of the Property, Naik, in the car with Mike. Naik apologized to Gray for the late payment. Gray says that this was the first time that he became aware that the former owner of the Property, Naik, was still residing there and was the one making payments on the Mortgage.

14 The mortgage payments over the next few months were made in a similar fashion. Mike and Naik would pick Gray up, take him to an RBC branch, and give him cash with which to make the monthly mortgage payment. Gray acknowledges that he thought this was somewhat unusual, but he went along with it to ensure that the payment was being made.

15 On July 27, 2006, Gray received an email from Bill Sykes ("Sykes") at RBC Corporate Investigation Services ("RBC CIS") requesting that Gray attend a meeting to discuss the purchase of the Property. On the same date, Gray immediate contacted and met with Sykes and another RBC investigator, Sheila Wilson ("Wilson"). Both questioned Gray for 2-3 hours regarding the purchase of the Property. Sykes advised Gray that he believed that the Property had been purchased using a fraudulent mortgage application and that the Property was worth much less than the purchase price of $529,000.

16 Sykes suggested that Gray obtain legal advice and prepare himself for the inevitable default, foreclosure and power of sale. The investigators also suggested that Gray view the Property for himself to determine if anyone was living there. On or about August 6, 2006, Gray visited the Property with his father, which up until that point he had not seen. Gray advised Wilson that it appeared to him that someone was living on the Property. Wilson advised Gray to remain in contact with Roberts and Mike but asked Gray not to do anything to raise a suspicion that he had met with RBC CIS. At that time, the mortgage payments were up to date. Gray heard nothing further from either Sykes or Wilson.

17 Gray continued to meet with Mike each month to satisfy himself that the mortgage payments were being made. Each time Gray met with Mike, he was with Naik. Roberts later advised Gray that Mike was in a relationship with Naik and that he believed that Mike's legal name was Mohamad Akhlaki ("Akhlaki"). The parcel register for the Property shows Naik and Akhlaki as the owners of the Property from July 27, 2002 to January 31, 2005, when it was transferred into the name of Naik and Webber.

18 In or about June 2007, Mike stopped making mortgage payments and both Roberts and Mike stopped returning Gray's telephone calls. The Mortgage subsequently went into default in 2007.

19 On November 30, 2007, RBC commenced an action against Gray and Roberts for payment of $524,577.34 (the amount due under the Mortgage) and possession of the Property. RBC did not allege fraud in its statement of claim.

20 On January 16, 2008, RBC obtained default judgment (the "Judgment") against Gray and Roberts wherein they were ordered: (1) to pay to RBC the sum of $524,577.34, plus interest at a rate of 6.025% per year (the "Debt"); and (2) to deliver possession of the Property to RBC. Shortly thereafter, RBC took possession of the Property. RBC subsequently sold the Property for $390,000 and applied the net proceeds of $331,875.03 against the Debt.

21 The Judgment was assigned from RBC to CMHC by an assignment dated August 12, 2008. On August 19, 2009, CMHC obtained an order to continue RBC's action against Gray and Roberts.

22 From April 2009 to February 2012, CMHC garnished Gray's wages in the amount of $17,169.39. Gray's income at the time was approximately $37,900.00 per year. On January 8, 2012, Mr. Gray and his wife had their first child. On February 23, 2012, as a result of the garnishment of his income and his inability to support his family, Gray made an assignment in bankruptcy. Gray remained an undischarged bankrupt at the date of the hearing of this proceeding.

This Proceeding

23 On April 11, 2012, CMHC served its motion record in this proceeding seeking a declaration that the outstanding amount of the Debt not be released by operation of sections 178 (d) and (e) of the BIA. On September 12, 2012, by order of Morawetz J., the motion was converted into a trial of an issue.

24 It has been established that the Mortgage arose out of a fraudulent scheme perpetrated by Roberts and others (the "Scheme"). Under the Scheme, as mentioned, Gray and Roberts took title to the Property, and applied for the Mortgage, in their names. It is established that Roberts misrepresented his employment status and his income in his mortgage application. In order to induce RBC to advance mortgage funds well in excess of the fair market value of the Property, Roberts also provided an inflated valuation of the Property (the false valuation and Roberts' misrepresentations in his mortgage application are collectively referred to as the "Misrepresentations"). The proceeds received in excess of the value of the Property represented the proceeds of the fraud, which were appropriated by the other participants in the Scheme.

25 Gray says that he had no knowledge of the Misrepresentations when he signed his mortgage application, and that he did not become aware of the Misrepresentations until he was served with CMHC's motion materials for this motion on April 11, 2012.

26 The principal CMHC claim is asserted under section 178(1)(e) of the BIA. CMHC submits that the Mortgage was obtained based on the following false pretences and/or fraudulent misrepresentations of Gray, which he made when he executed the application for the Mortgage, knowing that it was a mortgage application and knowing that it was important to be accurate and complete in that application:

> 1. he did not inform RBC of the true nature of the transaction - that he was providing the use of his credit rating and applying for the Mortgage in exchange for which he would be paid;
>
> 2. he did not inform RBC that he was not to be the beneficial owner of the Property, which he knew when the application for the Mortgage was executed;
>
> 3. he did not inform RBC that he did not intend to occupy the Property, which he knew when the application for the Mortgage was executed, and he did not subsequently do so; and
>
> 4. he did not inform RBC that he did not intend to personally pay the amounts due under the Mortgage, which he knew when the application for the Mortgage was executed.

27 CMHC argues that these circumstances demonstrate that Gray was aware of the Scheme at the time he applied for the Mortgage. Alternatively, it says that they demonstrate that Gray was reckless and/or willfully blind to the Scheme at the time he applied for the Mortgage.

28 CMHC also says that each of RBC and CMHC relied upon the information supplied by Gray in his mortgage application in deciding whether to grant and insure the Mortgage respectively. It says that, if RBC or CMHC had known of the Misrepresentations, the Mortgage would not have been granted or insured, and CMHC and RBC would not have suffered any losses in connection therewith.

29 Alternatively, CMHC argues that, since the fraud occurred while Gray was an employee of RBC, subsection 178(d) of the BIA applies in the circumstances.

Applicable Law

30 Section 178(1)(d) and (e) of the BIA provide as follows:

> 178. (1) An order of discharge does not release the bankrupt from ...
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

31 In *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52 (Man. C.A.) *[Geisel]* at paras. 98-100, the Manitoba Court of Appeal held that false pretences and fraudulent misrepresentations are similar, but not identical concepts, although the essence of each is a deceitful statement:

> In my view, there is no doubt that the conduct of each of the respondents satisfied at least one of the requirements of subs. (*e*), as constituting the obtaining of property by false pretences or fraudulent misrepresentation. While the two concepts are similar, they are not identical.
>
> In the Ontario Court of Appeal decision of *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 11 C.B.R. (4th) 190, the court explained these two concepts (at para. 14):
>
> > *The New Oxford Dictionary of English* (1998) defines the verb "misrepresent" as "give a false or misleading account of the nature of." The noun "pretence" is defined as "an attempt to make something that is not the case appear to be true." It is clear from these definitions that the core content of the phrases "false pretences" and "fraudulent misrepresentation" is deceitful statements.

32 In *Geisel*, the court held that false pretences extended to false representations made to third parties in aid of a scheme to defraud a creditor with whom the maker of the representations had no contact. This suggests that the relationship between the two concepts is related to the relationship of the maker of a deceitful statement to the creditor rather than the nature of the statement made.

33 The elements of the tort of deceit have been summarized by G.H.L. Fridman, *The Law of Torts in Canada*, 2d ed., (Toronto: Carswell, 2002) at 747 as follows:

> The tort of deceit is based on the making of a fraudulent misrepresentation. It entails a deliberate, willful, conscious distortion of the truth, the making of a false statement with the knowledge that it is untrue, or with reckless disregard for its truth or falsity, and with the intent that the plaintiff should act upon it. For liability to ensue the plaintiffs must act upon it in a manner contemplated or manifestly probable and, in consequence of such act, the plaintiff must incur damage. The deliberate or reckless deception of the plaintiff by the defendant must have been intended by the latter and must produce the consequence that was itself intended or, at the very least, foreseen as being likely. The tort of deceit involves more than fraud or falsehood. There must be a direct causal link between the untruth and the behavior of the plaintiff that leads to the detrimental occurrence. *Hence, for there to be liability for deceit the following elements must be established: (a) a false statement; (b) knowledge of its falsity; (c) an intent to deceive; (d) reliance by the plaintiff; (e) damage caused by such reliance.*
>
> [emphasis added]

A similar statement of the law in Ontario was set out by Newbould J. in *Fiorillo v. Krispy Kreme Doughnuts Inc.* (2009), 98 O.R. (3d) 103 (Ont. S.C.J. [Commercial List]) at paras. 66 and 67, referring to *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.).

34 Non-disclosure of material facts can amount to fraud if, among other things, the nondisclosure constitutes a fraudulent misrepresentation. As was observed in *Geisel* at para. 101, "silence and half-truths can amount to a fraudulent misrepresentation". This has been addressed in *Perdue v. Myers* (2005), 35 R.P.R. (4th) 304 (Ont. S.C.J.) at para. 31 as follows:

> Silence can be taken as fraudulent misrepresentation. The circumstances must establish dishonest conduct on the part of the defendant, who must have intended (i) to deceive the plaintiff by his/her failure to disclose irrelevant [sic] information, and (ii) to commit a fraudulent act by such non disclosure equivalent to that which would prevail had he/she made a false

statement knowing it to be false. See: *411397 B.C. Limited v. Granmour Holdings Limited*, [1996] B.C.J. No. 1310 (S.C.) [*Granmour*].

35 To a similar effect is the following statement of the British Columbia Court of Appeal in *411397 B.C. Ltd. v. Granmour Holdings Ltd.* [1996 CarswellBC 1187 (B.C. S.C.)]:

> Silence by a party can, in certain circumstances, be taken as fraudulent. However, as pointed out by Mr. Justice Wallace of our Court of Appeal in *Rainbow Indust. Caterers Ltd. v. C.N.R.* (1988), 30 B.C.L.R. (2d) 273 at 313:
>
> > At the very least the circumstances must establish dishonest conduct on the part of the defendant. He must be found to have intended to deceive the plaintiff by his failure to disclose to the plaintiff the relevant information and, as a result, have intended to commit a fraudulent act by such non-disclosure equivalent to that which would prevail had he made a false statement knowing it to be false.

36 Absent other circumstances, however, mere silence does not, by itself, constitute a false misrepresentation. The jurisprudence indicates that silence gives rise to a misrepresentation only where the silence or half-truths render an express or implied representation that has been given false or materially misleading.

37 The requirements of a fraudulent misrepresentation for purposes of section 178(1)(e) of the BIA were considered in *Berger, Re*, 2010 ONSC 4376 (Ont. S.C.J.), at 28 . The decision confirms a fraudulent misrepresentation is defined for such purposes on the basis of the foregoing principles regarding the tort of deceit:

> The learned authors of *The 2009 Annotated Bankruptcy and Insolvency Act*, 2009 Thomson Carswell, refer to the decision of Mr. Justice Osborne, as he then was, in *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (S.C.O.), in which His Lordship refers, at paragraph 23 *et seq*, to the findings of Pennell J referred to in *Bank of Montreal v. Terbois Ltd.* (1982), 41 C.B.R. (N.S.) 55 (Ont. H.C.) for the following proposition as to the elements of a fraudulent misrepresentation for the purposes of s. 178 BIA (as it now is):
>
> > i. the existence of a representation,
> >
> > ii. that the representation was false,
> >
> > iii. that the bankrupt knew the representation was false and intended the creditor to act upon it so as to enable the bankrupt to obtain the credit sought, and
> >
> > iv. iv. that the creditor did rely upon the false representation and extend credit.

38 In addition, the parties agree that wilful blindness can amount to fraudulent misrepresentation for the purposes of section 178(1)(e). The Supreme Court of Canada addressed the nature of wilful blindness in *R. v. Briscoe*, 2010 SCC 13 (S.C.C.) at para. 21 as follows:

> The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R.* v. *Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in Jorgensen (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"

Allegation of False Pretences or Fraudulent Misrepresentation for Purposes of Paragraph 178(1)(e) of the BIA

39 CMHC's principal allegation is that the Debt resulted from Gray obtaining property or services by false pretences or fraudulent misrepresentation. In this case, adopting the distinction between false pretences and fraudulent misrepresentations articulated in *Geisel*, the allegations pertain to false misrepresentations made to RBC to whom CMHC is subrogated.

40 Although CMHC presented its position in a different manner, I consider that CMHC makes three separate arguments in support of the declaratory relief sought under paragraphs 178(1)(d) or 178(1)(e):

1. that Gray knew or ought to have known of the Misrepresentations;

2. that Gray made specific fraudulent misrepresentations of his own; and

3. that Gray knew or was wilfully blind to the existence of the Scheme.

I will address each in turn.

Submission Based on Knowledge of the Misrepresentations

41 It is not suggested that Gray made any express misrepresentations on his mortgage application regarding his income or otherwise. However, the evidence demonstrates that Roberts made fraudulent misrepresentations regarding his employment status and income on his mortgage application and regarding the value of the Property, in the form of an inflated valuation, being the Misrepresentations. It is not disputed that the Mortgage was obtained in reliance on these fraudulent misrepresentations of Roberts. Therefore, CMHC would be entitled to an order under section 178(1)(d) if it could demonstrate that Gray knew, or reasonably ought to have known, of the Misrepresentations. However, in my view there is no evidence that would support such a conclusion.

42 There is no evidence that Gray was aware of any representations that Roberts made in his mortgage application regarding his employment status or income or regarding the value of the Property, much less that these representations were false. I do not think that this is disputed by CMHC. Accordingly, the issue for the Court is whether, on the evidence, Gray reasonably ought to have known of the Misrepresentations. I note that this is a different question from the question of whether Gray ought to have known of the Scheme and therefore ought not to have remained silent on several matters described below.

43 I conclude that there is no basis in the evidence for finding that Gray reasonably ought to have known of the Misrepresentations. In this regard, I note that Roberts did not attend the meeting at the RBC branch at which Gray executed his mortgage application. In addition, he did not visit the Property and apparently had no knowledge of the value of the Property, apart from what he was told by Roberts. There is no also evidence of any communications between Robert and Gray regarding the content of the mortgage applications of either of them, or more generally of the information to be communicated to RBC.

44 On a strict reading of section 178(1)(d), this conclusion is sufficient to determine the issue on this application. The Mortgage was obtained by Roberts' fraudulent misrepresentations that constitute the Misrepresentations. Gray did not participate in the making of the Misrepresentations and neither knew, nor reasonably ought to have known, of them.

45 However, CMHC submits that Gray's actions in withholding certain information from RBC also constitute fraudulent misrepresentations for the purposes of section 178(1)(d). It says that the Mortgage would not have been issued by RBC or guaranteed by CMHC if Gray had communicated this information to RBC. It says that this silence constituted fraudulent misrepresentations of Gray in his own right. CMHC frames its argument based on this silence in two ways: (1) as specific fraudulent misrepresentations; and (2) as a fraudulent misrepresentation of the legitimacy of the Mortgage transaction when Gray knew or was wilfully blind to the fraudulent nature of the Scheme. I will address these allegations in case I am found to have erred in reaching the conclusion above.

Submissions Based on Alleged Specific Fraudulent Misrepresentations by Gray

46 CMHC argues that the Court should find that Gray made fraudulent misrepresentations of a different nature that support an order under paragraph 178(1)(e) of the BIA even if he did not know, and ought not reasonably to have known, of the Misrepresentations. It says that Gray's misrepresentations took the form of a failure to advise RBC regarding four matters: (1) that he was not the beneficial owner of the Property; (2) that he intended to occupy the Property; (3) that he did not intend to

pay the mortgage payments due under the Mortgage; and (4) that he would receive $2,500 for participating in the transaction. I propose to discuss the significance of these four alleged misrepresentations in order.

47 First, I do not agree that the immigrant participant, rather than Roberts and Gray, was the beneficial owner of the Property. The evidence clearly establishes that Gray and Roberts acquired the Property as tenants in common and granted the Mortgage. There is no evidence of any trust arrangement in favour of third parties. To the contrary, there is undisputed evidence that Gray understood that was purchasing the Property and assuming the risk if the third party did not pay the Mortgage. He says this was explained to him as a matter of no concern because Roberts and Gray could sell the Property for a profit if the third party failed to make the mortgage payments. He also took some comfort from the fact that Roberts was also liable on the Mortgage and in a mistaken belief that Roberts was also concerned about any risk. However, Gray understood he was a part-owner of the Property and ultimately liable on the Mortgage if the third party failed to make the Mortgage payments. Moreover, this is precisely what CMHC bargained for.

48 Second, I also do not agree that Gray's failure to advise RBC that he was being paid $2,500 for participating in the transaction constitutes a misrepresentation for the following reasons. I accept for this purpose the evidence of CMHC that they would not have approved the CMHC insurance of the Mortgage if CMHC had known about this payment. However, demonstration of causation is not sufficient to establish a misrepresentation. In this case, there is no specific representation made, or implied, by Gray to RBC. The mortgage application is not before the Court. The Standard Charge Terms do not contain a representation that addresses this matter. Mere silence, even if intentional, does not constitute a misrepresentation unless it renders an express or implied representation untrue or misleading. CMHC cannot demonstrate any such express or implied misrepresentation.

49 Accordingly, the discussion below addresses the alleged fraudulent misrepresentations of Gray that: (1) he intended to occupy the Property; and (2) he intended to pay personally the mortgage payments. I conclude there are two difficulties with CMHC's assertion that Gray made fraudulent misrepresentations in respect of these matters.

50 First, I am not satisfied that CMHC has established that Gray made either of such representations either expressly or by operation of law for the following reasons.

51 As mentioned, Gray's mortgage application is not before the Court. In any event, there is no evidence that either representation would have been made in the RBC standard form of mortgage application that Gray executed.

52 CMHC says that Gray is deemed to have made these representations by virtue of execution of a standard form RBC document entitled "Approval of Mortgage and Cost of Borrowing Disclosure Statements", which acknowledged the primacy of the terms and conditions of the Standard Charge Terms over the signed statement. There is, however, no conflict between these documents that is relevant for the issue on this application.

53 CMHC also suggests that section 9 of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4 (the "LRR Act") is relevant in this context. Section 9 of the LRR Act provides that a charge shall be deemed to include standard charge terms filed under section 8(1) of the LRR Act if the terms are referred to in the charge. Accordingly, the Mortgage was deemed to include the Standard Charge Terms.

54 CMHC relies upon the following covenants in section 14 and section 24(1) in the Standard Charge Terms:

> 14. In return for our agreeing to lend the Principal Amount to you, you promise and confirm that:
>
> (a) You own your Property, you have the right to give the Mortgage and you mortgage your entire interest to us....
>
> (c) You will pay all of the Outstanding Amount to us and keep all of your other Promises, as provided in the Mortgage.
>
> (d) There are no limitations or restrictions on your title to your Property, except those disclosed to us in writing and that we approved.

(e) Your title to your Property is subject only to:

(i) Those interests filed in the land registry office at the time you give us the Mortgage; and

(ii) Any unregistered interests we have approved. ...

24(1). You promise that you will occupy your Property. If you want to rent, lease or enter into any form of tenancy agreement covering all of any part of your Property, you promise to get our prior consent. We may refuse to give it, at our option.

55 However, I do not think that these provisions of the Standard Charge Terms assist CMHC in the present circumstances for the reason that I do not think that they constitute deemed representations, as opposed to deemed covenants, by virtue of the operation of section 9 of the LRR Act. Section 24(1) is expressed to be a promise. Similarly, the introductory language of section 14 is worded "promise and confirm". Given that this is a standard form document of RBC, if RBC had intended that this provision was to constitute a deemed representation of a mortgagor with potential consequences under section 178(1) of the BIA, rather than a covenant whose consequences would be limited to establishing an event of default under the Mortgage, I think it was required to make that intention express.

56 Second, even if these provisions of the Standard Charge Terms are construed to be deemed representations of a mortgagor, I am not satisfied that any such representations are false, with the possible exception of the covenant in the first sentence of section 24(1). The provisions of section 14 relied upon by CMHC relate to title, or, in the case of section 14(c), payment. As discussed above, I see no inaccuracy in any representation to the effect that Roberts and Gray are the owners of the Property. In the absence of any agreement with Naik or Mike, as the presumed occupants of the Property, there is also no third party who had an interest in the Property. In particular, there was no a tenancy agreement, and no renting or leasing of the Property, for the purposes of the second sentence of section 24(1). Nor do I see any inaccuracy in the representation to the effect that Roberts and Gray would pay the Mortgage, given that they are liable on the Mortgage.

57 Lastly, and in any event, CMHC has failed to establish that Gray had any knowledge of these representations which CMHC says he is deemed to have made in the Standard Charge Terms. CMHC acknowledges that there is no evidence that Gray ever received a copy of the Standard Charge Terms. In these circumstances, I am of the opinion that CMHC cannot establish the necessary intentional requirement for fraudulent misrepresentations.

58 Demonstration of fraudulent misrepresentations requires, among other things, evidence that the representor has knowledge that the representation is false or that the representor was recklessly indifferent to its truth. In the absence of knowledge of the particular representations which a party is deemed to have made, the party cannot have knowledge of the falsity of such representations or have been recklessly indifferent to the truth of any such deemed representations. Accordingly, even if the effect of section 9 of the LRR Act is to deem Gray to have made such representations and even if CMHC can prove that such deemed representations were false, CMHC cannot establish that they were fraudulent representations given the absence of evidence that Gray was ever aware of these representations before the Mortgage was granted.

59 Based on the foregoing, I therefore conclude that CMHC cannot establish that Gray's actions constitute the making of fraudulent misrepresentations for the purposes of paragraph 178(1)(e).

Submission Based on Knowledge of, or Wilful Blindness in Respect of, the Scheme

60 Lastly, CMHC argues that Gray had actual knowledge of the Scheme, as distinct from the Misrepresentations of Roberts which furthered the Scheme, or was recklessly indifferent to the existence of the Scheme. CMHC says that his failure to disclose any of the four matters described above should be understood in this context.

61 There is, however, no evidence that Gray had actual knowledge of the Scheme. CMHC therefore argues principally that Gray was wilfully blind in respect of the Scheme to the point where his failure to advise RBC that he would not be living on

the Property, did not intend to be the party making the mortgage payments, and expected to receive $2,500 for his participation in the transaction, constituted fraudulent misrepresentations. I do not accept this argument for the following reasons.

62 I accept that there are a number of indicia that might raise a concern on the part of a reasonable person in Gray's position regarding the accuracy of the representations made to him by Mike and Roberts. For example, Naik introduced herself as a vendor not a purchaser. Further, Gray did not ask to meet the alleged immigrant who was going to occupy the Property, nor did he ask to see information regarding the employment status, income or credit status of this party to verify his or her ability to make the mortgage payments and to take over the Property.

63 However, even if it were held that such factors should have raised a concern in Gray's mind that called for further investigation that would have uncovered the Scheme, the test for the purposes of wilful blindness is a factual one - was Gray's suspicion aroused to the point where he saw the need for further inquiries but deliberately chose not to make those inquiries? I conclude that CMHC has not demonstrated such a state of knowledge on Gray's part.

64 It is Gray's evidence that he trusted Roberts and therefore failed to question any of the features of the transaction that should have raised concerns in his mind. He acknowledges that, in retrospect, his judgment was foolish and the consequences have been devastating. In particular, he says that, having no prior experience in these matters, he trusted Roberts' representations that arrangements of the sort in which he was asked to participate were normal. He says it was for this reason that he did not advise RBC of the four matters which CMHC alleges constituted misrepresentations by his silence. He also took comfort in Roberts' own participation in the transaction. In addition, he says that, when he raised the absence of the promised agreement to make the mortgage payments that was to come from the alleged immigrant, he was told it was coming and submitted to Roberts' and Mike's manipulation of the situation to make him feel "stupid". Lastly, Gray says he thought that, in some way, he was also helping Roberts, as his friend.

65 The onus of proving wilfull blindness rests with CMHC. I conclude that, on the facts of this case, it is at least as probable that Gray's evidence is credible - that he foolishly trusted Roberts and Mike beyond a point which was reasonable based on a lack of experience regarding what was usual or unusual in mortgage transactions and, I would add, weakness in the presence of stronger individuals that made him vulnerable to manipulation by them for unscrupulous purposes. I would add the following comments in respect of this conclusion.

66 First, the circumstances of this case differ from other cases of mortgage fraud inasmuch as Roberts joined Gray as a co-mortgagor. In these circumstances, as mentioned, Gray's reliance on Roberts' involvement is understandable, even if foolish. The evidence does not disclose any evidence at the time that would have suggested that Roberts was not to be trusted. In addition, there is no evidence that Roberts advised him to withhold the nature of his involvement from RBC or otherwise remain silent in any respect.

67 Second, for the same reasons, given his lack of experience and his trust in Roberts, there is an explanation for his acceptance of Roberts' assurance that this was a normal transaction. Moreover, there is no evidence that Gray was aware of fraudulent mortgage transactions of this nature or of the fact that the valuation submitted for the Property was inflated.

68 In these circumstances, I am not persuaded that the only explanation for Gray's failure to question Roberts or Mike regarding the "red flags" was wilful blindness on Gray's part to the possibility that the entire transaction was a sham intended to defraud RBC and CMHC in the inflated amount of the Property valuation.

69 Based on the foregoing, I conclude that CMHC has not demonstrated that it is more probable than not that Gray either knew of the Scheme or was wilfully blind in respect of the Scheme such that his failure to disclose the features of the arrangements described above constitute fraudulent misrepresentations for the purposes of paragraph 178(1)(e) of the BIA.

Allegation of Breach of Fiduciary Duty for Purposes of Paragraph 178(1)(d) of the BIA

70 As mentioned, as an alternative position, CMHC also alleges that the Debt arose out of fraud on Gray's part while acting in a fiduciary capacity, which thereby triggers the provisions of paragraph 178(1)(d) of the BIA. For this purpose, the alleged

fraud is the making of the misrepresentations addressed in the preceding section. Given the determination above that Gray's actions did not constitute false pretences or fraudulent misrepresentations for such purposes, there cannot be a viable claim asserted under section 178(1)(d).

71 In addition, I do not think that the mere fact that Gray owed a fiduciary obligation to his employer in his capacity as an employee is sufficient to establish a claim under paragraph 178(1)(d). In making the alleged representations, Gray was acting in the capacity of a prospective borrower from the bank, rather than as an employee. There is no law that imposes a fiduciary obligation upon a prospective borrower. There is also no law of which I am aware that would treat Gray, even though an employee of the prospective lender at the time, any differently from any prospective borrower who had no such relationship to the lender.

Application of the Limitations Act, 2002

72 As a defence to CMHC's allegations, Gray has also asserted a limitation period defence. Gray submits that, as the assignee of RBC's rights, CMHC is deemed under section 12 of the *Limitations Act, 2002*, S.O. 2002, c. 24 to have discovered its claim on or about July 27, 2006 when RBC discovered that the Mortgage had been obtained on the basis of the Misrepresentations of Roberts. Gray says that RBC did not allege fraud in the action commenced on November 30, 2007 and did not get a determination of fraud at the time it obtained the Judgment on January 16, 2008. As CMHC derives its title to the Debt through RBC and has no higher rights, Gray says CMHC is precluded from asserting a claim for fraud in this proceeding by virtue of the two-year limitation period in section 4 of the *Limitations Act, 2002*.

73 CMHC makes two arguments to the effect that this limitation period does not apply. First, it says that the present proceeding is not a new action but a proceeding for declaratory relief related to enforcement of the Judgment. As such, paragraphs 16(1)(a) and (b) of the *Limitations Act, 2002* provide that there is no limitation period applicable to the relief sought. Second, CMHC says that RBC was not required to anticipate Gray's fraud in its pleadings or to draft its pleadings with section 178(1) in mind. It relies on the principle originally articulated in *Phillips, Re*, [1994] A.J. No. 499 (Alta. Q.B.) at paras. 32-35.

74 Given the conclusions reached above, it is not necessary to reach a determination on this issue. However, if the Court were required to make such a determination, I would conclude that the *Limitations Act, 2002* does not apply to prevent CMHC from asserting its claims under section 178(1)(d) and (e) for the reasons cited by CMHC.

Conclusion

75 Based on the foregoing, the CMHC application is dismissed.

Costs

76 Gray is entitled to reasonable costs of the motion as the successful party. However, there has been no activity on the part of CMHC that would attract costs on a substantial indemnity basis. In particular, given the "red flags" described above, it was not unreasonable to bring this application. Accordingly, Gray is entitled to costs on a partial indemnity basis.

77 Gray seeks costs totaling approximately $29,000, comprised of legal fees of $27,000 plus disbursements and GST. Given the importance of the issue to him and the nature of the issues before the Court, I consider the time spent by counsel to be appropriate. I note that CMHC's legal fees were approximately $22,000. In the circumstances, it is not unreasonable to expect that the debtor's costs would be somewhat higher in mounting as comprehensive a defence as possible. I have made a small adjustment to reflect the actual length of the trial. Accordingly, I find fair and reasonable costs of this matter to be $28,000 on an all-inclusive basis.

Application dismissed.

End of Document

2014 ONCA 236
Ontario Court of Appeal

Canada Mortgage and Housing Corp. v. Gray

2014 CarswellOnt 3805, 2014 ONCA 236, 119 O.R. (3d) 710, 11 C.B.R. (6th) 324, 238 A.C.W.S. (3d) 807, 317 O.A.C. 286

In the Matter of the Bankruptcy and Insolvency R.S.C. 1985, c. B-3, as amended Act

In the Matter of the Bankruptcy of Evan Peter Gray of the City of Toronto in the Province of Ontario

Canada Mortgage and Housing Corporation Creditor (Appellant) and Evan Gray Debtor (Respondent)

John Laskin, K. van Rensburg, C.W. Hourigan JJ.A.

Heard: January 29, 2014
Judgment: March 28, 2014
Docket: C57109

Proceedings: affirming *Canada Mortgage and Housing Corp. v. Gray* (2013), [2013] O.J. No. 1969, 2 C.B.R. (6th) 23, 2013 CarswellOnt 5150, 2013 ONSC 1986, H.J. Wilton-Siegel J. (Ont. S.C.J.)

Counsel: Kenneth Kraft, Matthew Diskin for Appellant
Trung Nguyen for Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property; Torts

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

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Onus of proof

Bankrupt was employee of bank and was asked by friend if he would be willing to co-sign mortgage application to assist new immigrant who lacked sufficient credit history in Canada to obtain mortgage — Bankrupt and friend signed separate mortgage applications at different times in different places — Bankrupt provided accurate information about his income and employer while friend misrepresented income and employment and submitted inflated property valuation — Bankrupt was not aware of misrepresentations — Bank investigated what it believed to be fraud — Mortgage went into default — Bank sued and obtained default judgment against bankrupt and friend and judgment was assigned to Canada Mortgage and Housing Corporation (CMHC) — Bankrupt made assignment in bankruptcy — CMHC applied for declaration that outstanding amount of bankrupt's debt would not be released under s. 178(1)(e) of Bankruptcy and Insolvency Act (Can.) — Judge determined that bankrupt's debt would not survive his discharge from bankruptcy — CMHC appealed — Appeal dismissed — Section 178(1)(e) required finding that bankrupt obtained property by fraudulent misrepresentation or false pretences — Causal connection was required between bankrupt's wrongdoing and creation of debt — Mortgage was obtained by friend's fraudulent misrepresentations and not as result of anything bankrupt said or failed to disclose — Bankrupt was not aware of friend's misrepresentations or mortgage fraud — Trial judge did not err in failing to find that bankrupt was not wilfully blind — Decision did not condone straw man debtor scenario.

Bankruptcy and insolvency — Discharge of bankrupt — Effect of discharge — Debts not released by discharge — Fraud — False pretences or fraudulent misrepresentation

Bankrupt was employee of bank and was asked by friend if he would be willing to co-sign mortgage application to assist new immigrant who lacked sufficient credit history in Canada to obtain mortgage — Bankrupt and friend signed separate mortgage applications at different times in different places — Bankrupt provided accurate information about his income and employer while friend misrepresented income and employment and submitted inflated property valuation — Bankrupt was not aware of misrepresentations — Bank investigated what it believed to be fraud — Mortgage went into default — Bank sued and obtained default judgment against bankrupt and friend and judgment was assigned to Canada Mortgage and Housing Corporation (CMHC) — Bankrupt made assignment in bankruptcy — CMHC applied for declaration that outstanding amount of bankrupt's debt would not be released under s. 178(1)(e) of Bankruptcy and Insolvency Act (Can.) — Judge determined that bankrupt's debt would not survive his discharge from bankruptcy — CMHC appealed — Appeal dismissed — Section 178(1)(e) required finding that bankrupt obtained property by fraudulent misrepresentation or false pretences — Causal connection was required between bankrupt's wrongdoing and creation of debt — Mortgage was obtained by friend's fraudulent misrepresentations and not as result of anything bankrupt said or failed to disclose — Bankrupt was not aware of friend's misrepresentations or mortgage fraud — Trial judge did not err in failing to find that bankrupt was not wilfully blind — Decision did not condone straw man debtor scenario.

Bankruptcy and insolvency — Discharge of bankrupt — General principles

Bankrupt was employee of bank and was asked by friend if he would be willing to co-sign mortgage application to assist new immigrant who lacked sufficient credit history in Canada to obtain mortgage — Bankrupt and friend signed separate mortgage applications at different times in different places — Bankrupt provided accurate information about his income and employer while friend misrepresented income and employment and submitted inflated property valuation — Bankrupt was not aware of misrepresentations — Bank investigated what it believed to be fraud — Mortgage went into default — Bank sued and obtained default judgment against bankrupt and friend and judgment was assigned to Canada Mortgage and Housing Corporation (CMHC) — Bankrupt made assignment in bankruptcy — CMHC applied for declaration that outstanding amount of bankrupt's debt would not be released under s. 178(1)(e) of Bankruptcy and Insolvency Act (Can.) — Judge determined that bankrupt's debt would not survive his discharge from bankruptcy — CMHC appealed — Appeal dismissed — Section 178(1)(e) required finding that bankrupt obtained property by fraudulent misrepresentation or false pretences — Causal connection was required between bankrupt's wrongdoing and creation of debt — Mortgage was obtained by friend's fraudulent misrepresentations and not as result of anything bankrupt said or failed to disclose — Bankrupt was not aware of friend's misrepresentations or mortgage fraud — Trial judge did not err in failing to find that bankrupt was not wilfully blind — Decision did not condone straw man debtor scenario.

Table of Authorities

Cases considered by *van Rensburg J.A.*:

Bank of Montreal v. Giannotti (2000), 2000 CarswellOnt 4110, 21 C.B.R. (4th) 199, (sub nom. *Giannotti (Bankrupt), Re)* 138 O.A.C. 316, 51 O.R. (3d) 544, 197 D.L.R. (4th) 266 (Ont. C.A.) — referred to

Buland Empire Development Inc. v. Quinto Shoes Imports Ltd. (1999), 11 C.B.R. (4th) 190, 1999 CarswellOnt 2312, 123 O.A.C. 288, 24 R.P.R. (3d) 169 (Ont. C.A.) — considered

Simone v. Daley (1999), 1999 CarswellOnt 551, 170 D.L.R. (4th) 215, 8 C.B.R. (4th) 143, 118 O.A.C. 54, 24 R.P.R. (3d) 1, 43 O.R. (3d) 511 (Ont. C.A.) — referred to

Ste. Rose & District Cattle Feeders Co-op v. Geisel (2010), 255 Man. R. (2d) 45, 486 W.A.C. 45, 68 C.B.R. (5th) 163, 2010 MBCA 52, 2010 CarswellMan 185, [2010] 11 W.W.R. 251, 319 D.L.R. (4th) 694 (Man. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 178(1) — considered

s. 178(1)(d) — considered

s. 178(1)(e) — considered

APPEAL by corporation from judgment reported at *Canada Mortgage and Housing Corp. v. Gray* (2013), 2013 ONSC 1986, 2013 CarswellOnt 5150, 2 C.B.R. (6th) 23, 229 A.C.W.S. (3d) 333, [2013] O.J. No. 1969 (Ont. S.C.J.), determining that debt of respondent bankrupt would not survive discharge from bankruptcy.

van Rensburg J.A.:

Introduction

1 This is an appeal from the decision of Wilton-Siegel J. that determined that the respondent's debt to Royal Bank of Canada ("RBC"), which had been assigned to the appellant Canada Mortgage and Housing Corporation ("CMHC"), would not survive his discharge from bankruptcy.

2 This case engages the proper interpretation and application of s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") which provides as follows:

> 178. (1) An order of discharge does not release the bankrupt from...
>
> (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim.

3 For the reasons that follow, I would dismiss the appeal. There was no error in the trial judge's conclusion that the respondent's debt to CMHC would not survive his bankruptcy discharge.

Facts

4 In 2006, the respondent Evan Gray, an RBC employee, was asked by an acquaintance, John Roberts, if he would be willing to co-sign on a mortgage application, purportedly to assist a new immigrant who lacked sufficient credit history in Canada and was unable to obtain a mortgage. Roberts told Gray that this person would occupy the mortgaged property, would sign a written agreement promising to make the payments due under the mortgage, and after a year would assume the mortgage and take title to the property. Roberts told Gray that there was no risk because the property could be sold in the event of default, and that he would not have agreed to co-sign the mortgage himself if he thought there was any risk.

5 After Gray agreed to co-sign the mortgage application, Roberts took him to meet someone called "Mike," who held himself out as a mortgage broker, and the two assured him that the type of arrangement they were proposing was common and ordinary business practice. The mortgage application was signed by Gray at an RBC branch, where he attended with Mike and met with an RBC mortgage representative. Gray did not receive a copy of anything he signed, nor was he given the standard charge terms referred to in the mortgage document (and upon which CMHC relied in these proceedings).

6 Gray and Roberts signed separate mortgage applications, at different times and in different places. Gray provided accurate information about his income and employer, while Roberts misrepresented his income and employment on his application. Roberts also submitted an inflated property valuation with his mortgage application. Gray was unaware of Roberts' misrepresentations.

7 Gray and Roberts purchased the property as tenants in common and RBC extended a mortgage loan of $516,370.13. The mortgage was insured by CMHC. The transaction closed in April 2006.

8 Gray was paid $2,500 for his participation in the transaction.

9 Two months later, Gray was contacted by RBC and told a mortgage payment was late. He notified Roberts and Mike, and they picked him up and gave him funds to make the payment. The mortgage payments in the next few months were made in a similar fashion.

10 In July 2006, and before any default had occurred, RBC investigated what it believed to be a fraud. Gray co-operated in the investigation. Gray's employment was not affected and he remains employed by RBC.

11 In or about June 2007 Mike stopped making mortgage payments and both Roberts and Mike stopped returning Gray's telephone calls. The mortgage subsequently went into default.

12 In November 2007 RBC sued on the mortgage debt and obtained a default judgment against Gray and Roberts in the sum of $524,577.34 plus interest. RBC's statement of claim did not allege fraud. The judgment debt was reduced by the net proceeds of sale of the mortgaged property ($331,875.03). The judgment was assigned to CMHC in August 2008.

13 CMHC enforced the judgment, and Gray's wages were garnished to the extent of $17,169.39 before he made an assignment in bankruptcy in February 2012.

14 In April 2012 CMHC moved for a declaration that the outstanding amount of Gray's debt would not be released by his discharge from bankruptcy under sections 178(1)(d) and (e) of the BIA. (There is no issue on this appeal with respect to s. 178(1)(d), and the finding that Gray was not acting in a fiduciary capacity when the mortgage funds were obtained.)

15 The matter came before Wilton-Siegel J. as the trial of an issue. The evidence consisted of the affidavits and oral evidence of the bankrupt Evan Gray and a CMHC representative.

Decision in the Court Below

16 The trial judge concluded that there was no evidence of any misrepresentation by Gray that had been relied upon by RBC in advancing the mortgage funds, and there was no basis on the evidence for finding that Gray reasonably ought to have known of Roberts' misrepresentations. As such, on a strict reading of s. 178(1)(e) of the BIA, [1] the mortgage was obtained by Roberts' fraudulent misrepresentations, in which Gray did not participate and about which he neither knew nor reasonably ought to have known.

17 After concluding that this would be sufficient to dispose of the matter, the trial judge considered the alternative argument that Gray ought to have known of the scheme and ought not to have remained silent on certain matters. CMHC alleged that Gray had fraudulently failed to reveal to RBC that he was not the beneficial owner of the property, that he was receiving payment for his involvement in the transaction, and that he had no intention to live at the property or to personally pay the mortgage. CMHC argued that if these facts had been revealed, RBC would not have advanced the funds and CMHC would not have insured the mortgage.

18 The trial judge rejected these arguments. Gray and Roberts were the owners of the property and were ultimately liable on the mortgage. Silence about the payment Gray received was not a misrepresentation unless it rendered an express or implied representation untrue or misleading. CMHC could not demonstrate any such express or implied representation. With respect to the implied representations that Gray intended to occupy the property and personally pay the mortgage, the trial judge noted that there was no evidence of any such representation either in Gray's mortgage application (which was not produced), or by reference to RBC's standard charge terms, as there was no evidence that Gray had ever received a copy.

19 The trial judge observed that a fraudulent misrepresentation requires evidence that the representor knows that the representation is false or is recklessly indifferent to its truth. There was no evidence that Gray was aware of any misrepresentation made before the mortgage was granted. As for recklessness, after considering what Gray knew of the circumstances, the trial judge concluded that it was at least as probable that Gray had foolishly trusted Roberts and Mike. Accordingly, CMHC had not established that he was wilfully blind or reckless.

Issues on Appeal

20 The principal argument on appeal is that the trial judge did not correctly apply the law respecting false pretences, in considering whether the judgment debt would survive Gray's discharge from bankruptcy under s. 178(1)(e) of the BIA. Instead, he limited his analysis to whether Gray had made a fraudulent misrepresentation. The appellant asserts that the false pretences in this case were that Gray did not inform RBC that he had been paid to participate in the transaction, that he had no intention of living in the property, and that he did not intend to make the mortgage payments. It is acknowledged that the trial judge reviewed these circumstances in his analysis of fraudulent misrepresentation; the appellant argues that the judge failed to consider the separate question of whether Gray had used false pretences in connection with the borrowing. The appellant relies on the Manitoba Court of Appeal's decision in *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52 (Man. C.A.), with respect to the proper interpretation of false pretences in the context of s. 178(1)(e) of the BIA.

21 The appellant also asserts that the trial judge ignored the "straw borrower" scheme in his analysis. As a "straw borrower", Gray was not entitled to be treated as an "honest but unfortunate debtor", such that the debt incurred as a result of the fraudulent mortgage would be released upon his discharge from bankruptcy.

22 There are other arguments on appeal — that the trial judge erred in his articulation and application of the tests for wilful blindness and recklessness in considering whether Gray was party to Roberts' fraudulent misrepresentations, and that the trial judge erred in failing to conclude that certain provisions of the standard charge terms were false representations made by Gray.

23 The respondent asserts that there was no error in the trial judge's analysis, which was based on findings of fact that were supported by the evidence and not challenged on appeal. The evidence supported the conclusion that the mortgage was granted in reliance on Roberts' misrepresentations, and not as a result of anything Gray represented in his mortgage application. There was no evidence of any reliance on any representation by Gray that led to the mortgage advance. The crux of the matter was Gray's knowledge or ignorance of the fraudulent scheme. Gray was unaware that he was being used by Roberts as an unwitting "straw buyer" in a mortgage fraud, and the trial judge on the evidence concluded that he was not wilfully blind or reckless. As such, CMHC did not establish that the judgment debt was "a debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation", as required by s. 178(1)(e) of the BIA.

Analysis

24 Section 178(1) of the BIA preserves certain types of claims from a bankrupt's order of discharge. They are exceptions to the general rule of discharge and should be addressed accordingly: *Simone v. Daley*, [1999] O.J. No. 571 (Ont. C.A.), at para. 28. The onus is on the creditor who seeks to have the debt or liability survive the discharge of the bankrupt to bring it within one of the provisions of s. 178(1).

25 It is instructive to examine more closely subsections 178(1)(d) and (e), the two provisions dealing with a bankrupt's fraud. They provide as follows:

> 178. (1) An order of discharge does not release the bankrupt from
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;
>
> (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

26 Section 178(1)(d) preserves from discharge a debt or liability "arising out of" fraud, embezzlement, misappropriation or defalcation of the bankrupt while acting in a fiduciary capacity. Its application is restricted to bankrupts acting in a fiduciary capacity. As such, a debt or liability "arising out of" the fraud of a debtor who was not acting in a fiduciary capacity would fall outside the scope of this section and would need to be considered under s. 178(1)(e).

27 Section 178(1)(e) preserves from discharge a debt or liability "resulting from obtaining property or services by" false pretences or fraudulent misrepresentation.

28 The reasons of the trial judge demonstrate that he was alive to the specific wording of this section when he concluded at para. 44 of his decision:

> On a strict reading of [section 178(1)(e)], this conclusion is sufficient to determine the issue on this application. The Mortgage was obtained by Roberts' fraudulent misrepresentations that constitute the Misrepresentations. Gray did not participate in the making of the Misrepresentations and neither knew, nor reasonably ought to have known, of them.

29 The appellant acknowledges that in order for there to be a fraudulent misrepresentation there must be reliance by the party to whom the representation is made, and that in the present case the trial judge noted that it was not disputed that the mortgage was obtained in reliance on Roberts' misrepresentations. The trial judge concluded that Gray did not know, nor ought he reasonably to have known, of the misrepresentations made by Roberts, that led to the mortgage funds being advanced.

30 The appellant contends however that the trial judge failed to consider the false pretences branch of s. 178(1)(e). It is asserted that the false pretences consisted of Gray's participation in the straw borrower scheme, knowing that he was not going to live in the house, and failing to reveal this fact, as well as the payment he was receiving for his involvement when the mortgage was advanced.

31 There is a fatal flaw in the appellant's argument. Irrespective of whether one considers fraudulent misrepresentation or false pretences, s. 178(1)(e) requires a finding that the bankrupt "obtained property by" such conduct. A causal connection between the bankrupt's wrongdoing and the creation of the debt or liability is required. It is not sufficient that the bankrupt engaged in fraud, or that the debt or liability "arose out of" a fraudulent scheme. The trial judge in this case concluded that the mortgage funding was obtained by Roberts' fraudulent misrepresentations, and not as a result of what Gray represented or failed to disclose to RBC.

32 Since the appellant relies heavily on the decision of the Manitoba Court of Appeal in *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, an examination of that case is warranted.

33 In *Geisel* there were two debtors, a father and a son, against whom the plaintiff Co-op had obtained a default judgment before both went bankrupt. The father had borrowed money from the Co-op, and agreed to use the funds to purchase cattle, and to brand the cattle with the Co-op's brand. The father was to notify the Co-op when the cattle were taken to auction, and to repay the borrowing from the proceeds of sale. Ultimately, the cattle, which had not been branded with the Co-op's name, were transported and sold at auction in the name of the son. The proceeds were deposited into the son's bank account, where they were seized by one of his creditors. There was no intention to defraud the Co-op; rather the scheme was put in place by the two men for tax reasons, and with the expectation that the proceeds would be used to repay the father's borrowing.

34 There was no fraud on the part of the father and no involvement by the son in connection with the original borrowing, factors that led the trial judge to refuse relief under s. 178(1)(e) on the basis that the debt was not "property obtained by" fraudulent misrepresentation or false pretences.

35 This decision was overturned on appeal, with the Manitoba Court of Appeal holding that the judgment debt survived the bankruptcy discharges of both father and son.

36 The appeal court noted that, while there was no apparent fraud in the original borrowing, at the later stage where both debtors knowingly diverted the proceeds of sale of the cattle to the wrong bank account, there was fraud on the part of the

father and false pretences on the part of the son. The father knowingly withheld relevant information from the Co-op when he advised that the cattle would be sold, but not that they would be sold in his son's name with the proceeds deposited into the son's account. This was a fraudulent misrepresentation relied on by the Co-op to its detriment. The false pretences were on the part of the son when he falsely held out to the transport driver and auctioneer that the cattle were his to sell. He obtained the property of the Co-op (the proceeds of sale of the cattle) by pretences which he knew to be false.

37 The *Geisel* case does not stand for the general proposition urged upon us by the appellant — that a debtor's false pretences are sufficient to exempt a debt from discharge, even where there is no causal link between the debt or liability sought to be preserved and the false pretences of the bankrupt. In *Geisel* there could be no misrepresentation by the son to the Co-op, because the son had no dealings or relationship with the Co-op. What was key was that the son had obtained from the auctioneer the Co-op's property (the proceeds of the sale of the cattle at auction) by pretences he knew to be false. He had represented that he was the owner of the cattle.

38 In the present case, the trial judge referred to the *Geisel* decision and he cited that court's approval of the observation in *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.*, [1999] O.J. No. 2807 (Ont. C.A.), at para. 14, that "the core content of both false pretences and fraudulent misrepresentation is deceitful statements". He recognized that both false pretences and fraudulent misrepresentation involved the question of whether Gray had made a deceitful statement that led RBC to advance the mortgage funds. The trial judge considered the very circumstances that the appellant contends were false pretences and he concluded that they did not amount to a fraudulent misrepresentation on the part of Gray.

39 The wording of section 178(1)(e) makes it clear that the debt or liability must result from obtaining property or services by false pretences or fraudulent misrepresentation. The trial judge concluded that the money was advanced by RBC as a result of Roberts' misrepresentations, and not as a result of anything Gray said or failed to say or do. This was a finding of fact that is determinative of both the "false pretences" and "fraudulent misrepresentation" aspects of s. 178(1)(e) as applied to this case.

40 Finally, while it is correct to say that "the bankruptcy scheme is intended to benefit honest, but unfortunate, debtors" (see *Bank of Montreal v. Giannotti* (2000), 138 O.A.C. 316 (Ont. C.A.), at para. 11, cited with approval in *Geisel*), it is not sufficient to show that there was a false pretence or fraudulent misrepresentation unless it is also shown that the property (in this case the mortgage funding) was obtained thereby. While the *Geisel* case referred to this interpretive principle, in concluding that the debtors' motives and intentions to repay the Co-op were not relevant, the court nevertheless found in that case that property had been obtained by each of the debtors by their fraudulent misrepresentation or false pretences.

41 Having dealt with the principal arguments on appeal, I will address briefly the appellant's other submissions.

42 The appellant argues that the trial judge erred in his articulation and application of the tests for wilful blindness and recklessness, and that he had ignored obvious "red flags" that should have alerted Gray to the deception perpetrated by Roberts. I disagree. The trial judge correctly set out the test and he made findings of fact at paras. 65 to 69 of his reasons. He concluded that Gray did not know about Roberts' misrepresentations or the mortgage fraud in which he was engaged. He considered and determined the weight to be given to the bankrupt's reasons for not making further inquiries when confronted by "red flags". The question was whether Gray was wilfully blind to (and therefore participated in) the fraud that led to the advance of the mortgage funds. There was no error in the trial judge's analysis and conclusion that, with respect to whether the bankrupt was wilfully blind, it was at least as probable that Gray foolishly trusted Roberts and Mike beyond a point that was reasonable, based on his lack of experience and vulnerability to manipulation.

43 The appellant also submits that the trial judge erred in failing to find that the standard charge terms incorporated by reference into the mortgage agreement constituted representations by Gray that he knew to be false (that the borrowers would be living in the house and that no one else had an interest in the property). While I would not necessarily agree with the trial judge's characterization of such terms as covenants and not representations, I would not interfere with his conclusion that, in the absence of evidence that the standard charge terms were provided to Gray, he could not be said to have made the representations fraudulently. This is not to say that the standard charge terms did not apply to the borrowing, if they were incorporated by reference into the mortgage documents signed by Gray, even if he did not receive them; only that the necessary intentional

requirement for fraudulent misrepresentation could not be established in the absence of showing that Gray had knowingly made the representation. Accordingly, this argument on appeal cannot succeed.

44 Finally, I disagree with the appellant's submission that the trial judge's decision condones the "straw man" debtor scenario. It was necessary for the trial judge to examine all of the circumstances to determine whether in this case, the debtor who was a "straw man" in the borrowing, had obtained funds from RBC by false pretences or fraudulent misrepresentation. The trial judge correctly identified the relevant legal principles and he applied them to the facts as he found them. For the purposes of s. 178(1)(e), it was not sufficient to find that the debtor made some type of misrepresentation or engaged in some type of false pretence without also finding that the conduct in question led to the judgment debt.

Conclusion

45 For these reasons, the appeal is dismissed. Costs of the respondent are payable by the appellant and fixed at $10,000, inclusive of disbursements and applicable taxes.

John Laskin J.A.:

I agree

C.W. Hourigan J.A.:

I agree

Appeal dismissed.

Footnotes

1 Although the formal reasons refer (at para. 44) to s. 178(1)(d), it is apparent from the context that the trial judge intended to refer to s. 178(1)(e).

TAB 14

1990 CarswellOnt 536
Ontario Supreme Court, Court of Appeal

Toronto Dominion Bank v. Faulkner

1990 CarswellOnt 536, [1990] O.J. No. 1085, 11 R.P.R. (2d) 161, 21 A.C.W.S. (3d) 1066, 40 O.A.C. 61, 71 D.L.R. (4th) 364, 74 O.R. (2d) 92

FAULKNER et al. v. TORONTO-DOMINION BANK

McKinlay, Catzman and Carthy JJ.A.

Heard: February 6-7, 1990
Judgment: June 25, 1990
Docket: Doc. No. 630/87

Counsel: *I.V.B. Nordheimer*, for appellant Crown Trust Co.
H.R. Shanbaum, Q.C., for respondent.

Subject: Property; Corporate and Commercial

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

Headnote

Mortgages --- Priorities — Between types of creditors — Registered mortgagees

Mortgages — Priorities — Subsequent mortgages — Equitable mortgages — Owner mortgaging property to respondent bank and subsequently removing house thereon to spouse's property and granting mortgage to appellant trust company — Trust company's mortgage having priority — Trust company having legal interest in property while bank having only equitable interest.

F gave a mortgage of the land containing his house to the respondent bank, and the mortgage was duly registered. Without notifying the bank, F removed the house to another property owned by his spouse and granted another mortgage to the appellant trust company. At trial it was held that F had wrongfully removed his house, but that the bank had priority of security by virtue of the fact that the bank had no knowledge of F's actions and could not have provided adequate notice of those actions to any third party. The trial Judge held that the trust company's security interest was subordinate to that of the bank. The trust company appealed.

Held:

The appeal was allowed.

The trust company had priority over the bank's interest in the house on the second property. In this case, the equities were equal and therefore the party who held legal title had priority; there was no ground to deprive the party with the legal estate of the priority to which it was entitled. The trust company's interest was legal, as the residence was physically located on the property upon which it had a valid registered charge. The bank had only an equitable interest and, accordingly, its interest was subordinate to the trust company's security.

Table of Authorities

Cases considered:

Reynolds v. Ashby & Sons, [1904] A.C. 466, [1904-7] All E.R. 401, 53 W.R. 129 (H.L.) — *referred to*

Scottish American Investment Co. v. Sexton (1894), 26 O.R. 77 (Ch. D.) — *distinguished*

Toronto-Dominion Bank v. Faulkner (1987), 60 O.R. (2d) 529, 46 R.P.R. 1, 41 D.L.R. (4th) 182 (H.C.) — *referred to*

Travis-Barker v. Reed, [1923] 3 W.W.R. 451, [1923] 3 D.L.R. 927 (S.C.C.), reversing [1921] 3 W.W.R. 770, 17 Alta. L.R. 319, 66 D.L.R. 426 (C.A.), varying [1920] 3 W.W.R. 623, 54 D.L.R. 405 (Alta. S.C.) — *followed*

Authorities considered:

21 C.E.D. (Ont. 3d), Title 96, "Mortgages," § 27.

Megarry, R.E., and W.R. Wade, *The Law of Real Property*, 5th ed. (London: Sweet & Maxwell, 1984).

Rayner, W.B., and R.H. McLaren, *Falconbridge on Mortgages*, 4th ed. (Aurora, Ont.: Canada Law Book, 1977).

APPEAL from a decision, reported (1987), 60 O.R. (2d) 529, 46 R.P.R. 1, 41 D.L.R. (4th) 182 (H.C.), determining that appellant trust company's mortgage being subordinate to respondent bank's charge.

The judgment of the Court was delivered by *Catzman J.A.*:

The Contest

1 This appeal involves an unusual contest between two mortgagees of two different parcels of real estate. What makes the contest unusual is its subject-matter: a house — the same house — which was situated on each of the parcels at the time each of the mortgages was given.

The Facts

2 In 1977, a lawyer (since disbarred) named Faulkner mortgaged property in the Township of Goulbourn ("the first property") to The Toronto-Dominion Bank ("the bank") for the sum of $50,000. At the time the bank's mortgage was given, the house stood on the first property. The bank's mortgage was duly registered in the local land registry office.

3 In 1979, without the bank's knowledge, Faulkner physically moved the house from the first property to lands owned by his spouse in the Township of West Carleton ("the second property").

4 In 1980, Faulkner's spouse conveyed the second property to herself and Faulkner as grantees. At the same time, Faulkner and his spouse mortgaged the second property to Crown Trust Co. ("Crown Trust") for the sum of $55,080. At the time the Crown Trust mortgage was given, the house stood on the second property. There was no registration on the title to the second property of any encumbrance or any claim by the bank to the house. The conveyance and the Crown Trust mortgage were duly registered in the local land registry office. All of the mortgage funds were advanced by the bank and by Crown Trust on their respective mortgages.

5 The trial Judge, whose findings of fact were not disputed on the appeal, found that Faulkner wrongfully removed the house from the first property to the second property; that Crown Trust did not have actual notice that the house had been moved or

actual notice of the bank's claim until some time after it had advanced its mortgage funds; and that Crown Trust did not have constructive notice of the bank's interest in the house.

The Judgment at Trial

6 In reasons for judgment reported at (1987), 60 O.R. (2d) 529, 46 R.P.R. 1, 41 D.L.R. (4th) 182 (H.C.), the trial Judge held that the bank had priority. He concluded that, as against Faulkner, the bank would be entitled to damages for the value of the house, and that the bank was also entitled to an order for a lien upon the house at its location on the second property unless there was some conduct or omission on its part which inequity disentitled it to such an order. He found that there was no such conduct or omission, and that the bank did not know and could not easily have determined that the house had been moved from the first property before Crown Trust advanced funds under its mortgage on the second property.

7 The trial Judge considered himself to be faced with [at p. 532 O.R., p. 184 D.L.R.]

> two legal principles which, when applied to the above facts, present conflicting results. The first principle is that where a fixture which forms part of the security for a mortgage is removed, the mortgagee retains title in the object, even as against a subsequent innocent purchaser: *Scottish American Investment Co. v. Sexton et al.* (1894), 26 O.R. 77. ... The second, and in this instance conflicting principle is derived from the law of fixtures. It states that title to fixtures is in the owner of the land to which they are affixed, irrespective of title of the person who affixed them: *Reynolds v. Ashby & Son*, [1904] A.C. 466. Thus, the owner of a chattel will lose his legal title to it by permitting it to be annexed to the land of another person. According to Megarry and Wade, *The Law of Real Property*, 5th ed. (1984), at p. 738, even a stolen chattel, if annexed to real property, will become the property of the owner of the land.

8 He noted that, in resolving this conflict, he found assistance in two decisions: that of the Supreme Court of Canada in *Travis-Barker v. Reed*, [1923] 3 W.W.R. 451, [1923] 3 D.L.R. 927, reversing [1921] 3 W.W.R. 770, 17 Alta. L.R. 319, 66 D.L.R. 426 (C.A.), varying [1920] 3 W.W.R. 623, 54 D.L.R. 405 (Alta. S.C.), and that of the Chancery Division of the High Court of Justice of this province in *Scottish American Investment Co. v. Sexton* (1894), 26 O.R. 77. Applying those decisions to the present case, he found in favour of the bank and granted two declarations, which, in the form in which they appear in the formal judgment, declared the bank to be a mortgagee of the property described in the mortgage to Crown Trust (that is, the second property) in priority to the Crown Trust mortgage, and declared the house situated on the lands described in the Crown Trust mortgage to be held as security for the bank's mortgage.

9 Crown Trust now appeals from this judgment.

Travis-Barker v. Reed

10 It will be convenient to deal with the two cases from which the trial Judge indicated that he derived assistance in the order in which they were considered by him.

11 The first is *Travis-Barker v. Reed*. In that case, Travis-Barker sold a portion of a subdivision of land, subject to a mortgage, to Sutherland under an agreement by which the purchase price was to be paid in instalments. Sutherland in turn entered into an agreement to sell, by instalments, one lot in the subdivision to Punt, who erected upon it a house which he occupied as his home. Sutherland subsequently defaulted under his agreement with Travis-Barker, who obtained an order foreclosing Sutherland's interest in the land. The order had the effect of terminating any interest which Punt had in the lot he had agreed to buy from Sutherland. Thereafter, Punt and his father-in-law, Reed, who knew of the interests of Travis-Barker and the mortgagee, without notice to them removed the house to a second lot, title to which was then in the name of Mrs. Reed and was subsequently transferred to her daughter, Mrs. Punt. Mrs. Punt mortgaged the second lot, on which the house then stood, to Nettleton, who was found to be a bona fide investor acting in good faith throughout.

12 After Travis-Barker and the mortgagee learned of the removal of the house to the second lot, they instituted court action but took no steps to obtain an injunction for registration in the land titles office or otherwise to warn the public against purchasing

the lot or lending on mortgage against it. In the action, they sought damages or, in the alternative, permission to remove the house or a charge upon the lot on which it stood.

13 The trial Judge awarded damages against Punt and his father-in-law, Reed, for having wrongfully removed the house, and ordered a charge against the property of Mrs. Punt, which he declared to be secondary to the Nettleton mortgage: [1920] 3 W.W.R. 623, 54 D.L.R. 405.

14 On appeal, the Appellate Division of the Supreme Court of Alberta, reversing the finding of the trial Judge in this respect, concluded that the house erected by Punt was not intended by him to become a fixture and was thus not part of the freehold, and that Punt had the right to remove it from the lot on which it stood. The Appellate Division therefore ordered that the action be dismissed: [1921] 3 W.W.R. 770, 17 Alta. L.R. 319, 66 D.L.R. 426.

15 On further appeal, the Supreme Court of Canada, by a majority (Davies C.J., Duff, Anglin and Mignault JJ.; Brodeur and Idington JJ., dissenting), restored the judgment of the trial Judge: [1923] 3 W.W.R. 451, [1923] 3 D.L.R. 927. Anglin J., with whom Davies C.J. concurred, distinguished between the plaintiffs' right to damages for wrongful removal of the house and their right to relief in regard to the house itself in the following terms, at pp. 445-456 W.W.R., 930-931 D.L.R.:

> It follows that the removal of the building to lot 13 was a wrongful act as against the plaintiffs, who were respectively the owner and the mortgagee of lot 11, and that the defendant Reed who so removed it is answerable to them in damages. In demanding that relief, the plaintiffs are asserting a purely common law right and cannot be put upon terms as a condition of obtaining it.
>
> But in seeking further or alternative relief in regard to the building itself — either its restoration to lot 11 or the establishment of a lien upon it in its present location on lot 13 — they invoke the equitable jurisdiction of the Court and may, as a condition of being granted any such relief, be called on themselves to do equity. On that footing I think they were properly required to recognize the priority of the claim of Mrs. Nettleton. Her good faith is unquestioned. She became mortgagee of lot 13 in the belief that the building was lawfully upon and formed part of the land included in that lot. *The plaintiffs might by taking proper steps have affected her with notice of their claim to the building and she would then doubtless not have advanced her money to Mrs. Punt on mortgage on lot 13. Having failed to do so, they should not, in my opinion, be now allowed to assert an equitable claim in respect to the building to her prejudice.*

[Emphasis added.]

16 In an evident reference to this passage, the trial Judge in the present case drew the conclusion that the claim of the first mortgagee in *Travis-Barker*, supra, for a lien or for the restoration of the house to the original property failed [p. 533 O.R., p. 185 D.L.R.]

> because after it discovered the removal of the house, it did nothing to warn innocent third parties that it had a prior claim on the property. The first mortgagee was therefore estopped from succeeding in its equitable claim. *Although not expressly stated, it is a reasonable inference from the reasons that the first mortgagee would otherwise have succeeded*

[Emphasis added.], and, in purported reliance on this inference, determined that the bank's claim to priority in the present case should succeed.

17 With respect, nothing in the reasons given in *Travis-Barker* supports such an inference. It is nowhere suggested in the quoted passage or elsewhere in the reasons of Anglin J., and the separate reasons for judgment of Mignault J., who also formed part of the majority, are expressed in language which does not admit of any such inference. He said, at pp. 457-458 W.W.R., 932-933 D.L.R.:

> I have no doubt that the removal of the house was a wrongful act in so far as Travis-Barker and the Imperial Canadian Trust Company, the mortgagee, are concerned. The house was a fixture and part of the land, and Punt in removing it was a wrongdoer. The appellants therefore are entitled to the damages which they obtained from the trial Court.

> Their alternative demand for the restoration of the house to its original location, if possible, is met with the difficulty that the respondent, Jennie W. Nettleton, loaned money on mortgage on the land to which the house was removed in good faith and without notice of the appellants' rights therein. The appellants cannot claim a lien on the house or the land to which it was removed without submitting to Mrs. Nettleton's mortgage. The trial Judge granted them a lien on this land, but second to the Nettleton mortgage. In this I think he was clearly right, for the appellants must get their lien from the Court in the exercise of its equitable jurisdic tion, and the Court would grant this lien only upon terms that the Nettleton mortgage be paid in priority to the appellants' claim.

18 The present case is similar to *Travis-Barker* in one respect and dissimilar in another. In the present case, as in *Travis-Barker*, both the mortgagee of the first property and the mortgagee of the second property were innocent of any wrongdoing. In the present case, unlike *Travis-Barker*, the mortgagee of the first property had no knowledge of the removal of the house to the second property before the mortgage on the latter property was given. As I read *Travis-Barker*, however, this factual distinction is not a distinction in principle which would dictate a different result. Travis-Barker and his mortgagee were subordinated to Nettleton because their claim was equitable, whereas the claim of Nettleton, as mortgagee of the legal estate of the second property, was legal. The event that transformed the position of Travis-Barker and his mortgagee in respect of the house into an equitable claim was the removal of the house from the first property, to which they held the legal title, to the second property, to which they held no legal title. Where equities are equal, legal title prevails: "if two claims are equally meritorious there is no ground for depriving the claimant who has the legal estate of the priority which that estate" confers: W.B. Rayner and R.H. McLaren, *Falconbridge on Mortgages*, 4th ed. (Aurora, Ont.: Canada Law Book, 1977) at p. 114.

19 In the present case, the party in the position of Travis-Barker and his mortgagee is the bank; the party in the position of Punt and Reed, who wrongfully removed the house from the first property, is Faulkner, against whom, the trial Judge correctly concluded, the bank would be entitled to damages; and the party in the position of Nettleton is Crown Trust, to whose mortgage the bank's claim for a lien must, on my reading of *Travis-Barker* be subordinate.

Scottish American Investment Co. v. Sexton

20 The second case from which the trial Judge derived assistance was *Scottish American Investment Co. v. Sexton* (1894), 26 O.R. 77 (Ch. D.). In that case, the plaintiff granted a loan to Elizabeth and William Francis Sexton upon the security of mortgage on seven houses on Shaw Street in the City of Toronto. By agreement, the mortgage money was not advanced until the completion of the houses on all seven properties, including the installation of hot air furnaces. After default in payment of the mortgage, the plaintiff discovered that William Francis Sexton had removed five of the furnaces to houses belonging to his mother, Mary Sexton, on Clinton Street. The plaintiff brought two actions: the first, against the younger Sextons to restrain the removal of the two furnaces still in the Shaw Street houses; the second, against Mary Sexton to compel the return of the five furnaces in her houses on Clinton Street.

21 The plaintiff recovered judgment in both actions. In the action against the younger Sextons, Ferguson J. granted a permanent injunction and a mandatory order for the retoration of the five missing furnaces. In the action against Mary Sexton, he granted a declaration that the five furnaces in her Clinton Street houses were the property of the plaintiff as mortgagee and ordered their delivery to the plaintiff. In a passage quoted by the trial Judge in the present case, he said, at p. 79:

> [A]ssuming that the plaintiffs as mortgagees were owners of the furnaces, that is, to the extent of their right, the wrongful taking of them by the defendant Francis Sexton, the younger, would not place him in a position to pass title to the property in them to his mother, *even if it were to be supposed that she was an innocent purchaser for value*, a thing that I do not on the evidence suppose.

[Emphasis added.]

22 As the trial Judge in the present case noted (at p. 533 O.R., p. 186 D.L.R.), Ferguson J.'s reference to the position of an innocent purchaser is obiter, for, as appears from the closing words of the quoted passage — "a thing that I do not on the evidence suppose" — he clearly concluded that Sexton's mother was not an innocent purchaser. Given that premise, I have no

quarrel with the result reached in *Scottish American*, supra. However, to the extent that the case is said to be authority for the proposition that the first mortgagee would succeed to priority even over an innocent purchaser — and it is cited as such authority in 21 C.E.D. (Ont. 3d), Title 96, "Mortgages," para. 27 — it is at odds with the subsequent decision of the Supreme Court of Canada in *Travis-Barker* and is, in my respectful view, wrong in law. Read without the offending obiter, *Scottish American* is in conformity, rather than in conflict, with the decision of the House of Lords in *Reynolds v. Ashby & Son*, [1904] A.C. 466, [1904-7] All E.R. 401, 53 W.R. 129, and with the passage in R.E. Megarry and W.R. Wade, *The Law of Real Property*, 5th ed. (London: Sweet & Maxwell, 1984), at p. 738, which were cited (at p. 532 O.R., p. 184 D.L.R.) as authority for the second of the two principles which the trial Judge considered to be in conflict in their application to the facts of the present case.

Disposition

23 For the foregoing reasons, I consider that *Scottish American* does not support the position of the bank, and that the present case is indistinguishable in principle from *Travis-Barker*, which, properly considered, supports the position of Crown Trust. Applying *Travis-Barker*, the bank's claim to a lien on the house or the land to which it was removed, asserted in the exercise of the Court's equitable jurisdiction, must yield to the mortgage on the second property, and the trial Judge ought to have accorded priority not to the bank, but rather to Crown Trust.

24 I would therefore allow the appeal, set aside the judgment at trial, and substitute in its place an order declaring that the Crown Trust mortgage has priority over any interest claimed by the bank in the second property or the house situated on that property. The appellant should have its costs both at trial and on appeal.

Appeal allowed.

End of Document

TAB 15

2015 ONSC 543
Ontario Superior Court of Justice

CIBC Mortgages Inc. v. Computershare Trust Co. of Canada

2015 CarswellOnt 1053, 2015 ONSC 543, 250 A.C.W.S. (3d) 692

CIBC Mortgages Inc., Trading as Firstline Mortgages, Applicant and Computershare Trust Company of Canada, Respondent

Computershare Trust Company of Canada, Applicant and CIBC Mortgages Inc., Trading as Firstline Mortgages and the Director of Titles pursuant to s.57(14) of the Land Titles Act, Respondents

Secure Capital MIC Inc., Applicant and CIBC Mortgages Inc., Trading as Firstline Mortgages and Computershare Trust Company of Canada and the Director of Titles pursuant to s.57(14) of the Land Titles Act, Respondents

Murray J.

Heard: October 16, 2014
Judgment: January 23, 2015
Docket: 3218/13, 4301/13, 5501/13

Counsel: Benjamin Frydenberg, Sam Rappos, for Applicant, CIBC Mortgages Inc.
Christine Jonathan, for Respondent / Applicant
Jonathan Sydor, for Director of Titles
Bobby Brykman, for Applicant, Secure Capital MIC Inc.

Subject: Contracts; Corporate and Commercial; Insolvency; Property; Torts

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

Headnote

Real property --- Registration of real property — Registration of land — Land titles — Fraud — Definition in Land Titles Acts

Property owners obtained loan from C Co., registering charge on title to property in favour of C Co. — Without knowledge or consent of C Co., discharge of C Co.'s charge was registered on title by unknown person — Owners continued to make payments to C Co. for several years — Meanwhile, owners obtained mortgage from bank without disclosing secured indebtedness to C Co. — Bank's charge was registered on title — Owners obtained additional financing from S Inc. as second charge — Owners defaulted on all mortgages — Bank applied for declaration that it held first charge; C Co. applied for rectification of register restoring its charge as first charge; S Inc. applied for declaration that it held second charge ranking behind bank's charge — C Co.'s application granted; applications by bank and S Inc. dismissed — Registered discharge was fraudulent instrument within meaning of Land Titles Act — On balance of probabilities, owners were fully responsible for registration of fraudulent discharge — Owners fraudulently conveyed to themselves C Co.'s interest in property and then held themselves out to bank as registered owners of unencumbered property — Owners were fraudulent persons within meaning of Act in their dealings with bank and with S Inc., such that mortgages given by them to bank and S Inc. were fraudulent instruments within meaning of s. 78(4.2) of Act — Bank was intermediate owner with opportunity to investigate transaction with fraudster and avoid fraud — Discharge of C Co. mortgage was void and C Co. mortgage retained its priority as first discharge.

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

Property owners obtained loan from C Co., registering charge on title to property in favour of C Co. — Without knowledge or consent of C Co., discharge of C Co.'s charge was registered on title by unknown person — Owners continued to make payments to C Co. for several years — Owners obtained mortgage from bank without disclosing secured indebtedness to C Co. — Owners obtained additional financing from S Inc. as second charge behind bank's first charge — Owners defaulted on all mortgages — Bank applied for declaration that it held first charge; C Co. applied for rectification of register restoring its charge as first charge; S Inc. applied for declaration that it held second charge — C Co.'s application granted; applications by bank and S Inc. dismissed — Registered discharge was fraudulent instrument within meaning of Land Titles Act — Owners were responsible for registration of fraudulent discharge — Owners fraudulently conveyed to themselves C Co.'s interest in property and then held themselves out as registered owners of unencumbered property — Interest that owners purported to convey to bank, namely first charge on property, to their knowledge had already been conveyed to C Co. — Owners were fraudulent persons within meaning of Act in their dealings with bank and with S Inc., such that mortgages given by them were fraudulent instruments within meaning of s. 78(4.2) of Act — Bank relied on registry that showed C Co. mortgage to have been discharged — Bank acquired interest in title from fraudster and so had opportunity to investigate transaction and avoid fraud — Discharge of C Co. mortgage was void and C Co. mortgage retained its priority as first discharge.

Table of Authorities

Cases considered by *Murray J.*:

CIBC Mortgages Inc. v. Chan (2005), 2005 CarswellOnt 6726, (sub nom. *Household Realty Corp. v. Liu)* 205 O.A.C. 141, 43 R.P.R. (4th) 1, 261 D.L.R. (4th) 679, 26 R.F.L. (6th) 278 (Ont. C.A.) — considered

Durrani v. Augier (2000), 190 D.L.R. (4th) 183, [2000] O.T.C. 607, 36 R.P.R. (3d) 261, 50 O.R. (3d) 353, 2000 CarswellOnt 2807 (Ont. S.C.J.) — considered

Gibbs v. Messer (1891), [1891] A.C. 248, 60 L.J.P.C. 20 (Australia P.C.) — referred to

Lawrence v. Wright (2007), 51 R.P.R. (4th) 1, (sub nom. *Lawrence v. Maple Trust Co.)* 220 O.A.C. 19, (sub nom. *Lawrence v. Maple Trust Co.)* 84 O.R. (3d) 94, 2007 CarswellOnt 522, 2007 ONCA 74, 278 D.L.R. (4th) 698 (Ont. C.A.) — considered

Skill v. Thompson (1908), 17 O.L.R. 186, 12 O.W.R. 361, 1908 CarswellOnt 414 (Ont. C.A.) — considered

Statutes considered:

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

s. 1 "fraudulent instrument" — considered

s. 1 "fraudulent person" — considered

s. 57(14) — referred to

s. 78(4) — considered

s. 78(4.1) [en. 2006, c. 34, s. 15(10)] — considered

s. 78(4.2) [en. 2006, c. 34, s. 15(10)] — considered

APPLICATION by C Co. for rectification of register restoring its charge over property; APPLICATION by bank for declaration that it held first charge over property; APPLICATION by S Inc. for declaration that it held second charge.

Murray J.:

CIBC Mortgages Inc. Trading as FirstLine Mortgages and Computershare Trust Company of Canada.

1 In this application, the applicant CIBC Mortgages Inc. trading as FirstLine Mortgages (hereinafter "CIBC") seeks, *inter alia*, the following:

a. an order declaring that the CIBC mortgage granted by the Lowtans against the property municipally known as 40 Chipmunk Crescent, Brampton Ontario securing the sum of $252,800 and registered on title on July 28, 2011 as instrument number PR2045899 is of full force and effect and constitutes a valid and effective first ranking charge against the property;

b. an order declaring that the CIBC mortgage has priority over the Computershare mortgage;

Computershare Trust Company of Canada and CIBC Mortgages Inc., trading as FirstLine Mortgages

2 In its application, the applicant, Computershare Trust Company of Canada (hereinafter "Computershare") seeks, *inter alia*, the following:

a. a declaration that the discharge registered on August 26, 2009 on title to the property municipally known as 40 Chipmunk Crescent in Brampton, Ontario (hereinafter "the property") and known by instrument number PR1692570 is a fraudulent instrument and correspondingly void and of no force or effect.

b. rectification of the register for the property restoring the charge granted in favor of Computershare as chargee registered on November 21, 2008 and known by instrument number PR1571875 (the "Computershare charge") in first priority to all other charges/charges on title to the property registered after November 21, 2008.

c. a declaration of the Computershare charge as the first charge on the property.

d. An order directing the Director of Titles to rectify the register relating to the property deleting instrument number PR1692570 and restoring the Computershare charge as if the discharge had not been registered.

Secure Capital MIC Inc. and CIBC Mortgages Inc., trading as FirstLine Mortgages and Computershare Trust Company of Canada and Director of Titles Pursuant to Section 57(14) of the Land Titles Act.

3 In the application brought by Secure Capital MIC Inc. (hereinafter "Secure Capital") seeks, *inter alia*, the following:

a. a declaration that the mortgage granted by the Lowtans to Secure Capital securing the amount of $32,000 and registered against title to the property on December 11, 2012 as instrument number PR230945 is the second ranking charge on the property ranking behind the CIBC charge.

4 These three applications were heard together. All three applications are brought by secured lenders seeking a determination of priorities of their respective charges registered against the property owned by Dhanraj and Sumatie Lowtan.

Facts

5 Dhanraj Lowtan and Sumatie Lowtan (the "Lowtans") owned the property known as 40 Chipmunk Crescent in Brampton, Ontario (hereinafter "the property"). The legal description of the property is as follows:

PCL BLOCK 396-7, SEC 43M1026; PT BLK 396, PL 43M1026.

PARTS 11, 43, 44, 53 & 54, 43R19433

City of Brampton, Regional Municipality of Peel

PIN 14303-0457

6 The Lowtans applied to Computershare for a loan to be secured by a first charge on the property. The proceeds of the loan were be used to refinance existing charges on the property. After the charge loan was approved, the principal amount of $280,801.95 was advanced. The majority of funds were used to pay off previous charges registered on title to the property in favor of the Bank of Montréal and CitiFinancial Canada Inc. Coincidental with the advancing of the funds, a charge was registered on title to the property in favour of Computershare on November 21, 2008 as instrument number PR1571875 (the "Computershare charge"). When the discharge of the charges in favor of the Bank of Montréal and CitiFinancial Canada Inc. were registered, the Computershare charge was the first charge on the property. Part of the charge loan agreement permitted the monthly payments to be paid directly to Computershare from Sumatie Lowtan's bank account.

7 On August 26, 2009, without the knowledge or consent of Computershare, a discharge of the Computershare charge was registered on title to the property by the registration of a discharge bearing instrument number PR1692750. The discharge shows the discharging party to be Computershare and on the copy of the discharge placed in evidence, a person named Shekh Naeed Pabla represents that she has the authority to bind Computershare. The discharge was signed by Naveena Khanna and was submitted by 6613021 Canada Corp. The address for both Khanna and 6613021 Canada Corp. is shown as 10 Jayzell Drive, Toronto, Ontario. None of the individuals, Pabla or Khanna are known to Computershare. Neither person is registered as a lawyer or paralegal in the Province of Ontario. The numbered company is not known to Computershare. Neither Pabla or Khanna nor 6613021 Canada Corp. were known to or had authority from Computershare to register any discharge. Computershare never received a request to discharge the charge.

8 After the discharge of the Computershare mortgage was registered, payments continued to be made by the Lowtans pursuant to the terms of the Computershare charge more or less regularly for the next 4 1\2 years until January 2013. On January 4, 2013 the last payment was made by the Lowtans. Thereafter the Computershare charge went into default on account of nonpayment.

9 On or about March 3, 2011, the Lowtans granted a charge/charge in favor of Maria Giovanni and Darlene Geraci in the principal amount of $87,500 which was registered against title to the lands as instrument number PR1970026.

10 The Lowtans, through a mortgage broker, contacted CIBC on or about July 12, 2011 to discuss the possibility of obtaining a loan. CIBC was informed by the Lowtan's agent/broker that the Lowtans were seeking a first charge from CIBC to refinance an existing private charge registered against the lands in the outstanding amount of approximately $87,500 and to obtain a line of credit. Notwithstanding that the Lowtans were making monthly payments to Computershare pursuant to their agreement with Computershare, the Lowtans' indebtedness to Computershare was not disclosed to CIBC at the time of the loan application. When making their application their application for a first charge from CIBC, the Lowtans advised CIBC that they had aggregate debts of approximately $106,000 an amount which included the amount owed to Giovanni and Geraci. CIBC was advised by the Lowtans that they had no secured indebtedness other than the charge for approximately $87,500 in favor of Giovanni and Geraci. On July 15, 2011, CIBC entered into a commitment with the Lowtans for a loan secured by a first charge on the property. The CIBC charge securing the sum of $252,800 was registered on title on July 28, 2011 as instrument number PR2045899.

11 The proceeds of CIBC charge were used to discharge the Giovanni\Geraci charge on August 9, 2011.

12 In December, 2012, the Lowtans approached Secure Capital and sought financing to take additional equity from their residence to be registered as a second mortgage. The Lowtans represented to Secure Capital that they wished some additional financing in order to pay off credit card debt and to provide some immediate financial resources. Secure Capital was informed by the Lowtans that there was one other mortgage registered against the property, that is, the CIBC mortgage registered on July 28, 2011. The Lowtans represented that, in addition to the indebtedness owed to the CIBC, they owed approximately $81,715. No information was provided by the Lowtans to Secure Capital indicating that they were indebted to Computershare. The Lowtans

granted a mortgage to Secure Capital in the amount of $32,000 which was the maximum commitment that Secure Capital was prepared to make to them. This loan was secured by a charge registered against title to the property on December 11, 2012 as instrument number PR230945. Secure Capital had no knowledge of any other charge registered against the property other than the CIBC mortgage at the time the Secure Capital mortgage was granted and registered against title to the property. Secure Capital understood that it had obtained a second mortgage against the property with priority to the CIBC mortgage which had been registered against the property on or about July 28, 2011.

13 The Lowtans defaulted under the CIBC mortgage on or about February 1, 2013.

14 The Lowtans defaulted under the Secure Capital mortgage by failing to make payments on February 1, 2013 and thereafter. On April 9, 2013, Secured Capital's solicitor issued a notice of sale.

15 On or about April 12, 2013, Computershare discovered for the first time that the Computershare charge had been fraudulently discharged by the registration of the discharge bearing instrument number PR169-2750.

16 On or about April 25, 2013, both the Lowtans made an assignment into bankruptcy. By April 25, 2013 the Lowtans had vacated the property as they were unable to maintain payments.

17 On or about May 30, 2013, a Caution was registered against the property by the Director of Titles as instrument number PR2375145 indicating that the discharge of charge registered on the lands on August 26, 2009, as instrument number PR 169-2750 relating to the Computershare charge may be a fraudulent instrument and that no dealings could be had with the property until the matter was resolved.

18 On or about June 4, 2013 CIBC issued a notice of sale.

19 CIBC, Computershare and Secure Capital subsequently commenced these applications.

20 The sale of the property occurred pursuant to court order dated December 5, 2013 obtained by CIBC with the consent of Computershare, Secure Capital, the Lowtans' trustee in bankruptcy and the Director of Titles. The proceeds of sale, which as of September 23, 2014 amounted to $297,754, are being held in trust pending the resolution of the priorities litigation. Needless to say, the funds being held in trust are not sufficient to satisfy the three claimants, Computershare, CIBC and Secure Capital.

21 Paradigm Quest Inc. (hereinafter "Paradigm") is a company responsible for providing services to mortgage companies, including Computershare, which include collections, mortgage administration and the registration of mortgage discharges. Arrangements for the Computershare mortgage were made by the Lowtans through Paradigm. After the discharge of the Computershare mortgage was registered (such registration without the knowledge of Computershare or Paradigm) Paradigm continued to have contact with the Lowtans. For example, in the affidavit of Mario Brown, a recovery officer with Paradigm, Mr. Brown deposes that in late 2011 one of the Lowtans called the recovery department at Paradigm and asked to make a double mortgage payment on January 21, 2012. In addition, there were numerous phone contacts between the Lowtans and representatives of Paradigm in the fall of 2012 when the Computershare mortgage payments were not being made regularly. Dhanraj Lowtan called Paradigm and requested payments on the Computershare mortgage be deferred explaining to the Paradigm representative that he was in financial difficulty. In the course of these conversations, the Lowtans continued to acknowledge their obligation to make payments on the Computershare mortgage.

22 By early 2013, when the Lowtans failure to make regular mortgage payments had become problematic, a notice of default was sent to them by Computershare.

23 As a result of the Computershare mortgage being in default, Paradigm referred the matter to counsel for enforcement after which it was discovered that the Computershare mortgage had been discharged. Paradigm does not execute mortgage discharges but rather sends them to the lender for execution by persons authorized to sign mortgage discharges. Paradigm then registers the discharge on title in cases where they are authorized by Computershare to do so. Paradigm does not use third parties to register discharges and has never delegated this task to 6613021 Canada Corp. or to Shekh Naeed Pabla or to Naveena Khanna.

24 There is no disagreement among the parties with any of the above stated facts. There remains however an issue of whether Computershare knew or ought to have known about the fraudulent discharge prior to the registration of the CIBC charge.

Did Computershare have actual knowledge of the fraudulent discharge prior to enforcement proceedings being commenced in 2013?

25 CIBC argued that Computershare should be estopped from asserting that the discharge of its charge constituted a fraudulent instrument subject to reinstatement in priority of the CIBC charge because it had learned of the discharge almost 2 years before CIBC advanced funds under its charge and took no steps to reinstate the Computershare charge.

26 Fidelity National Financial Canada (hereinafter "FNF") is a company that provides services to various clients including various branches of the Canadian Imperial Bank of Commerce (hereinafter "the Bank"). The services provided by FNF include performing title searches of properties and preparing mortgage documentation for lenders. In March of 2010, FNF was requested by a branch of the Bank located in Brampton, Ontario to make inquiries with respect to the property in the context of the Lowtans' request to the Bank for a loan to be secured by a collateral charge against the property. As a result, FNF performed a title search of the property. In the course of the title search, FNF communicated to the branch of the Bank that although the collateral charge was to be a second charge on the property, there was no existing first mortgage registered on title. FNF asked the Bank to confirm the priority of the proposed collateral mortgage as a result of the title discrepancy. Ms. Sherri Frank, a manager of client services at FNF, has given evidence that she believes that she made a call to Paradigm on April 6, 2010 at approximately 10:50 a.m. Her note of the call which was made contemporaneously is as follows: "transferred to Manager, Sean.dacosta@paradigmquest.com x2268, advised of situation and advised once approval received from CIBC, Borrower, we will send an e-mail copy of search, mortgage and discharge. The customer can call him directly as they need to get this mortgage reinstated." Understandably when examined on February 5, 2014, Ms. Frank had no independent recollection of a conversation but based on her note, Ms. Frank believed she had spoken to Mr. Dacosta and that she would have given Paradigm enough information that they would have understood that there was no charge on title. Ms. Frank confirmed that she did not send an e-mail to Mr. Dacosta and did not send copies of any title or any documentation to FNF. Ms. Frank said that she would not send a copy of the search, mortgage and discharge to Paradigm or to Mr. Dacosta without getting approval from both the Bank and the borrower i.e. the Lowtans. The Lowtans did not qualify for the loan they were seeking from the Bank. FNF then closed its file. In cross-examination, Ms. Frank did not recall whether she had a conversation with Mr. Dacosta or left a voicemail message. Ms. Frank stated that initially she did not call Paradigm but called the number of the company called Merix and believes that she was transferred to Mr. Dacosta's extension at Paradigm. Merix, as I understand, is a company related to Paradigm.

27 Mr. Dacosta filed an affidavit in which he confirmed that he was employed by Paradigm and in 2010 was a supervisor of Paradigm's customer service department. Mr. Dacosta has deposed that he has no recollection or record of receiving any call or message from Ms. Frank and that he has no record of making a return phone call to her. In cross-examination, Mr. Dacosta testified that if he had been advised of the potential fraudulent discharge of the Computershare mortgage registered on title not only would he have made a note of it but also would have done something about it. However, if someone told him simply that a Paradigm administered mortgage had been discharged, without saying it had been fraudulently discharged, it would have been of no moment to him because every day Paradigm may be responsible for registering the discharges of numbers of mortgages. Mr. Dacosta did receive a request from the Lowtans on or about April 8, 2010 to provide them with an information statement showing the current status of the mortgage. Mr. Dacosta's records show that on April 8, 2010 he instructed an employee of Merix, Ms. Katarina Koutros, to prepare and send an information sheet to the Lowtans which gave the current status of the Computershare mortgage indicating that it was in good standing. A copy of that information statement was appended to his affidavit. On April 8, 2010, the Lowtans forwarded the information statement received from Paradigm to the branch of the Bank from whom they were seeking a loan. After reviewing the Statement, CIBC rejected the Lowtans mortgage application. No copy of the parcel abstract showing the discharge or of the discharge of the mortgage was ever sent to Dacosta at Paradigm by anyone at the Bank or by Ms. Frank.

28 Ms. Frank has no recollection of what, if anything, she said to Mr. Dacosta. Mr. Dacosta has no recollection of ever being advised that the Computershare mortgage had been fraudulently discharged. His instruction to Ms. Koutros to send an

information statement regarding the status of the mortgage and his failure to act on such information is inconsistent with his having been informed that the mortgage had been fraudulently discharged.

29 On the basis of the material before me, I am not prepared to find that Computershare or CIBC ought to have been aware that the fraudulent discharge had been registered. Therefore, Computershare is not estopped from claiming that it was unaware of the registration of the fraudulent discharge in April, 2010.

Were the Lowtans privy to the fraudulent discharge of the Computershare mortgage?

30 CIBC takes the position that the Lowtans were not privy to the fraudulent discharge of the charge. I disagree.

31 It is reasonable to conclude that the Lowtans made representations to Giovanni and Geraci that their indebtedness would be secured by a first charge on the property in the amount of $87,500. These representations were made at the same time that they were making monthly payments towards the Computershare charge and were fully aware of their obligations to Computershare.

32 Additionally, as is made clear from the CIBC material, when applying for a first mortgage loan in July 2011, the Lowtans advised CIBC that there was no charge against the lands other than the Giovanni/Geraci charge. Furthermore, the Lowtans advised CIBC that they had debts of approximately $106,000 and that this amount included the amount owed to Giovanni and Geraci. These representations were made to the CIBC at the same time they were continuing to make monthly payments to Computershare pursuant to their obligation under the Computershare charge. The representations made by the Lowtans to CIBC were false and designed to keep secret from CIBC their existing obligations to Computershare.

33 In December, 2012, when they were paying the Computershare mortgage, the Lowtans sought a loan from Secure Capital to be secured by a second mortgage, the Lowtans represented to Secure Capital that, in addition to the indebtedness owed to the CIBC, they owed approximately $81,715. No information was provided to Secure Capital indicating that the Lowtans were indebted to Computershare. The representations made by the Lowtans to Secure Capital were false and designed to keep secret from Secure Capital their existing mortgage obligations to Computershare.

34 The Lowtans granted a mortgage to Secure Capital in the amount of $32,000 being the maximum commitment that Secure Capital was prepared to make to them. This loan was secured by a charge registered against title to the property on December 11, 2012 as instrument number PR230945. Secure Capital had no knowledge of any other charge registered against the property other than the CIBC mortgage at the time the Secure Capital mortgage was granted and registered against title to the property. Secure Capital understood that it had obtained a second mortgage against the property with priority to the CIBC mortgage registered against the property on or about July 28, 2011.

35 The inescapable conclusion is that the reason the Lowtans continued to make monthly payments to Computershare was to ensure that Computershare did not become aware that the discharge of the Computershare charge had been registered on title. The Lowtans knew that default by them in paying the Computershare charge would have led to a discovery by Computershare of the fraudulent discharge registered on title. They continued to make mortgage payments in order to keep the discharge secret from Computershare.

36 On a balance of probabilities, I have no doubt in concluding that the Lowtans were fully aware of and responsible for the registration of the fraudulent discharge. After the registration of the discharge, they knowingly made false representations to subsequent lenders that their loans would be secured by a first charge in the case of CIBC and a second charge in the case of Secure Capital. The registration of the fraudulent discharge was caused by the Lowtans and relied on by them as part of a scheme to obtain additional financing from subsequent chargees which financing would not otherwise have been available to them. The dishonesty of the Lowtans is made abundantly clear by the evidence.

The Positions of the Parties

The position of Computershare

37 Computershare argues that the first charge granted to the Lowtans should remain in first position unaffected by the fraudulent discharge and that the subsequently registered CIBC charge should take second position and the Secure Capital charge should take third position. Computershare seeks a declaration that the Computershare charge is the first charge/charge registered against the property and that it stands in priority to the CIBC charge and the Secured Capital charge. Computershare asserts two main arguments:

> 1. The Lowtans were responsible for registering the fraudulent discharge of the Computershare charge. CIBC acquired its interest in the property from the Lowtans and is an intermediate owner having had the last and best opportunity to avoid the fraud. The CIBC charge therefore is defeasible in favour of Computershare's charge. In accordance with section 78(4.2) of the *Land Titles Act*, the CIBC charge is a valid charge which remains in second position behind the Computershare charge and ahead of the Secured Capital charge;
>
> 2. In the alternative, the discharge of the Computershare charge being fraudulently obtained and registered is void leaving the Computershare charge as a valid and effective first charge against the property.

The position of CIBC

38 CIBC takes the position that it relied on the discharge registered on title and that its charge should rank first, the Secure Capital charge should rank second and the Computershare charge should rank third. CIBC asserts that it obtained its charge for value and with no notice that the registration of the discharge of the Computershare charge was fraudulent. Relying on the "mirror" and "curtain" principles which inform the *Land Titles Act*, CIBC asserts that the discharge was not a "fraudulent instrument" within the meaning of the *Land Titles Act* and that it was entitled to rely on the register when it granted the Lowtans what it believed in good faith to be a valid first charge. CIBC's position may be stated simply as follows:

> Even if the discharge is a fraudulent instrument for the purposes of section 78(4.1) the reinstatement of the Computershare charge under section 78(4.1) cannot invalidate the effect of CIBC's charge as a valid and effective first ranking charge because CIBC's charge is not a "fraudulent instrument" as defined in s.(1) of the LTA.

The position of Secure Capital

39 Secure Capital agrees with the position advanced by CIBC except that it asks that all interest, expenses, penalties and further costs incurred by CIBC should be stayed as of June 7, 2014 being the date the first application in this proceeding was brought by CIBC by way of notice of application as court file number 3218/13. Secure Capital asserts that the delay and expenses caused by the dispute related to the priority of charges should not create adversely affect subsequent encumbrancers and that it would cause undue hardship to Secure Capital if the further interest, expenses, costs and penalties of CIBC incurred after the commencement of these applications are added to the CIBC charge and rank in priority to what it asserts is a valid second charge.

Analysis

40 The registration of the discharge of the Computershare mortgage raises questions that were not answered by the parties or by the evidence. How was the security system of electronic registration of documents circumvented? The discharge was filed by 6613021 Canada Corporation. How is it possible that the numbered company could submit a document on behalf of Computershare for electronic registration without being authorized by Computershare or Paradigm to do so? The answer to this question is speculative and this and other questions remain unresolved.

41 This case is about which innocent party should have the priority of its charge adversely affected because of the fraudulent discharge purported to discharge the first registered Computershare charge. There is no suggestion that CIBC or Secure Capital were aware of the fraudulent nature of the discharge registered on title.

42 CIBC and Secure Capital assert that they were entitled to rely on the register when it determined to advance mortgage funds to the Lowtans and therefore their mortgages should rate in first and second priority with Computershare having the right

to have their fraudulently discharged mortgage reinstated but in third priority to the CIBC and Secure Capital charges. CIBC and Secure Capital are supported in this contention by counsel representing the Director of Titles.

43 It is obvious that reliance on the registry however is not a one-way street. Computershare also had a legitimate expectation that registration of its charge on title would act as effective notice to any subsequent transferee, mortgagee or other encumbrancer that any subsequently acquired interest in the property would be subject to the priority of the Computershare mortgage.

44 There is no dispute that the registered discharge was a fraudulent instrument within the meaning of the *Land Titles Act*, R.S.O. 1990, c. L.5 (hereinafter referred to as the "LTA").

45 A fraudulent instrument is defined in s.1 of the LTA as follows:

> "fraudulent instrument" means an instrument,
>
> (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
>
> (b) that is given under the purported authority of a power of attorney that is forged,
>
> (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
>
> (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument.
>
> A "fraudulent person" as defined in section 1 of the LTA as "a person who executes or purports to execute an instrument if,
>
> (a) the person forged the instrument,
>
> (b) the person is a fictitious person, or
>
> (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument;

46 As noted above, all parties agree that the discharge of the Computershare charge was a fraudulent instrument. I have found the Lowtans to be responsible for the registration of the fraudulent discharge. The Lowtans made a false document - the Computershare discharge - which was designed to have subsequent lenders rely on it to their detriment. The Lowtans were the registered owners of the property when they granted CIBC and Secure Capital the first and second charges on the property. However, they did not own the property free and clear of encumbrances. The Lowtans knew full well that they were the registered owners of a property which was subject to a first charge in favour of Computershare and that the Computershare charge was intended to have first priority against any other subsequent registered security interest in the property. The interest in the property that they purported to convey to CIBC - a first charge on the property - to their knowledge had already been conveyed to Computershare. The Lowtans were not the owners of the "interest in land" conveyed to CIBC and Secure Capital by the charges registered in their favour. The Lowtans fraudulently conveyed to themselves the Computershare interest in the property and then held themselves out to the CIBC as the registered owners of the property whose interests as owner were not subject to any registered encumbrance.

47 CIBC and Secure Capital rely on s. 78(4) of the LTA which provides as follows:

> 78 (4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

48 Computershare relies on sections 78(4.1) and 78(4.2) of the LTA which provide:

> 78 (4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006

78 (4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument.

49 Computershare also relies on section 155 of the LTA which states:

155. Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of the land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.

50 Before turning to the case of *Lawrence v. Wright* (2007), 84 O.R. (3d) 94 (Ont. C.A.), which instructs us with respect to the interpretation of these sections as well as to the historical and current interpretation of the LTA, I would like to deal with the assertion by CIBC, Secure Capital and by counsel for the Director of Titles that the charges granted by the Lowtans to CIBC and to Secure Capital are not fraudulent documents within the meaning of the LTA with which I disagree.

51 A person is a fraudulent person within the meaning of the LTA when the person "holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument." As noted above, a "fraudulent instrument" is defined as including an instrument under which a fraudulent person purports to transfer an interest in land. The Lowtans did not own the interest in the property purported to be conveyed to CIBC and to Secure Capital. The Lowtans were fraudulent persons within the meaning of the LTA in their dealings both with CIBC and with Secure Capital. Therefore, I conclude that the mortgages given by the Lowtans to CIBC and Secure Capital were fraudulent instruments within the meaning of s. 78(4.2) of the LTA. Although I have concluded that the subsequent mortgages to CIBC and Secure Capital are fraudulent instruments, I of course do not mean to imply that CIBC and Secure Capital acted other than in good faith. Their good faith is not challenged by any party and certainly not by this court.

52 The tension between the sections reproduced above has been discussed most recently in *Lawrence v. Wright* (2007), 84 O.R. (3d) 94 (Ont. C.A.). In *Lawrence*, the Court of Appeal began its analysis with a description of the purpose of the land titles system. At para. 30, the Court of Appeal adopted the statement of Epstein J. in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.) at paras. 40-42 where she stated as follows:

The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

The essential purpose of land titles legislation is to provide the public with security of title and facility of transfer: Di Castri Registration of Title to Land vol. 2 looseleaf (Toronto: Carswell, 1987) at 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

The philosophy of a land titles system embodies three principles; namely, the mirror principle, where the register is a perfect mirror of the state of title, the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register, and the insurance principle, where the state guarantees accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system...

53 In *Lawrence*, the Court of Appeal affirmed that under the LTA, it is the theory of deferred indefeasibility that prevails in Ontario. The theory of deferred indefeasibility is consistent with the object of the legislation which is to save individuals dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of title and to satisfy themselves of its validity. See *Gibbs v. Messer*, [1891] A.C. 248 (Australia P.C.). However, as is stated in *Falconbridge on Mortgages*, (4th edition) at page 202:

It is important to bear in mind the exact nature of the "main object" of the legislation. A purchaser in good faith is entitled to rely upon the register and need not go behind the title of the registered owner, but, of course, he must satisfy himself

> that an instrument purporting to be made by the registered owner is itself a valid. Registration will not render an invalid instrument valid in favor of the purchaser therein named. But if the purchaser registers the instrument and becomes the registered owner of an estate or interest, then, even though the instrument as regards him is invalid, a purchaser from him is protected by the statute, because this second purchaser is entitled to rely upon the register and need not go behind it. Thus the instrument which is invalid so far as the immediate purchaser is concerned becomes a good root of title in favour of the subsequent purchaser.

54 Pursuant to the theory of deferred indefeasibility, registration of an invalid instrument does not make the instrument valid in favor of an immediate purchaser but if the purchaser becomes the registered owner, a purchaser from the immediate purchaser is protected by the statute because the second purchaser is entitled to rely upon the register and need not go behind it. As stated in *Falconbridge* at p. 203: "Thus, the instrument which is invalid so far as the immediate purchaser is concerned becomes a good root of title in favour of the subsequent purchaser."

55 Applying the theory of deferred indefeasibility in the *Lawrence* case, the Court of Appeal determined that Maple Trust, which had been granted a mortgage from Wright who had obtained title by fraud, was vulnerable to a claim from the true owner. It is the intermediate owner who has the opportunity to investigate the transaction and avoid the fraud. The Court of Appeal also stated that in accordance with the theory of deferred indefeasibility, any subsequent *bona fide* purchaser or encumbrancer would have no such opportunity and could obtain good title from Maple Trust.

56 How does the theory of deferred indefeasibility have application in this case? It is not disputed that the discharge of the Computershare mortgage was fraudulent. I have concluded that the Lowtans were responsible for registration of the fraudulent discharge. The fact that the register showed the Lowtans on title as the registered owners of the property unencumbered by any charge in favor of Computershare is as a result of their fraud. *Lawrence* confirms that a fraudster can never take good title so as to become an owner.

57 CIBC relied on the registry that showed the Computershare mortgage to have been discharged. It relied on the fact that the registry disclosed that the Lowtans owned the property without encumbrance. In fact, the Lowtans had conveyed away an interest in the property to Computershare in the form of a first charge. This first charge granted Computershare both an interest in the property and certain statutory rights pursuant to its mortgage to obtain possession and to sell the property in the event of default.

58 In this case, CIBC is in a position analogous to that of Maple Trust in the *Lawrence* case. In *Lawrence*, Maple Trust was found by the Court of Appeal to be an intermediate owner having received its interest in the property from a fraudulent transferee who appeared on the register as the registered owner. In this case, the Lowtans are fraudulent transferees having fraudulently conveyed Computershare's interest in the property to themselves by the registration of the fraudulent discharge. In my view, the CIBC is, in accordance with the theory of deferred indefeasibility, an intermediate owner. CIBC acquired an interest in title from a fraudster, and had an opportunity to investigate the transaction and avoid the fraud. For example, an inquiry as to how the Lowtans were able to pay off the Computershare mortgage given their financial circumstances might have raised concerns. In any event, according to the Court of Appeal in *Lawrence*, registration of a void instrument does not cure its defect and a void instrument or its registration cannot give good title. The discharge of the Computershare mortgage was void and registration of that discharge did not give clear title to the fraudsters.

59 Meredith J.A. stated in *Skill v. Thompson*, [1908] O.J. No. 41, 17 O.L.R. 186 (Ont. C.A.) (in a passage approved by the Court of Appeal in *Lawrence*) at paras. 39-40:

> The *Land Titles Act* is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.

> Its main purpose is to assure that title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect the registered owner against his own obligations, much less against his own fraud.

The words of Meredith J.A. are apposite in this case: the LTA is not designed to protect the registered owner against his own fraud.

60 In *Lawrence* the Court of Appeal decided that the earlier Court of Appeal decision in *CIBC Mortgages Inc. v. Chan*, [2005] O.J. No. 5001 (Ont. C.A.) [hereinafter Household Realty Corp.] was wrongly decided. I will not set out the facts of *Household Realty* in any detail. Suffice to say, in *Household Realty* a matrimonial home was owned jointly by a husband and wife. The wife forged her husband's signature on a power of attorney, naming her as his attorney, and then registered the power of attorney on title. She then mortgaged the property placing two separate charges on the property. The mortgagees both acted in good faith and were both unaware that the registered power of attorney was fraudulent. The Court of Appeal held that the mortgages were immediately effective once they were registered because they were given for valuable consideration and without notice of the fraud and pursuant to section 78(4) of the LTA, they were immediately effective according to their nature and intent.

61 In *Lawrence*, the Court of Appeal held that the *Household Realty* case was wrongly decided. The mortgagees in *Household Realty* had relied on the power of attorney registered in the land titles office to conclude that the named attorney, the wife, had authority to charge the property. Applying the deferred indefeasibility theory, the Court of Appeal - in reversing its earlier decision - concluded that in *Household Realty* the mortgages ought to have been invalid as against the true owner. The position of CIBC and of Secure Capital in this case is analogous to the position of the mortgagee in *Household Realty*.

Conclusion

62 I conclude that the Computershare mortgage retains its priority as the first charge in the property and that the CIBC and the Secure Capital charges rank second and third respectively.

63 This court therefore orders that the Director of Titles rectify the register by deleting instrument number PR1692579 being the discharge of the Computershare charge and restoring the Computershare charge (instrument number PR1571875) as if the discharge had not been registered.

Costs

64 Each party has been an innocent victim of fraud. Each party has acted in good faith. I conclude that no costs should be awarded in this case.

65 I also agree with the submissions of Secure Capital that the costs of the priorities litigation should not be added to the costs of mortgage enforcement proceedings against the Lowtans. Secure Capital has argued that the delay and expenses caused by the dispute related to the priority of charges should not adversely affect its position as a subsequent encumbrancer and that it would cause undue hardship if the further interest, expenses, costs and penalties incurred after the commencement of these applications are added to the CIBC charges that it conceded ranks in priority to what it asserted is a valid second charge. I agree that with some modification, this is a fair approach.

66 I therefore order that the further expenses, penalties and costs of the priorities litigation incurred from the commencement of the CIBC application should not be added to the costs of enforcement proceedings against the Lowtans. This will preserve as much as possible of the sale proceeds for the second and third mortgagees, CIBC and Secure Capital. Regrettably, this outcome will probably not help Secure Capital at least with respect to its claim against the sale proceeds because the magnitude of the debt owing under the charges of Computershare and CIBC will likely consume the entirety of the proceeds of sale but it will make a difference to CIBC.

67 To the extent there is a shortfall in recovery from the proceeds of sale of the property for CIBC and Secure Capital, judgments obtained by CIBC and Secure Capital against the Lowtans on their mortgage covenants should survive bankruptcy of the Lowtans since both mortgages were obtained by fraud.

C Co's application granted; applications by bank and S Inc. dismissed.

End of Document

TAB 16

2004 CarswellOnt 1581
Ontario Superior Court of Justice (Divisional Court)

XDG Ltd. v. 1099606 Ontario Ltd.

2004 CarswellOnt 1581, [2004] O.J. No. 1695, 130 A.C.W.S. (3d) 678, 186 O.A.C. 33, 1 C.B.R. (5th) 159, 35 C.L.R. (3d) 282

XDG LIMITED (Plaintiff / Respondent) and 1099606 ONTARIO LIMITED and GENERAL ELECTRIC CAPITAL (Defendants / Appellants)

O'Driscoll, E. Macdonald, Caputo JJ.

Heard: January 14, 2004
Judgment: April 23, 2004
Docket: Toronto 57/03

Proceedings: affirming *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 2002 CarswellOnt 4535, 23 C.L.R. (3d) 67, 41 C.B.R. (4th) 294 (Ont. S.C.J.); additional reasons at *XDG Ltd. v. 1099606 Ontario Ltd.* (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.); and varying *XDG Ltd. v. 1099606 Ontario Ltd.* (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.)

Counsel: Leonard Ricchetti for Appellant, General Electric Capital Canada Inc.
Irwin Duncan for Plaintiff / Respondent, XDG Limited
Anthony Speciale for Cross-Appellant, Wm. Green Roofing Inc., a lien claimant

Subject: Corporate and Commercial; Property; Contracts; Torts; Civil Practice and Procedure; Insolvency

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

Headnote

Mortgages --- Nature and form of mortgage — Mortgage as security for other debts

Defendant numbered company purchased property and leased it to E Corp. — R was sole director, officer and shareholder of numbered company and president of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by G Inc., which was large lending institution well known in commercial finance business — In March 1999, G Inc. determined E Corp. was in default position under credit agreement and amended agreement resulting in numbered company providing guarantee and mortgage on leased property in favour of G Inc. regarding indebtedness of E Corp. — Both numbered company and E Corp. were declared bankrupt in 2000 and leased property was sold resulting in insufficient funds to pay lien claimants and mortgage holder — In proceedings by lien claimants to determine priority between lien claimants and mortgage, issue arose as to whether mortgage was void as result of contravening s. 20 of Business Corporations Act — Mortgage was void — Purpose of s. 20(1) is to prevent dissipation of corporate assets that might otherwise prejudice financial position of creditors and shareholders — G Inc., inconsistent with its usual practice, failed to perform due diligence investigation of numbered company — E Corp. and numbered company were affiliated corporations and guarantee and mortgage provided by numbered company constituted financial assistance within meaning of s. 20(1) — Evidence indicated that when mortgage was granted, numbered company failed both solvency and balance sheet tests under ss. 20(1)(c) and (d) of Act — G Inc.'s failure to conduct due diligence test was wilful blindness by G Inc. and therefore G Inc. was not lender for value within meaning of safe harbour provision in s. 20(3) of Act — G Inc. appealed — Appeal dismissed — G Inc. failed to establish that trial judge was clearly wrong in findings of fact or in application of legal principles.

Fraud and misrepresentation --- Fraudulent conveyances — Fraudulent intent — Presumption of fraudulent intent — General

Defendant numbered company purchased property and leased it to E Corp. — R was sole director, officer and shareholder of numbered company and president and controlling shareholder of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by G Inc., which was large lending institution well known in commercial finance business — In March 1999, G Inc. determined E Corp. was in default position under credit agreement and amended agreement resulting in numbered company providing guarantee and mortgage on leased property in favour of G Inc. regarding indebtedness of E Corp. — Both numbered company and E Corp. were declared bankrupt in 2000 and leased property was sold, resulting in insufficient funds to pay lien claimants and mortgage holder — Lien claimants brought action to determine priority between lien claimants and mortgage — Issue arose as to whether mortgage was void as being fraudulent conveyance under Fraudulent Conveyances Act — Mortgage was void — G Inc., inconsistent with its usual practice, failed to perform due diligence investigation of numbered company — Evidence indicated that when mortgage was granted, numbered company failed both solvency and balance sheet tests under ss. 20(1)(c) and (d) of Business Corporations Act — In circumstances, there was prima facie presumption of intent on part of G Inc. to defeat current and future creditors which G Inc. was unable to rebut — G Inc. could not save situation by claiming it acted in good faith since wilful blindness was not good faith — G Inc. appealed — Appeal dismissed — G Inc. failed to establish that trial judge was clearly wrong in findings of fact or in application of legal principles.

Fraud and misrepresentation --- Fraudulent preferences — Intention to prefer

Defendant numbered company purchased property and leased it to E Corp. — R was sole director, officer and shareholder of numbered company and president and controlling shareholder of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by G Inc., which was large lending institution well known in commercial finance business — In March 1999, G Inc. determined E Corp. was in default position under credit agreement and amended agreement resulting in numbered company providing guarantee and mortgage on leased property in favour of G Inc. regarding indebtedness of E Corp. — Both numbered company and E Corp. were declared bankrupt in 2000 and leased property was sold, resulting in insufficient funds to pay lien claimants and mortgage holder — Lien claimants brought action to determine priority between lien claimants and mortgage — Issue arose as to whether mortgage was void as being unlawful assignment or preference under s. 4 of Assignments and Preferences Act — Mortgage was void — G Inc., inconsistent with its usual practice, failed to perform due diligence investigation of numbered company — Evidence indicated that when mortgage was granted, numbered company failed both solvency and balance sheet tests under ss. 20(1)(c) and (d) of Business Corporations Act — In circumstances, there was prima facie presumption of intent on part of G Inc. to defeat current and future creditors which G Inc. was unable to rebut — G Inc. appealed — Appeal dismissed — G Inc. failed to establish that trial judge was clearly wrong in findings of fact or in application of legal principles.

Construction law --- Construction and builders' liens — Priorities — General principles

Defendant numbered company purchased property and leased it to E Corp. — R was sole director, officer and shareholder of numbered company and president and controlling shareholder of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by G Inc., which was large lending institution well known in commercial finance business — In March 1999, G Inc. determined E Corp. was in default position under credit agreement and amended agreement resulting in numbered company providing guarantee and mortgage on leased property in favour of G Inc. regarding indebtedness of E Corp. — Both numbered company and E Corp. were declared bankrupt in 2000 and leased property was sold, resulting in insufficient funds to pay lien claimants and mortgage holder — Lien claimants brought action for declaration that they were entitled to priority over mortgage — Action allowed — G Inc., inconsistent with its usual practice, failed to perform due diligence investigation of numbered company — Failure to conduct due diligence test was wilful blindness by G Inc. — G Inc. gave no satisfactory answer to explain this neglect

— In circumstances, it would be unconscionable and inequitable to allow mortgagee to obtain priority based on its wilful blindness or negligence — Due diligence investigation would have led G Inc. to decide against mortgage security on leased property — G Inc. appealed — Appeal dismissed — G Inc. failed to establish that trial judge was clearly wrong in findings of fact or in application of legal principles.

Construction law — Construction and builders' liens — Practice on enforcement of lien — Costs — General principles

Numbered company purchased property and leased it to E Corp. — Contractors provided services and materials to leased property — Contractors were not paid for work and claims for lien were registered — E Corp. was financed under credit agreement by G Inc. — G Inc. determined E Corp. was in default position under credit agreement and amended agreement resulting in numbered company providing guarantee and mortgage on leased property in favour of G Inc. regarding indebtedness of E Corp. — G Inc. initiated insolvency proceedings and both numbered company and E Corp. were declared bankrupt — Leased property was sold, resulting in insufficient funds to pay lien claimants and mortgagee — Lien claimants brought action for declaration that they were entitled to priority over G Inc. as mortgagee — Action allowed on basis that G Inc. failed to perform due diligence investigation before taking mortgage security and that its failure to do so was wilful blindness — Lien claimants entitled to award of costs on substantial indemnity scale in total amount of $165,693.69 — As part of total costs award, lien claimant G Ltd was awarded $9,000 for fees, $1,500 for disbursements and $735 for G.S.T. — Lien claimant G Ltd. cross-appealed from costs order — Cross-appeal allowed — Adjustments made to bill of costs by G Ltd. compelled increase in amount of costs awarded to G Ltd. — G Ltd.'s lien was almost six times greater than lien of other lien claimant which had been awarded same amount of costs and whose counsel did not participate in trial — It was unfair to G Ltd. to measure its entitlement to costs by comparing its role to that of other lien claimant — G Ltd. was substantially more involved in proceedings and needed to be there to protect its interest — Award of $9,000 of costs was unreasonably low — G Ltd. was awarded costs on party and party basis — Costs for G Ltd. were fixed at $40,000, together with $1,500 for disbursements and applicable G.S.T. payable by G Inc. forthwith.

Bankruptcy and insolvency — Practice and procedure in courts — Costs — Miscellaneous issues

Numbered company purchased property and leased it to E Corp. — Contractors provided services and materials to leased property — Contractors were not paid for work and claims for lien were registered — E Corp. was financed under credit agreement by G Inc. — G Inc. determined E Corp. was in default position under credit agreement and amended agreement resulting in numbered company providing guarantee and mortgage on leased property in favour of G Inc. regarding indebtedness of E Corp. — G Inc. initiated insolvency proceedings and both numbered company and E Corp. were declared bankrupt — Leased property was sold, resulting in insufficient funds to pay lien claimants and mortgagee — Lien claimants brought action for declaration that they were entitled to priority over G Inc. as mortgagee — Action allowed on basis that G Inc. failed to perform due diligence investigation before taking mortgage security and that its failure to do so was wilful blindness — Lien claimants entitled to award of costs on substantial indemnity scale in total amount of $165,693.69 — As part of total costs award, lien claimant G Ltd was awarded $9,000 for fees, $1,500 for disbursements and $735 for G.S.T. — Lien claimant G Ltd. cross-appealed from costs order — Cross-appeal allowed — Adjustments made to bill of costs by G Ltd. compelled increase in amount of costs awarded to G Ltd. — G Ltd.'s lien was almost six times greater than lien of other lien claimant which had been awarded same amount of costs and whose counsel did not participate in trial — It was unfair to G Ltd. to measure its entitlement to costs by comparing its role to that of other lien claimant — G Ltd. was substantially more involved in proceedings and needed to be there to protect its interest — Award of $9,000 of costs was unreasonably low — G Ltd. awarded costs on party and party basis — Costs for G Ltd. were fixed at $40,000 together with $1,500 for disbursements and applicable G.S.T. payable by G Inc. forthwith.

Table of Authorities

Cases considered by *E. Macdonald J.*:

Bank of Nova Scotia v. Liberty Mutual Insurance Co. (2003), 2003 CarswellOnt 4362, 178 O.A.C. 254, 67 O.R. (3d) 699 (Ont. Div. Ct.) — referred to

Basdeo (Litigation Guardian of) v. University Health Network (2002), 2002 CarswellOnt 544 (Ont. S.C.J.) — referred to

Carpenter v. Malcolm (1985), 6 C.P.C. (2d) 176, 1985 CarswellOnt 631 (Ont. H.C.) — referred to

Clarke v. Technical Marketing Associates Ltd. (Trustee of) (1992), (sub nom. *Clarke v. Technical Marketing Associates Ltd. Estate)* 8 O.R. (3d) 734, 1992 CarswellOnt 1110 (Ont. Gen. Div.) — referred to

Cosyns v. Canada (Attorney General) (1992), 88 D.L.R. (4th) 507, 53 O.A.C. 127, 7 O.R. (3d) 641, 5 T.C.T. 4073, 1992 CarswellOnt 1086 (Ont. Div. Ct.) — referred to

David Schaeffer Engineering Ltd. v. D.T.A. Investments Inc. (1998), 1998 CarswellOnt 90, 37 C.L.R. (2d) 26 (Ont. Master) — referred to

Delrina Corp. v. Triolet Systems Inc. (2002), 2002 CarswellOnt 3220, 165 O.A.C. 160, 22 C.P.R. (4th) 332 (Ont. C.A.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp. (2000), 2000 CarswellOnt 3693, 23 C.C.L.I. (3d) 60, 49 C.P.C. (4th) 336 (Ont. S.C.J.) — referred to

Stein v. "Kathy K" (The) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1, 1975 CarswellNat 385, [1976] 1 Lloyd's Rep. 153, 1975 CarswellNat 385F (S.C.C.) — referred to

Toronto (City) v. First Ontario Realty Corp. (2002), 59 O.R. (3d) 568 (Ont. S.C.J.) — referred to

Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc. (1997), 1997 CarswellOnt 2254, 36 B.L.R. (2d) 31, 22 R.P.R. (3d) 310, 35 O.T.C. 233 (Ont. Gen. Div.) — referred to

561861 Ontario Ltd. v. 1085043 Ontario Inc. (1998), 1998 CarswellOnt 2935, Kirsh's C.L.C.F. 78.50, 66 O.T.C. 305 (Ont. Bktcy.) — referred to

Statutes considered:

Assignments and Preferences Act, R.S.O. 1990, c. A.33
Generally — referred to

s. 4 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
s. 20 — referred to

s. 20(3) — referred to

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

s. 78 — referred to

s. 78(6) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — referred to

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29
Generally — referred to

s. 2 — referred to

s. 3 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 49 — referred to

R. 57.01(1) — referred to

APPEAL by G Inc. from judgments reported at *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 2002 CarswellOnt 4535, 23 C.L.R. (3d) 67, 41 C.B.R. (4th) 294 (Ont. S.C.J.) allowing lien claimants action for declaration that they were entitled to priority over G Inc. as mortgagee and *XDG Ltd. v. 1099606 Ontario Ltd.* (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.) awarding costs; APPEAL by lien claimant from judgment reported at *XDG Ltd. v. 1099606 Ontario Ltd.* (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.) awarding costs.

***E. Macdonald J.*:**

NATURE OF PROCEEDINGS

1 General Electric Capital Canada Inc. (GECC) appeals from the December 23, 2002 judgment and February 27, 2003 award of costs of Gordon J. in a consolidated construction lien action in which judgment was granted in favour of XDG Limited (XDG) (representing several claimants) on the issue of the validity and priority of GECC's mortgage as against the lien claimants. Costs were awarded against GECC on a substantial indemnity basis.

2 GECC requests an order:

(a) setting aside the December 23, 2002 judgment and the February 27, 2003 costs order of Gordon J.;

(b) dismissing the claims of XDG (and all lien claimants) to any claim of priority over the GECC mortgage; and,

(c) awarding costs of the trial and appeal on a partial indemnity scale to GECC.

CROSS-APPEAL

3 Wm. Green Roofing Ltd. ("Green"), one of the lien claimants, cross-appeals and requests that the February 27, 2003 costs order of Gordon J. be set aside and that the costs at trial be awarded on a substantial indemnity basis to Green. Green seeks an increase in costs to the total amount of $83,937.50, plus $1,500 for disbursement, plus G.S.T. (See Appeal Book and Compendium, Tab 2) (Factum of cross-applicant, para. 12).

STANDARD OF REVIEW

4 On questions of fact, the standard of review for an appeal from the order of a judge is whether or not the decision of the judge was "clearly wrong". (*Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.)). A judge must have made a "palpable and overriding error" or a "manifest error" before interference can be justified (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.)).

5 Judicial discretion should not be interfered with unless it is apparent that the judge applied erroneous principles or disregarded or misinterpreted material evidence in a way that rendered the result "clearly wrong". (*Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Ont. Div. Ct.)).

6 On questions of law, however, a judge's decision must be correct. On matters of law, the appellate court is free to replace the opinion of the trial judge with its own. (*Housen v. Nikolaisen, supra*).

APPEAL AS TO COSTS

7 A costs award is a discretionary decision and even after the introduction of specific costs grids, the court retains an inherent power in relation to costs that is not exhausted by statute. A court retains the authority to diverge from statutory guidelines if it considers it fair and reasonable to do so. (*Basdeo (Litigation Guardian of) v. University Health Network*, [2002] O.J. No. 597 (Ont. S.C.J.)). Matlow J. concluded that, despite the new rules and Costs Grid in Ontario, judges were left with a very broad statutory discretion and were entitled to consider anything that is relevant to the question of costs when determining by whom and to what extent costs shall be paid. (*Toronto (City) v. First Ontario Realty Corp.*, [2002] O.J. No. 2519 (Ont. S.C.J.)).

8 The new rules indicate that trial judges are to fix costs; only in exceptional circumstances are cases to be referred to assessment. (*Delrina Corp. v. Triolet Systems Inc.*, [2002] O.J. No. 3729 (Ont. C.A.)). Generally, the practice of a reviewing court is to grant judges deference in all decisions not vital to the disposition of a lawsuit. (*Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp.* (2000), 49 C.P.C. (4th) 336 (Ont. S.C.J.)); (*Bank of Nova Scotia v. Liberty Mutual Insurance Co.*, [2003] O.J. No. 4474 (Ont. Div. Ct.)

9 For the reasons that follow, the appeal is dismissed.

BACKGROUND

10 GECC financed the operations of Euro United Corporation ("Euro") through a credit agreement, dated November 1998, that offered Euro a revolving line of credit of $127,000,000, subject to a margin formula. By March, 1999, Euro was in default of the margin formula. In exchange for continued and increased financing, the President and controlling shareholder of Euro, Sam Rehani ("Rehani"), gave GECC a first mortgage ("Mortgage"), registered on April 15, 1999, on property at 1 Deilcraft Place in Kitchener, Ontario, ("property") owned by 1099606 Ontario Limited ("109"), a company of which Sam Rehani was also the sole Director, Officer and Shareholder. Euro leased the property from "109".

11 At the time of the Mortgage, GECC obtained statutory declarations to the effect that no construction had been commenced or negotiated on the property and the Mortgage was not in breach of the financial assistance provisions of s. 20 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16 (OBCA).

The Lien Claimants

12 Under a construction agreement, dated April 15, 1999, "109" retained XDG to perform certain improvements on the property. XDG asserts that work on the site had commenced in August 1998. By August 1999, "109" had failed to pay its

progress invoice. XDG and various contractors and sub-contractors registered construction liens on title to the property in late 1999. The lien claimants then sought priority over the mortgage. By that point, Euro and "109" were insolvent and both were adjudged bankrupt on June 12, 1999.

TRIAL

13 At trial, Gordon J. found that the mortgage was not valid as against the lien claimants and that the lien claimants would be entitled to priority over GECC's Mortgage on the basis that (a) "109" failed both solvency tests in s. 20 of the OBCA (b) the Mortgage was void as against the lien claimants as being a fraudulent conveyance in contravention of both s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F. (FCA) and s. 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A. 33 (APA) and (c) GECC's Mortgage was registered after the first lien arose giving the lien claimants priority, pursuant to the priority provisions of the *Construction Lien Act*, R.S.O. 1990, c. C. 30 (CPA). In addition, Gordon J. found that GECC failed to conduct a due diligence review in addition to obtaining the representations and warranties of "109" and its officers and that GECC was not acting in good faith and was willfully blind, negligent or aware of Rehani's intent to defeat creditors, thereby depriving GECC of the benefit of its Mortgage. Gordon J. awarded costs on a substantial indemnity basis.

KEY ISSUES

1. Was the Mortgage void for:

   (a) contravening the financial assistance provisions of s. 20 of the OBCA?

   (b) contravening the FCA?; and,

   (c) contravening the APA?

2. Do the lien claimants have priority over the Mortgage by virtue of s. 78 of the CLA?

3. Was it appropriate to award costs on a substantial indemnity basis?

4. Is the cross-applicant, Green, entitled to an increase in its costs award?

POSITIONS OF THE PARTIES

GECC's Submissions

The Mortgage did not violate s. 20 of the OBCA

14 There was no evidence in April, 1999 when the Mortgage agreement was entered that either "109" or Euro would become insolvent. Advent, the Teachers' Pension Fund and Lehman Bros. all extended funds to Euro and none of these parties could have foreseen the eventual demise of Euro. Before August 1999, there was no evidence that "109" could not meet its financial obligations as they became due. "109" could pay all its liabilities as they became due as long as Euro paid the rent. The rent was paid until August, 1999. According to what was known in April 1999, "109" was in excellent financial condition. (Appellant's Factum, paras. 62-66)

15 The guarantee was not a liability or deduction from the realizable assets of "109". There were no reasonable prospects of the guarantee being called in April, 1999. There were no reasonable grounds for believing that the guarantee would cause the realizable assets to be exceeded by "109's" liabilities. (Appellant's Factum, paras. 68-69; *Clarke v. Technical Marketing Associates Ltd. (Trustee of)* (1992), 8 O.R. (3d) 734 (Ont. Gen. Div.)).

16 The "safe harbour" provision applies to GECC because it was a "lender of value" pursuant to s. 20(3) of the OBCA. GECC advanced monies to Euro that permitted Euro to continue to pay rent to "109". There is clear and uncontradicted evidence of continued and increased financing being provided in consideration of "109's" grant of the Mortgage.

GECC Acted in Good Faith

17 GECC was acting in good faith and it did not turn a blind eye to the obvious. GECC sought and obtained all the necessary representations and certificates from "109". GECC had no reason to question those representations in April, 1999. The courts have held that a solvency certificate would suffice in lieu of other inquiries. (*Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. Gen. Div.)). GECC obtained a solvency certificate. (Appellant's Factum, para. 75)

Fraudulent Conveyances Act ("FCA")

18 XDG can only seek to set aside the Mortgage transaction if it was a creditor on April 14, 1999. XDG only became a creditor on September 17, 1999. The conditions that would allow a subsequent creditor to impeach a fraudulent conveyance were not proven in this case. XDG did not prove that "109" granted the Mortgage with the "intent to defeat, hinder, delay or defraud creditors". (Appellant's Factum, paras. 77-79) The *FCA* also requires proof that the transferee had "notice or knowledge" of that intent. There is no evidence that GECC had knowledge of any intent on the part of "109" to defraud creditors. (Appellant's Factum, para. 81)

Assignment and Preferences Act ("APA")

19 In order to defeat the Mortgage, XDG must prove that "109" was unable to pay its creditors or was insolvent or on the eve of insolvency in April, 1999, that XDG was a creditor at the time and "109" had the intent to defeat, hinder, delay or prejudice creditors and GECC knew or ought to have known of "109's" intentions to do so. There was no evidence in April 1999 that "109" was unable to pay its debts. If this cannot be proven, then the APA cannot apply to defeat the Mortgage. (Appellant's Factum, paras. 82-84)

20 It also cannot be proven that XDG was a creditor of "109" at the time of the transfer. As of April 14, 1999, there was no debt owing to XDG. There is also no evidence that "109" intended to prefer GECC over its creditors, nor is there evidence that GECC had knowledge of any intent to defeat other creditors. A court is not likely to set aside conveyances upon a mere suspicion that they are fraudulent. There must be firm evidence of fraudulent intent. (Appellant's Factum, paras. 86-88)

Construction Lien Act ("CLA")

21 Section 78(6) of the CLA states that "any advance made in respect of that conveyance, mortgage or other agreement" enjoys priority unless there has been registration or written notice of a claim for lien. Section 78(6) does not require that the advance be made to the owner. It simply states that the advance must be made in respect of that conveyance, mortgage or other agreement. GECC made advances in respect of the Mortgage; none of the subsequent advances to Euro would have been made if the Mortgage had not been granted. (Appellant's Factum, paras. 91-93)

Costs

22 Only conduct of a reprehensible nature should give rise to an award of solicitor and client costs. Gordon J. awarded substantial indemnity costs on the basis of his conclusion that GECC failed to conduct due diligence, was not acting in good faith and was willfully blind. The evidence does not support those conclusions Moreover, the actions described do not constitute reprehensible conduct. (Appellant's Factum, para. 103)

XDG's Submissions

23 The Mortgage violated s. 20 of the OBCA. At all relevant times, s. 20 of the OBCA prohibited financial assistance between affiliated corporations such as "109" and Euro where there were reasonable grounds for believing that the corporation granting the assistance was insolvent. The two tests that must be met to prove solvency are the "Cash Flow" test and "Balance Sheet" test. "109" could not meet either of these solvency tests at the time the Mortgage was granted to "109" to provide assistance to Euro. "109" was not able to pay its outstanding liabilities in April 1999. As well, the assets less the liabilities and stated capital

of "109" were significantly less than the amount of the financial assistance or guarantee of $11.5 million. If "109" failed either of these two tests, the provision of the Mortgage violated s. 20 of the OBCA. (XDG's Factum, paras. 31-39)

24 GECC cannot rely on the "safe harbour" provision (s. 20(3) of the OBCA) because it was not a lender for value. The guarantee did not facilitate the extension of new credit. It merely provided security for pre-existing indebtedness. The "safe harbour" provision, therefore, cannot apply even if further credit was extended after the execution of the guarantee. (*Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. Gen. Div.)).

25 Section 20(3) of the OBCA also imposes a positive obligation on a lender to exercise reasonable diligence to determine the solvency of the guarantor. Any evidence of suspicious circumstances is sufficient to put a creditor on its inquiry. Where a creditor is put on inquiry, but fails to inquire, it cannot rely on the "safe harbour" provisions of the OBCA.

The Mortgage was void pursuant to the FCA

26 A transaction is void by operation of s. 2 of the FCA if it is "made with intent to defeat, hinder, delay or defraud creditors or others". Badges of fraud have been developed to allow a court to infer intent from the circumstances of a transaction. Badges of fraud, such as: the transfer was made to a related party, the transaction was effected with unusual haste, and the transaction was supported with inaccurate documents are present in the GECC Mortgage transaction. (XDG's Factum, paras. 45-48)

27 Section 3 of the FCA provides some protection to creditors declaring that a transaction is not void where the transaction was made "upon good consideration and in good faith". The transaction in question was not made for good consideration. "109" received no funds from GECC and it received no benefit from Euro. It cannot be said that GECC acted in good faith because GECC ensured that "109" received none of the benefit of the Mortgage. (XDG's Factum, para. 51-53)

The Mortgage was void pursuant to the APA

28 A transaction is void under the APA if it was made with the intent to defeat, hinder, delay or prejudice creditors. The badges of fraud outlined in paragraph 47 of XDG's factum are evidence of an intent to defeat, hinder, delay or prejudice creditors. (XDG's Factum, paras. 54-57)

GECC failed to meet the onus under the CLA

29 The CLA is to be interpreted liberally in favour of lien claimants. The overarching principle of the CLA is that lien claimants have priority over other interests. It is necessary for a mortgagee to persuade the court that it falls within one of the exceptions to the general priority of lien claimants. (XDG's Factum, para. 58)

30 GECC failed to demonstrate that its Mortgage should take precedence over the lien claimants. The Mortgage was registered after the first lien arose. As such, GECC's priority was limited to the extent of any advance made in respect of the Mortgage. GECC did not advance any amount in respect of the Mortgage. Any advances made were made to Euro, not to "109", and they were made in respect of the Credit Agreement, not in respect of the Mortgage. (XDG's Factum, paras. 59-61; *David Schaeffer Engineering Ltd. v. D.T.A. Investments Inc.* (1998), 37 C.L.R. (2d) 26 (Ont. Master)). The courts have held that where a mortgage was registered to secure a pre-existing debt for the purposes of the CLA, no monies were advanced. (*561861 Ontario Ltd. v. 1085043 Ontario Inc.* (1988), Kirsh's C.L.C.F. 78.50 (Ont. Bktcy.) at 78.166-167 and 169).

Costs Award

31 GECC required leave to appeal the costs award. There are no grounds to support a request for leave. Gordon J. provided lengthy, detailed reasons for the costs award. The CLA costs provisions suggest that substantial indemnity costs should be awarded more readily than in regular civil proceedings. It was reasonable to censure GECC for relying on a mortgage that was grossly excessive and found to be void. (XDG's Factum, para. 66)

CONCLUSION

32 The overriding issue in this appeal is whether the trial judge's finding that, on the facts of this case, GECC had a legal obligation to conduct a due diligence of "109" and that a due diligence would have put GECC on notice of the financial problems of "109" and likely consequences that, in fact, flowed. That finding was the substantial basis for declaring the mortgage invalid with respect to the lien claimants.

33 The trial judge, in his reasons, carefully analyzed the evidence, both testimonial and written. There was no demonstrable error shown in the substantial factual findings of the trial judge. Gordon J. applied the correct legal principles to the facts.

34 GECC has failed to establish that Gordon J. was clearly wrong in his finding of facts or in his application of legal principles. The trial judge had a basis for his findings of fact and he applied the correct legal principles to those facts.

35 Because the trial judge concluded that GECC failed to conduct due diligence, was not acting in good faith and was willfully blind, his award of costs, on a substantial indemnity basis, was not an improper exercise of his discretion.

Costs of the Appeal

36 Prior to reserving judgment, we asked each of the three (3) counsel for his submissions as to costs of the appeal. Counsel for GECC produced a draft bill of costs showing a total of $47,179.34, all inclusive. Counsel for XDG filed a draft bill of costs requesting $21,545.89, all inclusive. Counsel for Wm. Green Roofing Ltd. (Green) requested costs on the appeal at $8,500.00 plus G.S.T. The question of Green's costs on appeal is decided later in these reasons.

37 GECC's appeal has been dismissed. There is no reason that costs should not follow the event. No one suggested that XDG's draft bill of costs on appeal contained any improper claims, was inaccurate or excessive in any way. XDG's costs on appeal, payable forthwith by GECC, are fixed at $21,545.89, all inclusive.

Cross-Appeal of Green as to its costs

38 In paragraph [3] above we refer to Green's cross-appeal. Green asks that the February 27, 2003 costs order of Gordon J. be set aside and substituted for a costs on either a partial or substantial indemnity basis fixed at $83,937.50 plus $1,500 for disbursements and applicable G.S.T.

39 Before Gordon J., Green was awarded costs against GECC in the amount of $9,000.00 for fees, $1,500 for disbursements and $735.00 for G.S.T. for a total of $11,235.00.

40 In this cross-appeal, Green asserts that the amount of $9,000.00 for fees is unjust and inconsistent with the conduct of GECC throughout, Green's Rule 49 offer, the factors enumerated in Rule 57.01(1) and s. 131 of the *Courts of Justice Act*. Green takes no issue with the $1,500.00 awarded by Gordon J. for disbursements.

41 All counsel consented that this court could hear this cross-appeal without a formal disposition of the leave which was sought, "if necessary", in the amended Notice of Cross-Appeal.

42 The award of costs is in the discretion of the trial judge. The material presented to us on this appeal addresses some of the concerns noted by Gordon J. While we do not say that Gordon J. was clearly wrong, we are compelled to the view that it would be clearly wrong if Green was held to an award of $9,000.00 for fees now that it has "backed out" of the bill of costs the items which Gordon J. specifically complained about. In our view, these adjustments compel an increase in the amount of costs that were awarded to Green.

43 More specifically, in the cross-appeal, Green has backed out the costs it incurred in the insolvency proceedings and in the litigation between it and XDG. In his reasons on costs, Gordon J. noted that Green sought costs on a substantial indemnity basis fixed in the amount of $249,170.50. Gordon J. specifically referred to a number of problems with Green's material as follows:

(a) no docket entries were provided;

(b) costs are claimed regarding the insolvency proceedings;

(c) costs are claimed regarding the litigation between Green Roofing and XDG.

44 In paragraph [20] of his costs endorsement, Gordon J. correctly stated that a lien claimant is entitled to have its counsel participate in the proceedings even where the carriage of the action is granted to another claimant.

45 Now that Green has "backed out" the items referred to above, he seeks costs in this cross-appeal in the amount of $83,937.50. The materials contain a summary of the docketed time and hourly rates of participating lawyers. [1]

46 In our view, there is one other matter which compels an upward adjustment of costs in favour of Green. Gordon J. awarded $9,000.00 to Janick Electric for its time spent in the insolvency proceedings. The Janick lien was for $108,243.55. Green's lien was for almost six (6) times greater. Janick's counsel did not participate at the trial. We do not consider it fair to Green to measure its entitlement to costs by comparing its role to that of Janick. Their roles were substantially different. Green was substantially more involved in the proceedings and needed to be there to protect its interest.

47 In all of the circumstances we find the award of $9,000.00 of costs unreasonably low. The combination of factors set out above compel us to allow the cross-appeal and substitute our finding for costs which we would award to Green on a party and party basis and on the basis that the costs regarding the insolvency proceedings and the litigation between Green Roofing and XDG are backed out of the bill of costs of Green.

48 The process of fixing these costs is inherently arbitrary but it must be done in a manner that "reasonably and without arbitrary diminution acknowledges the efforts legitimately expended in that connection". See: *Carpenter v. Malcolm* (1985), 6 C.P.C. (2d) 176 (Ont. H.C.), at 178 per Catzman J. (as he then was). Fixing costs in this cross-appeal is made more difficult by the fact that we were not provided with actual docket entries.

49 We fix these costs at $40,000.00 together with $1,500.00 for disbursements and applicable G.S.T. These costs are payable by GECC forthwith. The cross-appeal is therefore allowed. $40,000.00 includes costs of the cross-appeal.

Appeal dismissed; cross-appeal granted.

Footnotes

1 These are summarized at paragraph [12] of Green's Factum in the cross-appeal.

TREZ CAPITAL LIMITED PARTNERSHIP ET AL.	-and-	WYNFORD PROFESSIONAL CENTRE LTD.
Applicants		*Respondents*

Court File No. CV-14-10493-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

PROCEEDING COMMENCED AT **TORONTO**

BRIEF OF AUTHORITIES OF THE APPLICANTS, TREZ CAPITAL LIMITED PARTNERSHIP AND COMPUTERSHARE TRUST COMPANY OF CANADA

ROBINS APPLEBY LLP
Barristers + Solicitors
2600 - 120 Adelaide Street West
Toronto ON M5H 1T1

Irving Marks LSUC #19979H
imarks@robapp.com
Tel: (416) 360-3329

Dominique Michaud LSUC #56871V
dmichaud@robapp.com
Tel: (416) 360-3795
Fax: (416) 868-0306

Lawyers for the Applicants, Trez Capital Limited Partnership and Computershare Trust Company of Canada