Court File No. CV-16-11529-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED

B E T W E E N:

ROMSPEN INVESTMENT CORPORATION

Applicant

- and -

206 BLOOR STREET WEST LIMITED

Respondent

BOOK OF AUTHORITIES

November 21, 2016

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Tab 1

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*Feb. 28, 29,
*May 18.

ST. GEORGE JELLETT (DEFENDANT) ..... APPELLANT;

AND

DANIEL R. WILKIE AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ST. GEORGE JELLETT (DEFENDANT) ..... APPELLANT;

AND

THE SCOTTISH ONTARIO & MANITOBA LAND COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ST. GEORGE JELLETT (DEFENDANT) ..... APPELLANT;

AND

ROBERT W. POWELL (PLAINTIFF).....RESPONDENT.

ST. GEORGE JELLETT (DEFENDANT) ..... APPELLANT;

AND

JACOB ERRATT (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Real Property Act—Registration—Execution—Unregistered transfers—Equitable rights—Sales under execution—R. S. C. c. 51; 51 V. (D.) c. 20.

The provisions of sec. 94 of the Territories Real Property Act (49 V. c. 51) as amended by 51 V. (D.) c. 29 do not displace the

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees but merely protect the lands from intermediate sales and dispositions by the execution debtor. If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers.

APPEAL from a decision of the Supreme Court of the North-west Territories reversing the judgment at the trial in favour of the several defendants.

The plaintiffs respectively purchased lands from the Edmonton and Saskatchewan Land Company of Canada on 7th March, 1891, for valuable consideration and the said company then executed and delivered to them respectively transfers of the lands so purchased executed under "The Territories Real Property Act" (1). The plaintiffs neglected to register the transfers and on the 20th of June, 1893, the sheriff had in his hands a writ of execution against the lands of the said company issued by the defendant Jellett, and filed a copy of the writ of execution against the said lands as being the lands intended to be charged thereby with the registrar of the registration district within which they are situate, and a memorandum thereof was made in the registry of the said lands of which the said company still appeared to be the registered owners under uncancelled certificates of title.

On the 14th December, 1893, the plaintiffs registered the transfers of the said lands to them from the company, but the registrar refused to issue certificates of ownership to the plaintiffs except marked as being subject to the execution, and accordingly certificates of ownership in favour of the plaintiffs were issued, but marked as affected by the writ under the pro-

(1) R. S. C. c. 51.

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visions of the amended sec. 94 of "The Territories Real Property Act."

The defendant Jellett maintained the execution in force and directed the sheriff to advertise the lands for sale.

The actions asked for declarations that the execution was a cloud on the plaintiffs' titles; that the entry of the execution should be cancelled and removed from the register, and for an injunction restraining the sale of the lands and for damages.

Taylor Q.C. for the appellants. Difficulty may arise by reading sections placed for a distinct purpose under one heading, with sections placed for different purposes under different headings of the Act. To get the correct bearing, each section must first be considered with reference to the particular purpose it is intended to serve under the heading where it is found. *Eastern Counties Railway Co.* v. *Marriage* (1); *White* v. *Neaylon* (2); for otherwise we may legislate an intention into the statute. *Lawless* v. *Sullivan* (3); Bowen L. J. in *The Queen* v. *Liverpool Justices* (4); Willes J. in *Abel* v. *Lee* (5); also Lord Coleridge in *Coxhead* v. *Mullis* (6): "It is better to suppose that Parliament meant what Parliament clearly said." Under "The Territories Real Property Act" unregistered transfers create nothing, and form the basis of no equities to defeat executions prior in registration.

Registration alone causes a transfer to create or pass an interest; sec. 3, subsec. *c*. See also secs. 41, 59 and 60. *McEllister* v. *Biggs* (7); *Registrar of Titles* v. *Patterson* (8). *Taylor* v. *The Land Mortgage Bank* (9).

(1) 9 H. L. Cas. 41.
(2) 11 App. Cas. 176.
(3) 3 Can. S. C. R. 117.
(4) 11 Q. B. D. 649.
(5) L. R. 6 C. P. 371.
(6) 3 C. P. D. 442.
(7) 8 App. Cas. 314.
(8) 2 App. Cas. 110.
(9) 12 Vic. L. R. 748.

Transfers would not, apart from the Act, pass any title. The Act substitutes a new method of passing title, and must be complied with to give the transferee the benefit of the Act. McGuire J. in *Re Rivers* (1); *Re Herbert and Gibson* (2).

In *White* v. *Neaylon* (3), the learned judge deals with the absurdity of the idea that unwritten equities would be stronger than written ones, but says, as Parliament excluded written ones from protection, and said nothing about unwritten ones, the court would conclude that it meant to leave them unprovided for. See Hagarty C. J. in *Peterkin* v. *McFarlane* (4), where he strongly upheld the same theory.

Foy Q.C. and *Chrysler* Q.C. for the respondents. The execution bound only the beneficial interest of the debtor. *Eyre* v. *McDowell* (5); *Morton* v. *Cowan* (6). This law has not been changed by "The Territories Real Property Act," which recognizes the creation and existence of equitable or beneficial estates as distinguished both from the legal estate and from a mere personal right against the registered owner. See sec. 3*a* as substituted by 51 Vict. ch. 20, sec. 3 and other sections. Jones, Torrens System 82, 128 and cases cited.

Equitable mortgagees can be protected. *Re Maloney* (7); *Colonial Bank of Australia* v. *Pie* (8); *Cunningham* v. *Gundry* (9); *Re Massey and Gibson* (10) explaining *Herbert and Gibson* (2).

The respondents were the beneficial owners of the land and the execution debtors owners of the bare legal estate in equity. Upon the delivery of the trans-

(1) 1 N.W.T. Rep. part 4 p. 66.
(2) 6 Man. L. R. 192.
(3) 11 App. Cas. 176.
(4) 9 Ont. App. R. 443; 13 Can. S. C. R. 677 *sub nom. Rose* v. *Peterkin*.
(5) 9 H. L. Cas. 619.
(6) 25 O. R. 529.
(7) 14 Can. L. T. 240.
(8) 6 Vic. L. R. Eq. 186.
(9) 2 Vic. L. R. Eq. 197.
(10) 7 Man. L. R. 172.

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fers the lands ceased to be exigible under any subsequent execution against the plaintiffs. *Parke* v. *Riley* (1); *Watson* v. *The Royal Permanent Building Society* (2); *Britain* v. *Rossiter* (3); *Maddison* v. *Alderson* (4); *Huntley* v. *Huntley* (5). Concurrently with the old rule of law was admitted the rule of equity, that the estate did pass if the intention was clearly indicated. The same rule of equity still exists concurrently with the provisions of section 59. *McEllister* v. *Biggs* (6); *Mathieson* v. *The Mercantile Finance and Agency Co.* (7).

Section 59 must be read also in conjunction with section 64, and restricted by the words "as against any *bonâ fide* transferee." "Transferee" probably includes "encumbrancee" but an execution creditor is neither.

A writ of execution filed under section 94 is not an "instrument" within the meaning of the Act.

Sections 63, 103 (*d*), 104, 105 and 124, place a *bonâ fide* purchaser for value in a distinct category. This interpretation fulfils the object of the Act. *Gibbs* v. *Messer* (8). As to priority between instruments filed without production of certificate, see *Re Bentley and Morris* (9).

Secs. 60, 61 and 62 are for the benefit of the registered owner, in whose hands the certificate is conclusive evidence *sub modo* as against persons claiming interests or estates adversely to the certificate, *i.e.* in the sense of attacking its validity, but not as against persons claiming under the very title evidenced by the certificate, as the respondents claim. Jones, Torrens System 80, 81, 82, 100, 101. *Cunningham* v. *Gundry* (10).

(1) 12 Gr. 69; 3 E & A. 215.
(2) 14 Vic. L. R. 283; Hunter's Cases 185, 192.
(3) 11 Q. B. D. 123.
(4) 8 App. Cas. 467.
(5) 114 U. S. R. 394.
(6) 8 App. Cas. 314.
(7) 17 Vic. L. R. 271.
(8) [1891] A. C. 248.
(9) 12 Can. L. T. 119.
(10) 2 Vic. L. R. Eq. 197.

This filing of the execution operates as a caveat merely and a caveat is not an "instrument" within the meaning of the Act (sec. 3, subsec. *b*). *National Bank of Australia* v. *Morrow* (1); *Giles* v. *Lesser* (2). *Massey and Gibson* (3) is followed in *Ontario Bank* v. *McMicken* (4), where the converse of the point involved in this case is established, viz., that the beneficial interest of a *cestui qui trust* is exigible under an execution filed under the Act.

The certificate can only be evidence when produced, and in favour of him who produces it. The purchasers had it in custody when they received their transfers, and the appellant never had it and cannot appeal to it as evidence in his favour. *The Shamrock Co.* v. *Farnsworth* (5). Moreover, a certificate cannot be conclusive evidence of more than appears on its face, namely, that at its date the title was in the person named.

The sheriff has been properly and of necessity made a party. See *Ontario Industrial Co.* v. *Lindsey* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This appeal involves a question of law arising upon undisputed facts. Four actions brought by different plaintiffs against the same defendant have been consolidated, the substantial question being the same in each. The plaintiffs in the three several actions of Wilkie, the Scottish Ontario & Manitoba Land Company, and Powell, were each the purchasers of certain lands from the Edmonton and Saskatchewan Land Company, who had obtained transfers of the lands respectively purchased by them, against which the appellant, Jellett, an execution creditor of the last named company had, subsequent to the trans-

(1) 13 Vic. L. R. 2.
(2) 5 Vic. L. R. Eq. 38.
(3) 7 Man. L. R. 172.
(4) 7 Man. L. R. 203.
(5) 2 Vic. L. R. Eq. 165.
(6) 3 O. R. 66.

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fers, but before their registration, procured his writ of execution to be registered under section 94 of "The Territories Real Property Act" as amended by 51 Vict. ch. 20. Erratt, the plaintiff in the remaining action, is also a purchaser for value from the execution debtors under an unregistered contract, prior in date to the registry of the appellant's execution. The questions are the same in all the four cases, viz., whether the registrar was right in refusing to register the transfers and contract except subject to the lien or charge of the execution, and whether the appellant is entitled to sell the lands so as to cut out the titles of the respondents. The consolidated actions having been heard in the first instance before Mr. Justice Rouleau, who dismissed them, were brought by way of appeal before the Supreme Court of the North-west Territories in *banc*, which court reversed the judgment of Mr. Justice Rouleau and entered a judgment for the respondents declaring the writs of execution clouds upon the respondents' titles and directing the registrar to cancel the entry of the executions, and further restraining the sheriff from selling the lands under the executions.

I am of opinion that this judgment and the reasons given for it in the opinion of the court, written by Mr. Justice Maguire, were entirely right and that there is no foundation for the present appeal.

By the North-west Territories Act the law of England as it existed on the 15th of July, 1870, so far as it has not been altered or varied by competent legislative authority, is, by the 11th section of the Act, made the rule of decision in those territories.

No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his

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debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor. In a dissenting opinion delivered in the case of *Miller* v. *Duggan* (1), I brought together a number of authorities bearing on this point. I may here refer to the following cases as conclusively establishing the principle in question, viz. : *Eyre* v. *McDowell* (2) ; *Beaven* v. *Lord Oxford* (3) ; *Whitworth* v. *Gaugain* (4) ; *Kinderley* v. *Jervis* (5) ; *Benham* v. *Keane* (6) ; *Wickham* v. *The New Brunswick Railway Co.*(7) ; *Watts* v. *Porter* (8) ; *Langton* v. *Horton* (9) ; *McMaster* v. *Phipps* (10) ; and *Strong* v. *Lewis* (11).

The rule thus well established must have become the law of the territories unless it has been displaced by some statutory provision to the contrary ; and if no such enactment can be referred to it must be conclusive of the question raised by this appeal, as the Supreme Court has held it to be.

It is, however, said in behalf of the appellant that section 94 of the Territories Real Property Act (49 Vict. ch. 51) as amended by 51 Vict. ch. 20, does alter the law so as to give the appellant the priority he claims for his writs of execution over the prior unregistered transfers and contract of the respondents. That section is as follows :

> Every sheriff or other officer charged with the execution thereof shall after the delivery to him of any writ or process affecting land or lien, mortgage or encumbrance or other interest therein deliver a copy of every such writ or process so in his hands or that may thereafter be delivered to him, certified under his hands, together with a memorandum n writing of the lands intended to be charged thereby, to the registrar within whose district such lands are situate, and no land shall be bound by any such writ or other process unless such copy and memorandum

(1) 21 Can. S. C. R. 33.
(2) 9 H. L. Cas. 619.
(3) 6 DeG. M. & G. 507.
(4) 1 Ph. 728.
(5) 22 Beav. 1.
(6) 3 DeG. F. & J. 318.
(7) L.R. 1 P.C. 64.
(8) 3 E. & B. 758.
(9) 1 Hare 560.
(10) 5 Gr. 253.
(11) 1 Gr. 443.

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have been so delivered; and the registrar shall thereupon, if the title has been registered, or so soon as the title has been registered under the provisions of this Act, enter a memorandum thereof in the register; and from and after the delivery of a copy of any such writ or other process and memorandum to the registrar the same shall operate as a caveat against the transfer by the owner of the land mentioned in such memorandum or of any interest he has therein, and no transfer shall be made by him of such land or interest therein except subject to such writ or other process.

Now, as I have already said, the sheriff having delivered a copy of the appellant's writs of execution to the registrar together with a memorandum of the lands intended to be charged thereby, the latter officer entered a memorandum in the register accordingly, the title then being a registered title, and the respondents then being entitled under the transfers and contract before mentioned. According to the ordinary rules of courts of equity the appellant could have made his execution a charge on, and have sold for the satisfaction of his judgment, just what beneficial interest the execution debtor had in these lands and nothing more. And this, which is said to be a "broad rule of justice" and to depend, as is well pointed out by Wood V.C. in *Benham* v. *Keene* (1), upon the obvious distinction between a purchaser who pays his money relying on getting the specific land he buys and a creditor who is in no such position, was from early times enforced by courts of equity in order to protect the title of equitable owners and chargees. And it must have been the obvious right of the respondents to have the benefit of this protection in the way in which the judgment now impugned afforded it to them, unless the statute has abrogated the principle.

Had there been no difference of opinion I should have thought that there could be no reasonable ground for the pretense of the appellant that this 94th section gives him any priority.

(1) 1 J. & H. 685; 3 DeG. F. & J. 318.

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The construction of it seems to me to be obviously plain. The effect to be given to the entry on the register of the memorandum of the writ of execution is clearly and precisely stated in the section itself to be to operate as a caveat or warning to persons who might subsequently purchase or be about to purchase from the execution debtor, that he could only sell or transfer an interest subject to the lien of the writ. This in so many words is what Parliament has declared to be the effect and consequence of the registering of an execution. Surely there is nothing in this abrogating or pointing to the abrogation of prior interests. It follows therefore that the rights of prior parties remain as they were before the execution was registered, and these entitled the respondents to have their transfers registered without any reference being made in the certificate to the execution, and to have the sheriff's sale restrained. I have been through all the sections of the amended Lands Act, and I find nothing abridging the equitable rights of the respondents as they stood when the statute was passed. So far from equities being shut out there are numerous indications, as pointed out in Mr. Justice Maguire's judgment, that it was the intention to conserve them (1); particularly the right to specific performance which applies here to Erratt's case is conserved. As regards authority the *National Bank* v. *Morrow* (2), appears to me directly in point. In that case the Supreme Court of Victoria held that an unregistered equitable mortgagee was entitled to priority over a registered execution, and not only over the execution creditor but also over a purchaser from the sheriff under the execution but whose transfer had not been registered.

The 106th section of the Victoria Act is substantially identical with section 94 of the amended Lands Act,

(1) See sec 130.

(2) Hunter's Torrens cases, p.306.

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the object of both being, not to give the execution creditor any superiority of title over prior unregistered transferees, but merely to protect the land against intermediate sales and dispositions by the execution debtor. No doubt if the sheriff had sold and the purchaser had registered his transfer, the Act would apply, and would in that case invalidate prior unregistered transfers made by the execution debtor before the registry of the execution, but no such case as that is presented by this appeal, which must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *S. S. & H. C. Taylor.*

Solicitors for the respondents: *Beck & Emery.*

Tab 2

McDonald v. The Royal Bank of Canada

[1933] O.R. 418

ONTARIO

Court of Appeal.

Mulock, C.J.O., Magee, Middleton, Masten and Davis, JJ.A.

April 24, 1933.

Mortgages -- Assignment of mortgage -- Assignment not registered -- Execution against assignor of mortgage -- Seizure -- Priorities -- The Execution Act, R.S.O. 1927, ch. 112, secs. 19 and 24 -- The Registry Act, R.S.O. 1927, ch. 155, secs. 1(d) and 71.

An assignee of a registered mortgage of land who claims under an unregistered assignment has priority over the claim of a subsequent execution creditor of the assignor of the mortgage, even where the sheriff has, pursuant to sec. 24 of the Execution Act, R.S.O. 1927, ch. 112, registered a notice of seizure of the mortgage without knowledge of the prior unregistered assignment of the mortgage. An execution creditor can only acquire the debtor's real beneficial interest and nothing more. The Registry Act, R.S.O. 1927, ch. 155, does not improve the position of an execution creditor where the sheriff has registered a notice of seizure because the notice of seizure is not an instrument within the meaning of the Registry Act and because the Registry Act deals with the protection of rights of purchasers or mortgages under registered instruments as against claims under unregistered instruments and does not deal with the rights of creditors. Moreover, under sec. 19 of the Execution Act, R.S.O. 1927, ch. 112, the sheriff is only empowered to seize mortgages "belonging to the person against whom the execution has been issued," and sec. 24 of the Execution Act only provides for the mode of taking in execution a mortgage which is made exigible under sec. 19, that is, a

mortgage which belongs to the execution debtor.

An action brought by the plaintiff for a declaration that the plaintiff, as the execution creditor of one Donald M. McDonald, is entitled to be paid out of the moneys in the hands of C.W. Morris, the full amount of his judgment and costs in priority to the claim of the defendant to such money. The facts are fully stated in the judgments of Raney, J., and the Court of Appeal.

The action was tried by Raney, J., without a jury at London.

A.R. Douglas, for the defendant.

C.A. Thompson, for the defendant, appellant.

December 23rd, 1932. Raney, J.: In January, 1932, the plaintiff recovered a judgment against one Don McDonald in the sum of $1,208.35 and costs, and placed an execution in the hands of the sheriff of the County of Middlesex who thereupon made a seizure, in the usual course, of a mortgage that had been made in favour of the debtor by one David R. McArthur for $5,155 and registered in the Registry Office for the County of Middlesex. The mortgage had however been previously assigned by the debtor in December, 1925, before its maturity, to the defendant bank; a duplicate original of the mortgage had been delivered to the bank, and the mortgagor duly notified; but the bank failed to register its assignment in the registry office, and the plaintiff had no notice of the assignment at the time of the seizure by the sheriff.

On this state of facts, the money payable under the mortgage, namely, the sum of $2,468.85, having been realized and deposited with the defendant's manager at London pending judgment in this action, the question is whether the plaintiff is entitled to be paid out of the moneys realized the amount of his judgment and costs or whether the defendant bank is entitled to retain the whole amount.

A land mortgage transaction usually includes both a covenant to repay the debt and a conveyance of the land as security; and

usually a transfer of mortgage includes both an assignment of the debt and a conveyance of the land -- though no doubt either the debt or the security may be assigned separately (Falconbridge's Law of Mortgages, 1919, p. 191). Here, both the debt and the security were assigned by Don McDonald to the bank, the material words of the assignment being as follows: "All moneys, claims, rights and demands whatsoever . . . in respect of or incidental to or resulting from . . . first mortgage given by David R.M. McArthur for fifty-one hundred and fifty-five dollars due April first, 1927." That was, I think, a complete assignment of the mortgage, and it follows that the provisions of the Registry Act, R.S.O., ch. 155, secs. 1(d) and 71, and of The Execution Act, R.S.O., ch. 112, sec. 24, apply, and the plaintiff is entitled to priority to the extent of his claim.

There will be judgment accordingly and the plaintiff will have his costs of the action.

The defendant appealed to the Court of Appeal from the judgment of Raney, J.

C.A. Thompson, for the defendant, appellant.

J.C. Elliot, K.C., and N.F. Newton, for the plaintiff, respondent.

March 3rd, 1933. The appeal was heard by Mulock, C.J.O., Magee, Middleton, Masten and Davis, JJ.A.

C.A. Thompson, for the defendant, appellant, contended that the trial Judge erred in holding that the plaintiff, an execution creditor, was entitled to be paid the full amount of his claim in priority over the defendant, the assignee of the mortgage. The fact that the assignment of the mortgage was not registered is immaterial. Section 71 of the Registry Act, R.S.O. 1927, ch. 155, is not applicable in this case, as the plaintiff is not a purchaser for value: Keenan v. Osborne (1904), 7 O.L.R. 134.

J.C. Elliott, K.C., and N.F. Newton, for the plaintiff, respondent, relied upon sec. 71 of the Registry Act, supra. Reference to Falconbridge, Law of Mortgages, 2nd ed., p. 127: Russell v. Russell (1881), 28 Gr. 419; Peebles v. Hyslop (1914), 30 O.L.R. 511.

The Court at the conclusion of the argument allowed the appeal with costs. Subsequently the Court delivered the following written reasons:

April 24th, 1933. The judgment of the Court was delivered by Middleton, J.A.: An appeal by the defendant from the judgment of the Honourable Mr. Justice Raney pronounced on the 17th of December, 1932, after the trial of the action declaring that the plaintiff as execution creditor of one Donald M. McDonald, is entitled to be paid out of the moneys in the hands of C.W. Morris the full amount of his judgment and costs in priority to the claim of the defendant to such money and directing the defendant to pay to the plaintiff his costs of the action.

The facts giving rise to this litigation are exceedingly simple. In January, 1932, the plaintiff recovered judgment against the said McDonald for $1,208 and costs and placed an execution in the hands of the sheriff of the County of Middlesex, who thereupon made seizure of a mortgage made by one David R. McArthur to the execution debtor. This mortgage was claimed by the Royal Bank to which it had been assigned by the debtor in December, 1925. At the time of the assignment the duplicate original of the mortgage had been delivered to the bank and the mortgagor had been duly notified of the assignment. The bank, however, failed to register this assignment in the Registry Office and the plaintiff had no notice or knowledge of the assignment at the time the sheriff registered the necessary notice of seizure as required by The Execution Act.

By consent of the parties the mortgage money has been released and has been deposited in a special account pending the result of this litigation.

The bona fides of the assignment to the bank is not disputed but the learned trial Judge held that the registration of the notice under The Execution Act constituted the execution creditor a bona fide purchaser for value without notice and gave him priority over the bank's assignment by virtue of the provisions of The Registry Act.

In this we are all of opinion that the learned Judge erred.

Ever since the decision of the House of Lords in the case of Eyre v. McDowell (1861), 9 H.L.C. 619, the matter is free from doubt. As said by the Chief Justice of Canada in Jellett v. Wilkie (1896), 26 S.C.R. 282, at p. 288, "no proposition of law can be more amply supported by authority than . . . that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor."

The case in the House of Lords is singularly parallel to that in hand because it deals not only with the right of the execution creditor but it deals also with the problem presented by the registry of the judgment. The case came from Ireland and under the Irish Statute the judgment could be registered against the lands of the debtor and upon the registration the statute provided that the execution creditor should be deemed to be a purchaser of the lands as under a deed in which the execution debtor was vendor, the execution creditor purchaser and the amount of the execution the consideration for the conveyance. The Irish Court had held that this made the execution creditor after the registration a purchaser for value and as he had no notice of the unregistered conveyance, his title as execution creditor defeated the right of the grantee under the unregistered instrument. This decision was reversed in the Lords by Lord Cranworth, Lord Wensleydale, and Lord Kingsdown after a most exhaustive argument by very eminent counsel. Lord Cranworth gives as the reason for his opinion that apart from the statute the sheriff could only seize the debtor's beneficial interest, that which, if there had been no judgment, the debtor might have appropriated for the payment of the debt. The debtor could not have appropriated the land to the liquidation of his debt without first satisfying the claim

of his equitable mortgagee and the statute did not intend to and did not enable the creditor to take that which the debtor could not give.

The effect of the statute was not to vary the rights of the debtor and the creditor by putting them in a position different from that in which they stood apart from the statute. Its intention and effect were that nothing should be transferred except that which the debtor could transfer to a purchaser or mortgagee with notice of all prior titles, that is, that to which the debtor was beneficially entitled. Lord Wensleydale entirely agrees. The provision for registration only affected the debtor's actual interest. It conveys only the real beneficial interest of the debtor and no more. Its effect cannot be increased or lessened by the absence from or presence on the registry of the previous equitable charge.

In the Supreme Court, in the case already referred to, it was held that the registration of an execution did not defeat a prior unregistered transfer made by the debtor even when the land was registered under the Torrens System. It was, however, pointed out that if the sheriff sold under the fi. fa. a purchaser from the sheriff would be protected by virtue of the provisions of The Registry Act.

In the case of Whitworth v. Gaugain (1846), 1 Ph. 728, Lord Cottenham reviewed the early cases and decided that notwithstanding a statutory provision which gave to a judgment the effect of an equitable charge upon the lands of the debtor, a prior equitable mortgagee retained his right in equity to enforce his security against the title of a creditor under a subsequent judgment although the latter had acquired the legal seisin and possession of the land under an elegit without notice of the mortgage. This decision was approved in the case in the Lords.

It is needless to multiply references for, since the decision in the Irish case, I find no discordant note. I would, however, refer to Madell v. Thomas, [1891] 1 Q.B. 230, a decision of the Court of Appeal, particularly to what is said by Lord Justice Kay on page 238, where a title by estoppel was set up as

against a trustee in bankruptcy: "Nothing is clearer than that upon general principles a trustee in bankruptcy or an execution creditor will be bound by it just as much as the bankrupt or execution debtor himself . . . a trustee in bankruptcy or execution creditor is in privity with the bankrupt or execution debtor. He takes under the bankrupt or execution debtor and not as a purchaser for valuable consideration and it has been decided over and over again that he only takes what was vested in the bankrupt or execution debtor. Where property is subject to any rights by which it would be bound in the hands of the bankrupt or execution debtor nothing can be more clear as a general principle than that it would be subject to such rights as against the trustee in bankruptcy or execution creditor. The defendant's counsel admitted that as a general rule this was so, but he said that we are here dealing with a statute that gives special rights to a trustee in bankruptcy or execution creditor because it aviods as against them a document which may be good as between the parties. I do not think that answer is sufficient. The Act of Parliament does not purport to give to a trustee in bankruptcy any benefit in the way of avoiding an estoppel that would bind the bankrupt. If a transaction would be such as would create an estoppel as between the grantor and grantee of a bill of sale, I do not see anything in the Act to prevent such estoppel extending to a trustee in bankruptcy or execution creditor."

This is alone sufficient to dispose of the appeal. I would, however, draw attention to the fact that there are other difficulties in the plaintiff's way. The notice of the execution is not an instrument within the meaning of the Registry Act. The Registry Act is plainly concerned with protecting the rights of actual purchasers or mortgagees under registered instruments as against claims under unregistered documents. It does not in any way deal with the rights of creditors.

Furthermore the learned Judge has misinterpreted the Execution Act, R.S.O. 1927, ch. 112. Under sec. 19 the sheriff is only empowered to seize mortgages, &c., "belonging to the person against whom the execution has been issued." Section 24 only provides for the mode of taking in execution a mortgage

which is made exigible under the earlier section, that is, a mortgage which belongs to the execution debtor.

For these reasons the appeal must be allowed with costs and the action dismissed with costs.

Appeal allowed with costs.

Tab 3

Kerr v. Ruttle and Cruickshank.

[1952] O.R. 835-839
BARLOW J.
19th and 22cd SEPTEMBER 1952

Executions -- Effect of Executions against Lands -- Lands Subject to Equitable Mortgage -- The Execution Act, R.S.O. 1950, c. 120, ss. 31, 32, 34.

It is clear from ss. 31, 32 and 34 of The Execution Act that a writ of execution attaches only to the interest of the execution debtor in lands, and where an execution debtor is the registered owner of lands that are subject to an equitable mortgage at the time the execution is placed in the sheriff's hands the execution will attach only to the equity in the land remaining after the claim of the equitable mortgagee. The fact that the equitable mortgagee, after the filing of the execution, takes a conveyance of the property from the execution debtor does not give the execution creditor a right to claim against any interest acquired by the equitable mortgagee under the mortgage. Jellett v. Wilkie et al. (1896), 26 S.C.R. 282, referred to.

Mortgages -- Equitable Mortgages -- Constitution by Deposit of Deed -- Effect as against Execution Creditor -- Subsequent Recovery of Judgment by Mortgagee.

A borrowed money from B for the purpose of purchasing land, promising to give B a mortgage on the lands as security. The money was actually paid to A, and the time of repayment and the rate of interest were agreed upon. No formal mortgage was ever eexecuted, but A, after he received his deed, took it to B's solicitor and left it with him.

Held, this transaction constituted a good equitable mortgage, and B acquired all the rights of an equitable mortgagee. Russel v. Russel (1783), 1 Bro. C.C. 269; Burgess v. Moxon (1856), 2 Jur. N.S. 1059; Zimmerman v. Sproat (1912), 26 O.L.R. 448, applied. In particular, B's claim had priority over that of an execution creditor of A, whose execution was not lodged with the sheriff until after the creation of the equitable mortgage. The fact that B later obtained a judgment against A for the debt did not affect his rights under the mortgage, nor did the further fact that B, still later, accepted a conveyance of the land from A give the execution creditor any greater rights as against the land, since the execution never attached to anything more than A's interest in the land.

TRIAL of an issue.

19th and 22nd September 1952. The issue was tried by BARLOW J. without a jury at Sarnia.

R.D. Steele, Q.C., for the plaintiff.

M.E. Manderson, for the defendant Ruttle.

D.V. Hambling, for the defendant Cruickshank.

20th October 1952. BARLOW J.:-- The plaintiff is the holder of a writ of execution issued on a judgment obtained by the plaintiff against one Stewart William Brown. The defendant Ruttle is the registered owner, by virtue of a deed from Stewart William Brown, of certain lands to which the plaintiff claims his writ of execution attaches. The defendant Cruickshank is the purchaser of the said lands by virtue of an agreement for sale and purchase entered into between himself and the defendant Ruttle as vendor. The sale by Ruttle to Cruickshank was about to be closed, in fact the purchase-money of $2,775 had been paid to Ruttle's solicitor, when it was discovered that the plaintiff Kerr held the above writ of

execution, and the solicitor for the defendant Ruttle now holds the purchase-money in escrow.

Following the discover y of the writ of execution held by the plaintiff, an application was made by the defendant Ruttle under The Vendors and Purchasrs Act, R.S.O. 1950, c. 407, to determine the rights of the parties. When this application came on before Kelly J. on the 28th June 1952, he directed an issue to be tried, which issue by the order of Kelly J. requires the Court to determine whether the plaintiff, claiming by way of a writ of execution in a suit by the plaintiff against one Stewart William Brown, which writ of execution was filed with the Sheriff of the County of Lambton on the 20th October 1950, in which county is situate the land in question,owned, at the time of filing the writ of execution, by the said Stewart William Brown, takes priority over the defendant Ruttle claiming as an equitable mortgagee of the said lands.

The facts are of importance in determining the question in issue.

On or about the 18th May 1949 Stewart William Brown borrowed from the defendant Ruttle the sum of $2,000 for the purpose of purchasing certain land in the country of Lambton and erecting a butcher-ship thereon, promising to give the defendant Ruttle a mortgage on the said lands as security. Some few days later the said Brown, having obtained the duplicate registered deed of the said property, then registered in the names of himself and his wife, took the deed to the solicitor for the defendant Ruttle, stating that he had promised to give the said Ruttle a mortgage. No mortgage was ever drawn or executed.

It is clear to me from the evidence that Brown received the sum of $2,000, that he agreed to pay the same in one year with interest at 6 per cent., and that he agreed to give the defendant Ruttle a mortgage as security for the loan, and that he deposited the deed with the solicitor for the defendant Ruttle. I find that this constitutes a good equitable mortgage: Russel v. Russel (1783), 1 Bro. C.C. 269, 28 E.R. 1121; Burgess v. Moxon (1856), 2 Jur. N.S. 1059; Zimmerman v.

Sproat (1912), 26 O.L.R. 448, 5 D.L.R. 452; and Falconbridge, Law of Mortgages, 3rd ed. 1942, p. 75.

On the 13th June 1950 the plaintiff obtained judgment against the said Stewart William Brown for $1,223.10 and costs. Subsequently, on the 20th October 1950, a writ of execution was filed in the office of the Sheriff of the County of Lambton.

If this had been the end of the steps taken by the parties, undaoubtedly the equitable mortgage held by Ruttle would take priority, to the amount thereof, over the writ of execution held by the plaintiff.

It is contended by counsel for the defendant Ruttle that notwithstanding the subsequent dealings with the property, the rights as between the plaintiff and the defendant Ruttle should be determined as of the time of the filing of the writ of execution by the plaintiff. I shall deal with this matter later.

The following steps were taken by the defendant Ruttle:

The defendant Ruttle, not having received payment from Brown on 1st September 1950 issued a writ of summons against Brown and his wife, which writ was endrosed as follows:

"The Plaintiff's claim is for the sum of $2,160.00.

"The following are the Particulars:

19th May, 1949, by cash loaned . . . . . $2,000.00 Interest from May 19th, 1949 to August 19th, 1950 at 6% per annum . . . . . 150.oo Preparing for mortgage from Defendants to John A. Ruttle and attendances . . . . . 10.00."

No appearance having been entered to this action, default judgment was signed by the defendant Ruttle on the 15th November 1950, for $2,160.00 and $65.95 for costs. Upon this judgment the defendant Ruttle issued a writ of execution and filed the same with the Sheriff of the County of Lambton on the 19th December 1950.

It is contended by counsel for the plaintiff that the taking of this judgment operates as an estoppel and prevents the defendant Ruttle from now asserting any rights under his equitable mortgage. I cannot agree with him. The law appears to me to be well settled that a mortgagee may sue for his debt and notwithstanding such suit may later take action to enforce his security: see 23 Halsbury, 2nd ed. 1936, p. 522, para. 773, as follows: ".... and a judgment on a debt secured by equitable mortgage does not deprive that mortgage of its priority, notwithstanding that the judgment operates as a charge on the land."

In December 1951, or early in January 1952, the sheriff of Lambton upon instructions from Ruttle's solicitor investigated the land owned by Brown and upon which Ruttle claimed to hold an equitable mortgage, and in January 1952, under Ruttle's writ of execution he advertised the land for sale. On the 31st January 1952 Ruttle's solicitor withdrew this writ of execution from the sheriff's office and instructed the sheriff to discontinue the advertising.

By a deed dated the 21st September 1950, and apparently executed on the 31st January 1952, Brown and his wife conveyed the property in question to the defendant Ruttle in consideration of $1. This deed was registered on the 1st February 1952.

On the 18th March 1952 the defendant Ruttle listed the property in question for sale with a real estate agent in Sarnia, at a sale price of $3,300.

On the 7th April 1952 the defendant Ruttle entered into a binding contract of purchase and sale to sell the property in question to the defendant Cruickshank and to give him an absolute title free from encumbrance. The purchaser, the defendant Cruickshank, having discovered the writ of execution filed by the plaintiff, requested that the same be removed. There then followed the application under The Vendors and Purchasers Act, in connection with which this issue was directed as set out above.

The writ of execution placed in the hands of the Sheriff of the County of Lambton on the 20th October 1950 by the plaintiff Kerr attached only to the equity of Brown in the property in question remaining after the claim by way of equitable mortgage held by the defendant Ruttle. In other words, the equitable mortgage held by the defendant Ruttle took priority over the writ of execution. This position as between the equitable mortgagee Ruttle and the writ of execution held by Kerr continues down to the present time. The fact that the mortgagee Ruttle took a conveyance of the property does not give to the execution creditor, the plaintiff Kerr, the right to claim by virtue of his writ of execution against any interest which the defendant Ruttle acquired in the said lands by virtue of his mortgage: see The Execution Act, R.S.O. 1950, c. 120, ss. 31 and 32.

it is clear from s. 31(1) that the writ of execution only attaches on "the interest of the mortgagor in any mortgaged lands and tenements".

The effect of s. 32 is that the writ of execution only attaches to "all the interest of the mortgagor therein at the time the execution was placed in the hands of the sheriff" as well as subsequently.

Section 34 is directly applicagle to the position at the present time and makes it clear that it is only the interest in the land over and above what is sufficient to satisfy the equitable mortgage to which the plaintiff's writ of execution attaches. For reference see Jellett v. Wilkie et al. (1896), 26 S.C.R. 282.

I therefore find that the amount of the equitable mortgage held by the defendant Ruttle takes proprity over the writ of execution held by the plaintiff Kerr. The costs of the issue and of the application should be paid by the plaintiff to the defendants.

Judgment accordingly.

Solicitors for the plaintiff: Perkins & Ward, Chatham.

Solicitors for the defendant Ruttle: Weir & Manderson, Dresden.

Solicitors for the defendant Cruickshank: Cown, Millman & Hambling, Sarnia.

Tab 4

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113

Date: 20140324
Docket: CA041068

Between:

Pan Canadian Mortgage Group III Inc.

Appellant
(Petitioner)

And

0859811 B.C. Ltd., as assignee of Nathan Jarman, Serin Investments Ltd., E & J Management Ltd. and Lynn Elisabeth Wong; and Steven Kern and Monica Kern

Appellants
(Respondents)

And

679972 B.C. Ltd., Collateral Loan Brokers Ltd., Gopal Singh Gill, Jaspal Singh Lalli, Maple Leaf Disposal Ltd., and The Crown in the Right of British Columbia

(Respondents)

And

Rob Parker, Rob Angco, Belinda Lockhart, Glen Lockhart, Kalwant Ciulla, Alfonso Ciulla, Sarbjit Gill, Ravinder Gill, Angela Athwal, Harjinder Athwal, Juanita Athwal, Darcie Ouellette, Ken Wilson, Sheila Wilson, Surrinder Kaur Sangha, Haroon Hussein, Raj Ranbir Singh Bahad, Narinder Dhaliwal, Suzanne Dhaliwal, Piara Singh, Lakhvinder Kaur Thandi, Pardeep Singh Thandi, Shinder Kaur Atker, Kamaljit Kaur Atker, Manohar Singh Purewal, Jasbir Singh Purewal, Simba Holdings Ltd., Kashmir Kaur Johal, Balbir Kaur Khabra, Gurjit Kaur Pattar, Ava Carlyle, Balazs Holdings Ltd., Thomas O'Hara, Gillian O'Hara, Colin Miller, Maria Miller, Nicholas Kilpatrick, Linda Kilpatrick, Pamela Lyn Christensen, Susan Joy Eva Thomson, Julia Marie Joy Thomson, Dr. Sukhjit Bubra, Jagdip Kaur Shoker, Manjinder Sarowa, Kulvinder Sarowa, Balbinder Singh Sidhu, Navdip Kaur Sidhu

Respondents
(Applicants/Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Chiasson

On appeal from: An order of the Supreme Court of British Columbia, dated June 19, 2013 (*Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, 2013 BCSC 1078, Vancouver Docket No. H090932).

Counsel for the Appellant 0859811 B.C. Ltd.:	D.W. Donohoe
Counsel for the Appellants Steven Kern and Monica Kern:	J.A. Miner
Counsel for the Applicants/Respondents:	H.L. Jones, O. de Vries
Place and Date of Hearing:	Vancouver, British Columbia February 4 and 5, 2014
Written Submission from J.A. Miner, counsel for the Kern Appellants, received:	February 17, 2014
Written submission from H.L. Jones, counsel for the Applicants/Respondents, received:	March 14, 2014
Place and Date of Judgment:	Vancouver, British Columbia March 24, 2014

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Lowry

Concurring in the Result:
The Honourable Mr. Justice Chiasson (Page 31, para. 57)

Summary:

Respondent Purchasers had entered into Agreements with "L", whom they believed was acting on behalf of Owner ("G") of real property to be developed into townhouses. Each Purchaser paid entire purchase price for a townhouse to L, but acknowledged in Agreement that a strata lot could not be sold before property was properly stratified, so that Purchaser would not acquire an interest in land until he or she "ratified" the deal at that later stage. As well, each Agreement contained a "protective clause" in which Purchaser acknowledged that the Agreement created contractual rights only.

After many months, L notified the Purchasers that the project would not be going ahead and that L hoped to return purchase-monies to them. Property was foreclosed and sold; some $2.5 million remained in trust after payment of mortgage. This part of the foreclosure proceeding concerned priorities as between Purchasers and the holders of registered judgments. Court below granted "purchasers' liens" to the Purchasers, making them secured creditors ranking ahead of judgment creditors.

APPEAL ALLOWED. Majority held that a purchaser's lien is security for monies paid under a binding contract of purchase and sale which gives rise in Equity to equitable title to the land to the extent of the purchaser's payment. The Agreements were not binding contracts for the purchase and sale of property. As well, the protective clauses negatived any intention on the part of the contracting parties to create an interest in land. On these two bases, the chambers judge had erred in finding that a purchaser's lien was available to each Purchaser. Discussion of the equitable remedy of purchaser's lien. Given the foregoing, it was not necessary to discuss various other issues, including the question of whether L had been acting on behalf of G, who did not give evidence.

Chiasson J.A. agreed that no purchaser's lien arose on the basis of the protective clauses and would not have addressed other issues.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The purchaser's lien is a relatively obscure equitable remedy with roots dating back at least to the mid-19th century: see *Wythes v. Lee* (1855) 61 E.R. 954; *Rose v. Watson* [1864] 10 H.L.C. 672. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides him or her with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs.[1] It exists even though specific performance may not be available (as in this case, which involves strata lots that were never created) and even though the purchaser may have (legally) rescinded the contract. The lien is said to have the same effect as if the vendor had executed a mortgage in the purchaser's favour in the amount covered by the lien; and comes into existence at the moment of payment by the purchaser. (See generally *Halsbury's Laws of England*, 4th ed., Vol. 28 at paras. 560-64; *Snell's Equity* (31st ed., 2005) at §42-25 to §42-32; C. Harpum, S. Bridge and M. Dixon, eds., *Megarry and Wade: The Law of Real Property* (7th ed., 2008) at §15-056; A. Warner La Forest, ed., *Anger & Honsberger: Law of Real Property* (3rd ed., looseleaf) at §34:80; and J.V. Di Castri, *The Law of Vendor and Purchaser* (3rd ed., looseleaf) at §781.) The Supreme Court of British Columbia has granted a purchaser's lien in at least one case, although the Court did not go on to consider how it might be affected by the land registration system: see *Lehmann v. B.R.M. Enterprises Ltd.* (1978) 88 D.L.R. (3d) 87.

[2] True to its equitable roots, the purchaser's lien is intended to do justice in situations in which the common law does not, or cannot, do so. Thus in *Whitbread & Co., Ltd. v. Watt* [1902] 1 Ch. 835, Vaughan Williams L.J. observed that the lien "is not the result of any express contract" but is a right that may be said to have been invented "for the purpose of doing justice" (at 838). In a similar vein, it is said that the

[1] A statutory purchaser's lien is also provided by s. 111 of the *Land Title Act*, R.S.B.C. 1996, c. 250, where a person sells a parcel of land purporting to be described by a plan of subdivision not yet deposited, to a buyer who has accepted delivery of the transfer "without knowledge of the nondeposit".

lien "supplies a remedy where the law falls short of accomplishing full justice". (See Di Castri, *supra*, at §913.)

[3] The chambers judge below was clearly convinced that a purchaser's lien was needed to do justice in the case at bar. Before the Court was an unfortunate set of circumstances involving a proposed townhouse development in Surrey known as the "Hilands". In the absence of a lien, the respondents (herein called the "Purchasers") may stand to lose many hundreds of thousands of dollars as a result of their reliance on representations made to them by Jaspal Singh ("Paul") Lalli and his company, Lallico Investments Ltd. ("Lallico"). The Purchasers, none of whom obtained legal advice before signing the agreements provided to them, understood that Lalli was acting on behalf of the owner of the subject property, 679972 B.C. Ltd. ("679"), and that their purchase money ($200,000 or $250,000 per unit) would be used for the development and construction of approximately 80 townhouses on the property. The Purchasers acknowledged in the agreements that closing could not occur until the filing of the required strata plan and the issuance of strata title to the units. (In fact, the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, prohibited the marketing (including the sale) of strata lots until various conditions were met, including the deposit of a strata plan in the land titles office or the issuance of a building permit by the municipality: see ss. 3, 5, 10, 11, 14, 15 and 18.) The Purchasers attended various meetings between 2005 and 2009 at which Lalli informed them of progress in the planning of the project and the obtaining of municipal approvals. They were encouraged to choose which unit(s) they would wish to receive once stratification was complete.

[4] Lalli also told the Purchasers that if they changed their minds about buying a townhouse unit, they could do so before completion, and would receive their money back with interest in accordance with separate "Investment Agreements", signed at the same time as the Purchase Agreements. The Investment Agreements, between each Purchaser and *Lallico*, provided that if and when a Purchaser elected to "terminate" his or her purchase, he or she would lend the "Investment Principal" (the unit price) to Lallico on the terms set forth in a promissory note bearing interest at

10% per annum and due two years (or in some cases, three years) from the "Investment Date". Lallico could at its option elect to satisfy the note by delivering title to a unit within the two-year period, failing which the Purchaser could make demand under the note.

[5] The appellants Mr. and Mrs. Kern exercised their right of "termination" under their Investment Agreement in 2008, and received a cheque for $305,645, issued by 679. The cheque, which appears to have been signed by Lalli alone, was dishonoured. The Kerns then sued 679, Lallico, Lalli, and others, asserting several causes of action, including breach of trust, conversion and debt. (Strangely, they did not sue on the dishonoured cheque.) They pleaded that "the Defendants ... and each of them were acting in concert and/or as mutual agents each for the other and/or under the control or direction of each other ... and communication to one was communication to all". They take the opposite position in the case at bar.

[6] The solicitors for 679, MacKenzie Fujisawa LLP, responded in a letter to the Kerns' solicitor that neither Lalli nor his company had had the authority to bind 679 "in any fashion whatsoever". Thus, the letter contended, none of the representations made by Lalli to the Kerns about the development was attributable to 679. Ultimately, however, 679 chose not to oppose the granting of relief, and in June 2009, the Court granted summary judgment in favour of the Kerns against 679 for $250,000 plus interest at 10% per annum.

[7] As the owner of the subject property, 679 is clearly a key player in this story, but neither 679 nor its principal, Gopal Gill, appeared or provided evidence in this proceeding. Evidently, Gopal Gill is an uncle of Lalli and was the original owner of all the shares and the sole director of 679. At some point in 2006, Lalli acquired 50% of the shares of 679 in consideration of $1.6 million (received by him from the first group of Purchasers), as contemplated by the Investment Agreements. Lalli also became a director of 679 at that time. Another nephew of Gopal Gill, Kal Gill ("Kal"), was also involved in the development and attended some of the meetings, many at

Lalli's house, where Lalli discussed the Hilands project with the Purchasers. We are told that Gopal Gill had no direct contact with any of the Purchasers.

[8] The chambers judge made the following findings:

> Lalli was the Purchasers' primary contact for the vendor, although from time to time [Kal] Gill participated in information meetings with Lalli and the Purchasers.
>
> Throughout Lalli's dealings with the Purchasers he never made a distinction between representing Lallico or 679972 by the time most of the Purchasers signed their contracts. It was understood by the early Purchasers that Lallico would become an owner in the near future and had the authority to bind 679972 in any event. He was a director of 679972 and Lallico became a 50% owner of 679972. He always spoke on behalf of both companies which were inextricably linked in the matters associated with the Property. The Purchasers were meant to understand and they understood that Lalli had the authority to act on behalf of all parties involved, to accept payment and to execute agreements on behalf of the owner of the Property.
>
> Lalli himself confirmed in affidavit and cross-examination on affidavits that when he was speaking to the Purchasers and when signing the Contracts he believed he had the authority to do so for 679972.
>
> The Judgment Creditors challenge that Lalli confirmed that he acted on *behalf* of 679972 or was authorized to do so. [At paras. 36-9; emphasis by underlining added.]

She also found, at para. 42 of her reasons, that all the purchase monies paid by the Purchasers were transferred by Lalli to 679 or its "holding company". By this she meant 642943 B.C. Ltd. ("642"), which she described as the "holding and operating company for [679]." (Para. 118.) The evidence indicates that Gopal Gill was the sole director and officer of 642.

[9] The Purchasers were told that no charges would be registered against the property other than a construction mortgage to facilitate completion of the development, but this turned out to be untrue. Serin Investments Ltd. and related parties (the "Serin Group") made a loan of $1.6 million to two other numbered companies and others in May 2006. They took mortgage security on property owned by the borrowers located in Richmond and Port Moody, and received a covenant from 679. When the borrowers defaulted, they commenced foreclosure proceedings against them and the covenantors. In early 2009, the Serin Group obtained

judgment against, *inter alia*, 679 and filed the judgment in the Land Titles Office against the Hilands property. Later in 2009, the Serin Group assigned their interest in the judgment to 0859811 B.C. Ltd. ("811"). We granted the Serin Group's application, made while this judgment was under reserve, to have 811 substituted in their place as appellants in this appeal.

[10] In February 2008, 679 itself also granted a mortgage against the property to Pan Canadian Mortgage Group III Inc. ("Pan Canadian") to secure a loan of $3.6 million. This mortgage was signed by Lalli as the "authorized signatory" of 679 (his signature being witnessed by the same solicitor for 679 who later denied, in the letter to the Kerns' solicitor, any agency relationship between 679 and Lalli.) Gopal Gill and Lalli personally were additional borrowers and signed as such. The loan proceeds were not used for the Hilands development and the loan went into default in mid-2009. Pan Canadian began foreclosure proceedings in July.

[11] On June 3, 2009, Lalli notified the Purchasers by email that his bank had decided "as a result of the credit crunch ... not to honour our construction financing contract". Alternate financing that Kal Gill had hoped to obtain in India had not materialized. Lalli said he had decided the Hilands development would not be proceeding and that the subject property (and other "development sites in which Kal and I are involved") should be sold and the Purchasers' monies returned to them. The email expressed his regret:

> I am so sorry that it has worked out this way, especially for those who were planning to live at the Hilands. There will be times to be aggressive. I believe this is a time to be conservative. Please rest assured that I am committed to taking care of all of you. I have personally injected a significant amount of money into this development. I have "put my money where my mouth is" so to speak. You have my assurance that I have never taken a single penny out of the development over the last number of years despite the fact that pursuing this development has been my full time job. I ask for a bit more indulgence from you so we can make plans to liquidate in an orderly way which will ensure the maximum return for everyone. To this end, I have already met with my lawyer, and asked him to oversee the fair and equitable dispersal of funds once they arrive.

[12] Eventually the land was indeed sold, through the present foreclosure proceeding, for some $7.68 million. After payment out of the Pan Canadian mortgage and some other minor charges, there now remains in trust some $2.5 million and interest.

[13] Various applications brought by groups of Purchasers in this action were joined for hearing below and several of the Purchasers were represented by Ms. Jones, who acted on behalf of all the Purchasers on this appeal. Since their claims arose in the context of a foreclosure, the Purchasers did not have the opportunity to file conventional pleadings, which might have asserted various causes of action against 679, Lallico and their principals. The hearing below was concerned solely with who is entitled to the proceeds in trust – and in what order of priority – as between the 47 Purchasers, whose claims total about $6.2 million; 811, which claims up to approximately $1.1 million; and the Kerns, who claim the amount of their judgment for $250,000 plus interest.

[14] All the parties agreed that if the Purchasers were found to be entitled to liens, they would rank in priority to the claims of 811 and the Kerns (the "Judgment Creditors"). The Purchasers agreed amongst themselves that they would share on a *pro rata* basis any amount obtained by them in this proceeding.

The Proceeding Below

[15] The evidence adduced in the court below was unsatisfactory to say the least. I have already mentioned that Gopal Gill did not provide evidence; and there was no accounting evidence from 679 or 642, making it impossible to know with any certainty where the Purchasers' purchase-monies went after they were paid to Lallico. In cross-examination on his affidavit, Lalli deposed that once he had transferred the $1.6 million received from the first group of Purchasers to MacKenzie Fujisawa LLP to pay for his 50% share in 679, he forwarded the later Purchasers' funds to 642. This was done, he said, for "accounting purposes" and at the suggestion of his solicitor, Mr. Greenwood. Lalli deposed that he had had no written communications with Gopal Gill concerning the project. He acknowledged that

although some "legal agreements", such as a share purchase agreement, a co-owners' agreement, a shareholders' agreement, and a declaration of trust between 679 and Lallico, had been prepared by 679's solicitors, they were never executed because "we were comfortable proceeding without them." He said he thought he had had a "commitment" from Gopal Gill as to what was to be done with the Purchasers' money, but had lost control of the funds once they were sent to 642.

[16] The chambers judge found that Lalli made the following representations to the Purchasers:

> a) Gill was an experienced property developer, was and would remain a director of 679972, and was and would remain an investor in the project;
>
> b) 679972, Lalli, Gill and other related companies promised and intended that all of the money advanced by the Purchasers was to stay in the Property and would not be used for any purpose other than the completion of the Development;
>
> c) The Property did not have any charges against it and 679972, Lalli and Gill promised and intended that no charges would be put against the Property other than a construction mortgage to facilitate the completion of the Development;
>
> d) 679972, Lalli and Gill promised and intended that 679972 was and would be the only company involved in the Development, would own all lands or other assets in relation to the Development and that, therefore, any assets they acquired in relation to the Development would enhance the value of the Development for the benefit of the Purchaser and would be available to satisfy any claims that the Purchasers might have;
>
> e) The purpose of the Contracts was to enable the Purchasers to purchase an interest in the Property and that the Purchasers could instead elect to be paid monies equivalent to their purchase price plus 10% under a promissory note. [At para. 40.]

(The chambers judge defined "Gill" to mean Kal Gill, but seems to have conflated him and Gopal Gill at various points in her reasons.) In the Court's analysis, the weight of all the evidence confirmed that these representations had been made in good faith and were true, with the exception of the representation that no charges other than a construction mortgage would be registered against the subject property.

[17] An obvious issue was whether the representations made and actions taken by Lalli in connection with the Hilands project were binding on 679. Lalli's evidence on this point was strikingly inconsistent. In an examination for discovery conducted in the Kern action in December 2009, he said he did not think he had ever had the authority to sign documents on behalf of 679 "without getting prior approval of both directors." He answered "no" when asked if he had understood that Lallico had had the authority to sign the Kerns' Purchase Agreement on behalf of 679. On the other hand, at a cross-examination conducted in September 2012 by Mr. Miner, Lalli deposed that it had been his "intention that Lallico did have the authority to bind [679]", contrary to the assertion made in the MacKenzie Fujisawa letter mentioned above. He suggested this authority came from the fact that Lallico owned shares in 679. He deposed that he had been the "primary contact person who dealt with the Plaintiffs [sic] on behalf of the vendors [sic] when entering the [Agreements]." And, in an examination of Lalli conducted by Mr. Donohoe in February 2012, the following exchange took place:

> Q I'm going to ask you about paragraph 8, and there you refer to the three legal documents that you described earlier being the land purchase contract, the investment agreement and the promissory note, and you go on and you say that these three legal documents were signed under the corporate name of Lallico, but you were always acting on behalf of and with the authority of [679] as at least a part owner of that company. Is there any qualification or change you would make to that statement?
>
> A Well, I was an owner and partner in [679], and I am an authorized signator for [679].
>
> Q So you remain of the same position then really with respect to that statement; is that correct? You're not going to change that in any way?
>
> A Uh, no.

In the same discovery, Lalli acknowledged having signed various subdivision applications in respect of the Hilands property in his capacity as a director of 679.

[18] I have already quoted paras. 36-9 of the chambers judge's reasons in which she emphasized the Purchasers' *understanding* that Lalli was representing 679 in his dealings with them, and Lalli's *belief* that he had had the authority to do so. After

reviewing further evidence, she stated at para. 57 that the Agreements had been created "entirely by [679] and Lallico and were drafted by [679] and Lallico's lawyer." Her finding, however, was only that Mr. Lalli *believed* he had had such authority and that the Purchasers "were meant to understand and they understood" that he did. She did not find specifically that Lalli or Lallico *did* have authority to act on behalf of 679 or otherwise became its agent.

[19] The judge considered the legal nature and features of a purchaser's lien, beginning at para. 90 of her reasons. She noted that such a lien may be granted even where specific performance is not possible and that in such circumstances, the lien will apply to the entire property rather than to the "particular portion of the property for which the funds were advanced", citing *Lehmann, supra*. The judge distinguished *bclMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* 2008 BCSC 897, *CareVest Capital Inc. v. C.B. Development 2000 Ltd.* 2007 BCSC 1146 and *J.A.R. Leaseholds Ltd. v. Tormet* [1965] 1 O.R. 347 (C.A.) on the bases that they had been concerned with equitable interests "*in* land" generally (as opposed to security interests "*over* land") or with the ability of a receiver to disclaim contracts of sale. There was no support in law, she concluded, for the notion that a purchaser's lien is unavailable "if the contracts underpinning [it] do not create an interest in land and/or are incapable of specific performance." (Para. 104.)

[20] The judge also rejected the contention that the Purchasers had been aware, when they advanced their funds, that some or all of their money would be used to purchase other properties rather than to construct the Hilands project. (This possibility would, I note, have been apparent from the recitals in the Investment Agreements.) But even if the funds had gone elsewhere, the judge said, it was the Purchasers' *intentions* as to the purpose of the funds that were essential to the creation of a lien. She continued:

> In this case the vendor represented and the Purchasers relied on the Representations, both written and oral, that the funds advanced by the Purchasers was [sic] to procure, after the development was complete, a townhouse <u>on</u> the Property.

> There is no evidence and really no dispute ... that the purpose of the payment of the funds was to secure a right to a townhouse to be built on the Property. [Paras. 120-1.]

[21] The Court rejected arguments to the effect that the Purchase Agreements were uncertain, contained mistakes in the legal descriptions of the subject property, or were otherwise "contrary to the *Land Title Act*". (Para. 122.) The judge found that none of these matters made the Agreements "void for uncertainty"; that most of the items complained of had been satisfactorily explained; and that errors in the legal descriptions of the property in the Agreements were "fixable" (by references to the municipal address of the land). (Para. 131.) Then, in an important passage, she stated:

> Lalli on a fair reading of all of his proffered evidence both in affidavit and cross-examination on his affidavits stated he acted at all times either with the authority of the owner of the land or once his company acquired its one-half interest in the vendor 679972 as an owner.
>
> Thus in my view the Contracts signed by the Purchasers created no interest in land and likely were unenforceable in relation to creating an interest in land to allow specific performance of the contract. Nevertheless the intention of the Contracts to be binding on the parties to the Contracts is clear and agreed to by said parties; that is, according to Lalli for 679972, the owner of the land at the material times and the Purchasers, the payment was for a townhouse to be built on the Property.
>
> In the case at bar all of the elements required for a purchaser's lien are satisfied. The Purchasers provided funds to the vendor for the purchase of land which contract was not completed through no fault of the Purchasers.
>
> The purchaser's liens arose as early as 2005, not as a result of contract but through equity. They have a secured charge against the land that is independent of the contract between the parties. Their liens vested immediately upon payment (all of which were made prior to the Judgment Creditors' claims) and are secured by the Property as a whole.
>
> The Purchasers paid their purchase price to Lalli as Lallico for the represented purpose of the vendor 679972 being able to develop the land and build townhouses to be owned by the Purchasers. Lalli has confirmed that he accepted payment and entered into the contracts of purchase and sale with what he believed was the authority of the vendor. For years after the deposits were paid and right up to the time the Contracts were terminated, the vendor, through Lalli and Gill the joint shareholders and directors of 679972, confirmed that the Purchasers were to obtain a townhouse as a result of their deposit. [At paras. 132-6; emphasis added.]

[22] The Court also rejected the Judgment Creditors' submission that the creation of purchaser's liens in this case would contravene s. 28 or s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250. Section 28 deals with priority as between two or more charges *entered on the register* affecting the same land, and provides that they take priority according to the date and time of their respective applications for registration. Section 73 prohibits a person from subdividing land into smaller parcels for the purpose of transferring it or leasing it for a term exceeding three years. Subsection 2 thereof states:

> (2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.

The chambers judge found that neither provision was applicable, since in her words, the liens asserted here were "not based on an interest *in* land, equitable or otherwise, but rather on an equitable right resulting in a security interest or a charge *on* the land." (Para. 143; my emphasis.)

[23] In the result, the Court declared that the Purchasers had established their respective claims to liens over the property, and that the liens had priority over the judgments obtained by the Judgment Creditors.

ON APPEAL

Grounds of Appeal

[24] 811 advanced nine grounds of appeal as follows:

1. The learned chambers judge failed to rule on or erred in rejecting the primary submission of the Appellants that any claim of a purchaser's lien was excluded by the terms of the agreements made by the Respondent investors with Lallico Investments Ltd. and/or 679972 B.C. Ltd.
2. The learned chambers judge erred in ruling that a claim of purchaser's lien should be upheld against an un-subdivided parcel of land which was not the subject and was not intended to be the subject of any alleged existing or future contract of purchase of proposed strata lots by the Respondent investors.

3. The learned chambers judge erred in ruling that a claim of purchaser's lien should be upheld despite the fact that any proprietary claims relying on the contract of purchase of proposed strata lots offend the prohibition in Part 7 of the *Land Title Act* against certain dispositions of land that require subdivision approval.

4. The learned chambers judge erred in ruling that the terms of the agreements made by the Respondent investors with Lallico Investments Ltd. and/or 679972 B.C. Ltd. were sufficiently certain to be enforced and in ruling that the lack of any order for rectification did not bar the Respondent's claims of a purchaser's lien.

5. The learned chambers judge erred in ruling that the equitable principles of acquiescence, laches and equitable estoppel did not apply to the conduct of the Respondents to bar their claims and that the equities favoured the investors.

6. The learned chambers judge erred in her ruling that the investment funds advanced by the Respondents to Lallico Investments Ltd. were traceable to use only for the benefit of Lot 1, PID 027-769-437, which land was declared by the court to be charged by the purchaser's lien.

7. The learned chambers judge erred in failing to correctly interpret and apply ss. 20, 28 and 29 of the *Land Title Act* and s. 86 of the *Court Order Enforcement Act*, which provisions establish priority of charges in favour of the Appellant's registered certificate of judgment against the claims of the Respondents.

8. The learned chambers judge erred in ruling that the Judgment Creditors had no standing to challenge the validity of contracts to which they were not privy.

9. The learned chambers judge erred in ruling that none of the evidence contained in the affidavit of Constable Tine Paterson sworn on 13 October 2010 was admissible evidence.

[25] The Kern appellants filed a very similar factum through their counsel and asserted identical grounds of appeal, but added a tenth ground raising the issue of Lalli's agency, namely that the chambers judge had erred:

> ... in making findings of fact as to the authority of Lallico Investments Ltd. to bind the owner of the lands in the face of uncontroverted evidence of a denial of such authority by the owner of the lands.

This issue is obviously an important one, since unless Lalli or Lallico was an agent of 679, no purchaser's lien against the subject property could arise. However, the bulk of the submissions made on appeal by counsel for the Judgment Creditors assumed that agency had been shown, and were directed to Item 1 of the stated grounds of appeal, an issue of law. I therefore propose to address that issue in depth and will

also assume, for purposes of this discussion only, that Lalli or Lallico was acting on behalf of 679 in dealing with the Purchasers.

Standing

[26] Item 8, however, raises a preliminary question which the Judgment Creditors characterize as involving standing: they challenge the correctness of the chambers judge's ruling at paras. 126-8 that the Judgment Creditors, and the Kerns in particular, did not have standing to challenge the "validity" of the Agreements. (In fact, the "validity" of the Agreements was not challenged – no one asserted the doctrines of *non est factum*, unconscionability, illegality or fraud, for example.) The chambers judge provided no reasoning to support her ruling, except the following in connection with the Kerns' position:

> The Kerns as Judgment Creditors are in a particularly legally awkward position since prior to obtaining their judgment they claimed a purchaser's lien which they subsequently abandoned in favor of reliance on contractual provisions, in particular the promissory note, which formed part of the agreement package they signed with Lallico/679972. They demanded, pursuant to their understanding of their contractual rights, repayment of their purchase price for a townhouse plus interest. Subsequently, apparently pursuant to the agreements between Lallico/679972 and the Kerns, 679972 issued a cheque for the amount demanded and unfortunately that cheque was dishonored by the bank for lack of funds. Even then, neither Lallico nor 679972 denied that the contracts were not [sic] valid.
>
> In these circumstances can the Kerns be heard to say their Judgment Creditors status trumps other purchasers' lien rights on the basis that the contracts (which were similar or the same) signed by the owner of the subject lands and the other Purchasers are invalid and otherwise unenforceable? The answer surely is no. [Paras. 127-8]

[27] I do not see this as a question of standing. The chambers judge here was objecting to the 'awkwardness' of the Kerns' position in the face of their previous situation, which was identical to that of the Purchasers now. The Kerns invoked their right set forth in their Investment Agreement to "terminate" their "presale contract" prior to the creation of title to a townhouse unit. They sued on several bases, and obtained a judgment, apparently for debt. Other Purchasers could have done the same, but did not. In the present foreclosure proceeding, the Kerns argue not that the Agreements were "invalid", but that they did not constitute binding contracts *for*

the purchase and sale of townhouse units, as the Investment Agreements make clear on their face. (See para. 33 below.) Nor do I see the Kerns as 'approbating and reprobating'. They are not asserting a right that is inconsistent with their judgment: see P. Feltham, D. Hochberg and T. Leech, eds., *Spencer Bower on The Law Relating to Estoppel by Representation* (4th ed., 2007) at 365. Unless and until it is set aside by a court of law, they are entitled to seek to enforce it fully, including the right to assert the priority over unsecured claimants to which they claim to be entitled under s. 28 of the *Land Title Act*.

Other Preliminary Issues

[28] Many of the remaining grounds of appeal overlap substantially, and with respect, some appear to arise from misconceptions either of the law or of the judge's reasons. Item 6, for example, seems to be based on an assumption that a purchaser's lien requires that the *purchaser's* funds be traceable to the subject property in the same way as trust funds. No authority was cited for this proposition, and I have located none. Such a requirement would be nonsensical, given that in most cases the vendor is already the owner at the time he or she agrees to sell. As Di Castri notes, *supra* at §916, "it is payment *to the vendor* which is the foundation of the purchaser's claim of lien and elevates him to the position of a secured creditor." (Of course, payment to the *agent* of the vendor would be regarded as payment to the vendor.) The lien then attaches to the property that was the subject of the contract or, as in this case, to the proceeds of sale of that property.

[29] Some of the grounds of appeal also seem to assume that the ability to grant specific performance is necessary. The authorities have long rejected that proposition: see *Levy v. Stogdon* [1898] 1 Ch. 478 (C.A.); *Hewitt v. Court* [1983] H.C.A. 7; 149 C.L.R. 639 at 649-650, *per* Gibbs C.J., citing *Middleton v. Magnay* (1864) 71 E.R. 452 and *Barker v. Cox* [1876] 4 Ch.D. 464; *J.A.R. Leaseholds Ltd*, *supra*; and *Capital Plaza Developments Ltd. v. Counterpoint Enterprises Ltd.* [1985] B.C.J. No. 321 (S.C.), at para. 11. Indeed, the cases illustrate that a purchaser's lien is usually sought precisely *because* specific performance is not possible. In

Lehmann, for example, Mr. Justice Hutcheon, then a trial judge, held that a lien was available in respect of funds paid by the plaintiff towards the acquisition of a strata lot notwithstanding that stratification never took place due to financing problems of the vendor. Counsel for the Judgment Creditors in the case at bar emphasize that the plaintiff in *Lehmann* had moved into a unit without receiving title, but it was not on that basis that a lien was found to arise. Hutcheon J. observed:

> There is some support for the proposition that the lien is confined to the land covered by the agreement of purchase. In *Re Karrys Investments Ltd.* (1960), 22 D.L.R. (2d) 552, [1960] O.W.N. 181 (Ont. C.A.), there is a statement not necessary to the decision and without any reasons that the lien in that case did not lie against land not covered by the agreement.
>
> If the purchaser is not able to obtain title because the vendor has failed to complete registration under the *Strata Titles Act*, 1966, or has failed to file a subdivision plan, I know of no reason in principle that would prevent a Court of Equity from placing a lien on the whole of the vendor's property of which the subject-matter of the sale formed a part.
>
> . . .
>
> In *Chalmers v. Pardoe*, [1963] 3 All E.R. 552 (P.C.), relied upon by Mr. Curtis, there appears the following passage at p. 555:
>
> > There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will *prima facie* require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended. [At 90-1; emphasis added.]

In the result, Hutcheon J. held that the plaintiff was entitled to a lien "upon the whole of the property" as security for the funds he had paid towards the purchase of a strata lot.

Primary Issue

[30] I agree with the Judgment Creditors that Item 1 is the primary question on this appeal. I would rephrase it, however, as asking whether the chambers judge erred in finding that a purchaser's lien was available even though no binding contract *for the purchase of property* came into existence, and even though the parties to the

Agreements expressly disclaimed an intention to create any legal or beneficial interest in land.

[31] The chambers judge did not consider it necessary to analyze these issues at length. She relied on the comment in *Whitbread*, *supra*, that the lien arises "not as a result of contract, but through equity", so that the terms of the Agreements were effectively irrelevant. She adopted the argument that:

> Specific performance is a remedy that flows from and as a result of the contract. A purchaser's lien exists independent of the contract by virtue of the principles of equity. Thus, the ability to enforce, or even to claim specific performance, does not affect the rights of a holder of a purchaser's lien.
> [At para. 130.]

As already noted, she also reasoned that:

> ... in my view the Contracts signed by the Purchasers created no interest in land and likely were unenforceable in relation to creating an interest in land to allow specific performance of the contract. Nevertheless the intention of the Contracts to be binding on the parties to the Contracts is clear and agreed to by said parties; that is, according to Lalli for 679972, the owner of the land at the material times and the Purchasers, the payment was for a townhouse to be built on the Property.
>
> In the case at bar all of the elements required for a purchaser's lien are satisfied. The Purchasers provided funds to the vendor for the purchase of land which contract was not completed through no fault of the Purchasers.
>
> The purchaser's liens arose as early as 2005, not as a result of contract but through equity. They have a secured charge against the land that is independent of the contract between the parties. Their liens vested immediately upon payment (all of which were made prior to the Judgment Creditors' claims) and are secured by the Property as a whole.
> [At paras. 133-5; emphasis added.]

[32] As I will explain below, this reasoning overlooks the essential nature of a purchaser's lien as security for monies paid under a *binding contract of purchase and sale* that gives rise in Equity to "equitable title to the land to the extent of [the purchaser's] payments." See *Capital Plaza* at para. 9; see also *London & South Western Ry. v. Gomm* (1882) 20 Ch.D. 562 at 580-1.) Lord Westbury observed in *Rose v. Watson*:

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.
>
> ... In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.
>
> Then, my Lords, if that contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the obvious question arises, Is the purchaser to be deprived of the interest in the estate which he has acquired by that *bona fide* payment? [At 678-9; emphasis added.]

Thus the purchaser's lien developed from the principle that as between the contracting parties, *equitable title transferred to the buyer* under a contract, but closing – the transfer of legal title – failed. Provided the buyer was not at fault, Equity would not countenance the 'aggravation' of his loss by depriving him of the "only means of acquiring the repayment of his money ... by following the interest which in respect of that payment of money he had acquired in the estate." (*Rose v. Watson*, at 680.)

The Terms of the Agreements

[33] This brings us to the Agreements themselves. In the operative part of the Investment Agreement, each Purchaser (referred to as the "Investor") agreed to "advance" the purchase price (referred to as the "Investment Principal") to Lallico. In return, the Agreement said, *Lallico would obtain from 679* a contract of purchase and sale in the form attached to the Investment Agreement as Schedule A, which would entitle the Investor to acquire one unit in the project. At the same time, para. 6 contained an acknowledgment by each "Investor" that he or she had been advised it was "*not possible for a buyer and seller to enter into a legally binding Agreement with regard to a townhouse unit that does not yet exist*" (my emphasis), but stated that it was common practice for such persons to enter into "Presale Contracts" that

could be "terminated" by the buyer prior to the creation of title to the townhome unit. Upon the filing of a strata plan and receipt of a disclosure statement, the Investor would have 30 days in which to "ratify" the purchase. Under para. 7, if he or she elected to "terminate" (apparently equated to a failure to "ratify" the purchase), the "Investment Principal" would be lent to Lallico on the terms contained in the form of promissory note attached as Schedule B to the Investment Agreement.

[34] Paragraph 10, referred to by counsel as a "protective" clause, then provided:

> It is agreed and understood by the Investor that nothing in this Agreement shall operate to give the Investor any vested right in LandCo. [679] or LalliCo Nothing in this Agreement shall be construed so as to create a partnership or joint venture between the parties. Nothing in this Agreement will confer on the Investor any legal or beneficial interest in the Lands prior to the date of ratification referred to in Paragraph 6. [Emphasis added.]

and an 'entire agreement' clause appeared at para. 13.

[35] The Purchase Agreements, each signed by a Purchaser and Lallico, began with the following para. 1, headed "Offer":

> The Purchaser hereby offers to purchase from the Vendor [defined as 679] the Strata Lot (as above mentioned) for the Purchase Price and upon the terms set forth herein subject to the encumbrances (the "Permitted Encumbrances") referred to in the Disclosure Statement. The Purchaser acknowledges that the Purchaser is purchasing a residential Strata Lot that is presently under construction. The purchase of the Strata Lot entitles the Purchaser to those items shown in the Disclosure in respect to the Development which has not yet been prepared but which will be delivered to the Purchaser in due course (collectively, the "Disclosure Statement"). (Please refer to the Disclosure Statement). [Emphasis added.]

Under para. 3, each Purchaser paid what was called a "Deposit" in the amount of the entire purchase price, which the Agreement said would become non-refundable after delivery of a disclosure statement (required by the *Real Estate Development Marketing Act*), the creation of title to the strata lot, and ratification of the Purchase Agreement by *both* parties (presumably the vendor, 679, and the Purchaser). None of these events took place. (The completion date inserted in para. 5 of each Agreement was the same date as the date of its execution -- obviously an error.)

[36] At para. 15, the protective clause appeared:

> This offer and the agreement which results from its acceptance creates contractual rights only and not any interest in land. [Emphasis added.]

This was again followed at para. 17 by an 'entire agreement' clause (which referred also to the Investment Agreement), and at para. 19 by a clause headed "Acceptance":

> This offer will be open for acceptance on presentation up to 6:00 P.M. on _____ and upon acceptance by the Vendor signing a copy of this offer, there will be a binding Agreement of Purchase and Sale of the Strata Lot for the Purchase Price, on the terms and subject to the conditions set out herein. [Emphasis added.]

In each case, the Agreement was signed by the Purchaser and purported to be "accepted by the Vendor" on the same date. The acceptance, however, was signed not by 679, but by Lallico.

No Binding Agreement to Purchase

[37] Mr. Donohoe on behalf of 811 argued in this court that the Investment Agreements were the 'primary' agreements between Lallico and the Purchasers – a contention that garners some support from the fact that in each case, the Purchase Agreement was an attachment to the Investment Agreement, not *vice versa*. He emphasized that, at least at the time they were signed and until the strata plan was filed and the purchases "ratified", the arrangements were "speculative", as each Purchaser acknowledged in writing. There is no such thing, he submitted, as an "investor's lien".

[38] If by this Mr. Donohoe was suggesting that the purchaser of a townhome who intends to rent it or even to sell it is in a different position *vis-à-vis* the purchaser's lien than the purchaser who intends to reside in it, I cannot agree. But where a person pays money not for property *per se* (here a strata lot) but either as a "deposit" (in the hope that stratification will be completed and an acceptable disclosure statement received) under an "agreement" he or she may or may not choose to "ratify", or as an "advance" (to be repaid by promissory note) to a

company that is not the owner of the property, it is difficult to imagine that Equity would regard the person as having acquired an equitable interest, or would regard the property as bound by the contract. As for the chambers judge's observation that a purchaser's lien arises "not as a result of contract but through equity" (see para. 135), I suggest with respect that the more complete statement was made by Farwell J., the judge at first instance in *Whitbread*, who wrote:

> The lien is created by the contract under which the money is paid as part of the purchase-money, and on the faith that the contract will be carried out, and not by the default of the vendor. The default gives rise to the necessity for enforcing the lien, but the lien arises from the contract. [At [1901] 1 Ch. 911, at 915; emphasis added.]

Farwell J.'s judgment was expressly approved by the English Court of Appeal in *Whitbread*, and was endorsed again by that court more recently in *Chattey v. Farndale Holdings Inc.* [1997] 1 EGLR 153 at 156.

[39] The observations of Deane J. of the High Court of Australia in *Hewitt v. Court* also illustrate the role of a binding contract in attracting equitable protection:

> The basis of equitable lien between the parties to a contract lies in an equitable doctrine that the circumstances are such that the subject property is bound by the contract so that a sale may be ordered not in performance of the contract but to secure the payment or repayment of money. ...
>
> The suggested requirement that equity would grant specific performance of the contract is usually propounded as being derived from the principle that an agreement for valuable consideration for the present assignment of property operates to transfer the equitable estate in the property if equity would, in all the circumstances, grant specific performance of the agreement .... In the statement of principle however, the reference to specific performance must be understood as meaning not merely specific performance in the primary sense of the enforcing of an executory contract ... but also the protection by injunction or otherwise of rights acquired under a contract ... [At 665; emphasis added.]

[40] The only case to which we were referred involving something *less than* a binding contract of sale and purchase confirms the necessity thereof. *In re Barrett Apartments Ltd.* (1985) I.R. 350 involved the payment of so-called "booking deposits" on account of a future agreement for the purchase of apartment units. As in the case at bar, the parties' arrangements contemplated that a binding agreement

of purchase would be entered into at a later date; and the parties acknowledged in writing that the vendor's receipt of the deposit did not "constitute a note or a memo of any agreement. It is further agreed that no right of action in law arises out of this receipt." (At 353.) The proposed apartment complex never came to fruition and the vendor was ordered to be wound up. The question arose as to priorities between the purchasers' claims to the return of their deposits, and the claim of a mortgagee.

[41] The receiver of the vendor argued that no lien could arise in a situation in which there was "no contract at all" or at best a contract which could not be enforced in an action for a specific performance or in any other way. (At 355.) The lower court rejected this submission on reasoning similar to that of the chambers judge in this case:

> ... this submission is not well founded. It proceeds on the assumption that, for such a lien to exist, the money must have been paid on foot of a contract; and that, where there is no such contract or, at all events, no contract capable of being enforced, no lien can arise. I think it is clear that the lien which is claimed by the depositors in the present case arises not from the existence of any contract but from the right of the prospective purchaser to recover his deposit in circumstances where it would be unjust for the prospective vendor to retain it. The law was thus stated by Vaughan Williams L.J. in [*Whitbread, supra*] at p. 838:
>
> > The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. ...
>
> In the present case, it is conceded that the company has not been for some time in a position to implement the transactions in respect of which the deposits were paid and bring them to completion in the normal way .... In these circumstances, it is clear that, if the company were not in liquidation, the depositors would have an uncontestable right in every case to recover their deposits. If the lien relied on depends upon that right, and need not be the result of any express contract, it follows that the fact that in a number of the cases there is no enforceable contract is not material.
>
> I am satisfied, accordingly, that in each of the fourteen cases where deposits have been paid by prospective purchasers in respect of apartments, the persons who paid the deposits are entitled to a lien on the site in respect of the money so paid; and that, accordingly, they are entitled to rank as secured creditors in the liquidation. [At 355-6; emphasis added.]

[42] On appeal, however, the Supreme Court of Ireland disagreed. It ruled that the persons who had paid the deposits "clearly did not get a purchaser's lien, *for they acquired no beneficial estate or interest in the property.*" (My emphasis.) Henchy J. for the majority explained:

> Where, as is the case here, no contract to purchase was entered into by the depositors, and the only payment made was what was called a booking deposit, which was accepted expressly on the basis that it would be returnable upon notification by either party and that the proposed purchase would be the subject of a written contract, the payment of the booking deposit did not give the payer any estate or interest, legal or equitable, in the property – as would have been the case if a written contract had been entered into and the booking deposit had been converted into a deposit paid on foot of the contract. There is no basis in law or equity, therefore, for treating the depositors as having, on payment of the deposit, acquired a purchaser's lien on the property.
>
> . . .
>
> The persons who paid booking deposits in this case clearly did not get a purchaser's lien, for they acquired no beneficial estate or interest in the property. But ought they to be deemed to have acquired some other kind of equitable lien for the amount of the deposit, on the basis that it would be inequitable to deny them the standing of a secured creditor? [At 357-8; emphasis added.]

[43] The case at bar, of course, does not involve merely a "booking deposit" or any other "comparatively small amount". The Purchasers here paid the entire price for the units they expected to be built. The chambers judge found that each Purchaser intended to buy a townhouse and that that was the purpose of the Agreements. (Para. 46.) However, the court must not look to the parties' *subjective* intentions, but must determine those intentions objectively by construing the plain and ordinary meaning of the words used, in the context of the whole agreement and in the "factual matrix" in which it was reached. As we have seen, the parties stated in the Agreements that they were *not* binding themselves to buy or sell townhouse units and that no interest in land was being created.

[44] On this basis alone, it seems to me that with respect, the chambers judge erred in law in finding that a "secured charge against the land" arose "independent of the contract between the parties." (Para. 135.) While it is not necessary that the contract expressly contemplate a purchaser's lien – in this sense, the lien is not the

"result of any express contract", as observed in *Whitbread* – and while the lien may arise where specific performance is not available, the remedy develops logically from the existence of a contract, binding on the conscience of the vendor, that would in Equity have resulted in the transfer of ownership of the property to the buyer. As we have seen, it arises where the vendor has received payment or part payment of the purchase price and transfer of legal title fails for reasons other than the buyer's fault. In these circumstances, Equity will not countenance a further 'aggravation' to the buyer in the form of loss of the payment and will enforce what is seen to be the common intention of the parties. (See also Mr. Justice J.C. Campbell, "Some Historical and Policy Aspects of the Law of Equitable Trusts" (2009) 83 *A.L.J.* 97 at 126.) In my view, it is clear no transfer of equitable title, or of an equitable interest, took place or was intended to take place by means of the Agreements in this case – even if one assumes Lalli had the authority to bind the vendor.

Protective Clauses

[45] Even if I were incorrect in holding that a binding contract of purchase and sale between the vendor and buyer is necessary, I also regard the "protective" clauses in the Agreements as fatal to the existence of the lien in this instance. There is no general principle to the effect that contracting parties may not contract out of private equitable remedies (subject of course to the doctrines of undue influence and unconscionability) and there are many authorities that suggest the contrary: see, e.g., *Bank of Montreal v. Fennell* (1991) 1 B.L.R. (2d) 66 (B.C.S.C.); *Manulife Bank of Canada v. Conlin* [1996] 3 S.C.R. 415 at para. 4.

[46] With respect to equitable liens in particular, the jurisprudence suggests that the remedy may be waived or excluded by the contracting parties. In *Ahone v. Holloway* (1988) 30 B.C.L.R. (2d) 368, McLachlin J.A. (as she then was) noted in connection with a *vendor's* lien, the close relation of the purchaser's lien, that:

> It arises by operation of law and is an incident to the contract between the vendor and purchaser. There is no need for the vendor to stipulate for the lien: *Gordon v. Hipwell* [[1952] 3 D.L.R. 173 (B.C.C.A.)] .... On the contrary, in order to avoid the creation of an equitable lien it must be shown that the parties intended that there should be no lien. [At 376; emphasis added.]

In *Balkau v. Sanda* (1984) 53 B.C.L.R. 292, Boyle J., also discussing a vendor's lien, stated at 299 that the onus was on the purchaser to show that the lien had been waived, abandoned or discharged, citing *High River Meat v. Routledge* (1908) 8 W.L.R. No. 3 at 259.

[47] Two Ontario cases are of more assistance. In *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* (1999) 43 O.R. (3d) 319 (C.A.), the Court rejected the argument that a subordination clause contained in the parties' agreement did not apply to a purchaser's lien "because the liens do not arise from the contract but by operation of law." In the Court's analysis, "The purchasers' claim to their deposits clearly arose under the purchase agreements and *any rights flowing therefrom are subject to the terms of those agreements, including the subrogation clause*." (At 320; my emphasis.)

[48] *Counsel Holdings* was applied in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.* 2012 ONSC 4816, in a more complicated contest between one group of purchasers who had entered "pre-sale" agreements for condominium units and made significant investments towards such units, and the receiver of the vendor. The receiver sought an order that such agreements be "vested out" on a sale of the entire property. As the Court noted, all the pre-sale agreements contained subordination clauses under which the purchasers acknowledged that their interests would be subordinate to any mortgages arranged by the vendor. In addition, the purchasers acknowledged, as did the Purchasers in the case at bar, that the agreements did not confer interests in property.

[49] The Court ruled in favour of the receiver, relying in part on the subordination clauses. Morawetz J. wrote:

> ... the purchase agreements and leases contain expressed [sic] clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Limited v. Chanel Club Ltd.* ....)

> Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:
>
> > 19. Agreement not to be Registered
> >
> > The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property ...
>
> I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees. [Emphasis added.]

(See also *395432 Alberta Ltd. v. Broadcast Hill Holdings Ltd.* 2003 ABCA 96.)

[50] None of these cases is exactly on point with the case at bar, but all support the proposition that an equitable remedy such as a purchaser's lien may be excluded or modified by agreement of the parties. As stated in *Chatty v. Farndale Holdings*, *supra*, by Morritt L.J.:

> It is not disputed that the purchasers' lien arises by operation of law from the contract unless it is modified or excluded by express agreement of the parties or by necessary implication from the contractual arrangements the parties have entered into. The lien so arising is an unqualified equitable right. [At 157.]

(See also *Snell's Equity*, §42-27; *In Re Birmingham, Deceased* [1959] 1 Ch. 523 (which concerned a vendor's lien); *In Re Brentwood Brick & Coal Company* [1876] 4 Ch.D. 562; *bcIMC Construction Fund v. Chandler*, *supra*, at para. 65; R.M. Stoneham, *The Law of Vendor and Purchaser* (1964) at §1346; and *Hewitt v. Court*, *per* Deane J. at 663, citing *Davies v. Littlejohn* (1923) 34 C.L.R. 174 (H.C.A) at 195-6, and *In Re Bond Worth* [1980] Ch. 228 at 251.) Ms. Jones cited no authority to the contrary.

[51] In these circumstances, I am driven to the conclusion that no purchaser's liens came into being because no binding agreement for the purchase of a strata lot came into being; and that even if a binding contract had existed, the Purchasers expressly agreed and intended that their arrangements created contractual rights only. I am also unable to accede to Ms. Jones' submission that the protective clauses were not engaged because a purchaser's lien constitutes a security interest *on* land and not an interest *in* land. I cannot think that the existence of the lien would

turn on a semantic distinction of this kind or that, as Ms. Jones also contended, the exclusion of an "interest" referred only to "title to" the land.

Agency

[52] In light of the foregoing, it is not necessary to resolve the remaining questions raised on the appeal. I wish, however, to return briefly to the matter of agency. The chambers judge made no express finding that Lalli or Lallico had acted as the agent of 679, but treated Lalli, Gopal Gill and their companies essentially as acting in concert. Mr. Miner submitted that the judge had erred in failing to "weigh the evidence" of the MacKenzie Fujisawa letter denying any agency relationship, or of the denials appearing in 679's pleading in the Kerns' action. (With respect, these items were "evidence" only of the position taken by 679 after the fact.) Counsel also relied on the absence of any written authorization of Lalli or Lallico to act on 679's behalf.

[53] Clearly, this was an issue that would have required a thorough examination of all the properly admitted evidence, and detailed findings of credibility. Contrary to Ms. Jones' submission, it was not enough that the Purchasers *believed* Lallico was 679's agent. And, contrary to the suggestion of counsel for the Judgment Creditors, a written document is not required to constitute an agency, nor is the giving of a particular title to the agent by the principal – though both may do so. On the other hand, the director of a company is not necessarily its agent; nor is a 50% shareholder. In the absence of express authority (by written contract, for example), the primary focus must be on the acts or conduct of the purported *principal*. Did he or she hold out the alleged agent as having the authority to bind him or her in dealings with third parties? Did he or she make a representation to a contracting party that was intended to be acted upon by that party to the effect that the agent had authority to act for him or her? Did he or she entrust the alleged agent with duties in the normal course that implied certain authority? (See generally G. Fridman, *Canadian Agency Law* (2nd ed., 2012) Ch. 2 and 3; P. Watts and F. Reynolds, eds., *Bowstead and Reynolds on Agency* (19th ed., 2001) at arts. 22, 74.)

[54] I would not purport to answer these questions in the absence of a full evidentiary record. I raise the matter only because I would not want to be taken as having affirmed the proposition that because Lalli purported to be acting "for" 679 and the Purchasers *believed* he was doing so, he must have been 679's agent. In my respectful view, the chambers judge erred in making this assumption, at least on the basis of the facts stated.

Disposition

[55] At the outset of these reasons for judgment, I inferred that the court below was of the view that a purchaser's lien was necessary to do justice in this case. I too am not without sympathy for the position in which the Purchasers found themselves as a result of their reliance on Lalli's representations. It may be that the Purchasers were persuaded not to pay the attention they should have to the terms of the Agreements they were signing, and not to seek legal advice. I am mindful, however, that on the other side of the equation there were parties who acted more prudently and took reasonable steps for their own protection. I am also mindful that "hard cases make bad law". I do not wish to make bad law by extending equitable protection beyond its fair reach; but one hopes that other avenues of legal recourse may be available to the Purchasers against anyone who should properly be held responsible for their losses.

[56] I would allow the appeal and order that the claims of the Judgment Creditors be paid, in order of the date of their registration against title to the subject property, from the proceeds in trust. Any remaining proceeds should be made available to the Purchasers *pro rata* in accordance with their agreement.

"The Honourable Madam Justice Newbury"

I AGREE

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

[57] I have had the opportunity to read a draft of the reasons for judgment of Madam Justice Newbury. I agree with her disposition of this appeal, but prefer to limit the analysis to the first ground of appeal. It engages a consideration of the so-called "protective" clauses. I repeat ground one:

> The learned chambers judge failed to rule on or erred in rejecting the primary submission of the Appellants that any claim of a purchaser's lien was excluded by the terms of the agreements made by the Respondent investors with Lallico Investments Ltd. and/or 679972 B.C. Ltd.

[58] I would not rephrase ground one. It asserts that even if the Purchasers were entitled to liens, such liens were excluded contractually. My colleague concludes, and I agree, that such liens are excluded contractually. In my view, it is not necessary to and I would not address other substantive issues in this appeal, including whether there was a binding contract for the purchase of land.

[59] I do wish to add a comment on the positions of the Kerns.

[60] The Kerns are judgment creditors of 679972 B.C. Ltd. ("679"). As noted by my colleague, the Kerns made a demand on the promissory note given to them by Lallico Investments Ltd. ("Lallico") and received a cheque from 679 in payment. The cheque was dishonoured.

[61] On this appeal, in opposition to the contention of the Purchasers that they have liens, the Kerns contend that Lallico could not bind the owner of the land, 679. They argue that Lallico and 679 did not act in concert and were not agents for each other. We queried the basis on which judgment was obtained against 679 if there was no agency between it and Lallico and were told that the judgment was on the cheque. After a request by the Court for information as to the basis on which the Kerns' judgment was obtained, submissions were received advising that the judgment was on the promissory note, not on the cheque. It is stated to be a judgment in debt.

[62] As my colleague notes, we must take the judgment as it is. Because I base my decision on the first ground of appeal, it is not necessary to consider whether Lallico and 679 acted in concert or were the agents of each other. If that were a live issue, I would have difficulty accepting that the Kerns could argue in this Court that Lallico could not bind 679 in the absence of an accurate appreciation of the basis on which the judgment was obtained in the Supreme Court. It is not a matter of going behind that judgment, but a question whether the Kerns would be advancing a legal position that would require this Court to reach a conclusion of fact and law that is inconsistent with the determination of the Supreme Court, that is, whether the position of the Kerns in this Court would be an abuse of process.

"The Honourable Mr. Justice Chiasson"

Tab 5

Counsel Holdings Canada Limited v.
The Chanel Club Limited et al.*

[Indexed as: Counsel Holdings Canada Ltd. v. Chanel Club Ltd.]

33 O.R. (3d) 285
[1997] O.J. No. 1428
Court File No. 43535/89

Ontario Court (General Division),
Adams J.,
April 10, 1997

* An appeal from the following judgment of Adams J. to the Ontario Court of Appeal (Labrosse, Charron and Feldman JJ.A.) was dismissed on March 5, 1999. See 43 O.R. (3d) 319.

Mortgages -- Priorities -- Purchaser's lien -- Purchaser of condominium unit agreeing that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

Real property -- Agreements of purchase and sale -- Agreement obliging vendor to hold deposit in trust -- Vendor entitled to use deposit funds after deposit receipt delivered to purchaser under Ontario New Home Warranty Program -- Condominium Act, R.S.O. 1990, c. C.26 -- Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Real property -- Registration -- Priorities -- Purchaser's lien -- Actual notice -- Purchaser of condominium unit agreeing

that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

In 1986, the defendant C Club began construction of an 89-unit condominium. For this project, it was the proposed declarant under the Condominium Act and a vendor of new homes under the Ontario New Home Warranties Plan Act ("ONHWPA"). The purchasers of units paid deposits under written agreements of purchase and sale that provided that the deposits were to be paid into an interest-bearing trust account. The agreements also provided that the purchaser's rights were to be subordinate to any mortgage arranged by C Club.

Under the Condominium Act, C Club was obliged to hold the deposits in a trust account to the extent that the purchasers had not received a "deposit receipt" issued under the ONHWPA by the defendant Ontario New Home Warranties Plan (the "Plan"). The ONHWPA provided that a purchaser with a deposit receipt and damages claim against a vendor was entitled to be paid by the Plan to a maximum of $20,000 and that the Plan was subrogated to the purchaser's claim. C Club entered into a vendor-builder agreement with the Plan and, in March 1987, the Plan provided C Club with 89 blank deposit receipts having received the security of a letter of credit and C Club's covenant to reimburse the Plan for any sums it might have to pay under the deposit receipts.

In December 1987, the plaintiff C Holdings replaced F Trust as the financier for the project. It agreed to provide a construction loan of $9,420,000 and a credit facility of up to $1,500,000 for the issuance of the deposit receipts. In return, it received a first registered charge on the project. Before agreeing to this loan, C Holdings had reviewed 58 purchase agreements that had already been signed and which provided that the purchaser's deposits were to be payable to C Club and F Trust. Some of these agreements were later amended to refer to

C Holdings instead of F Trust. After 1987, C Club entered into 30 additional agreements, under eight of which the deposits were payable to C Club alone, and under 22 of which the deposits were payable to C Club and C Holdings.

In 1989, the amount of the loan was increased, and a new first mortgage of $13,500,000 was registered. In November 1989, C Club defaulted under the loan and a receiver-manager was appointed. The receiver did not complete the project, and the Plan paid purchasers $1,628,141 pursuant to the deposit receipts. The Plan exercised its letter of credit but there was a shortfall of $549,231. C Holdings also suffered a shortfall on its mortgage in the amount of $4,436,979.09 as of April 1995. In an action, C Holdings claimed the proceeds of the receivership on the basis that it held the first registered mortgage; however, the Plan claimed priority on the basis that it was subrogated to the purchasers' lien claims because C Holdings had notice of these claims or on the basis that C Club was obliged to hold the deposits in trust notwithstanding the delivery of the deposit receipts and that C Holdings was equally responsible for the deposits.

Held, there should be judgment for C Holdings.

While a purchaser's lien arose in the context of all the purchase agreements, the liens were not registered and did not take priority over the first registered charge. Although the priority of a mortgage may be affected by actual notice of a prior equitable lien, the priority will not be affected where the lien, by its terms, is expressed to be subordinate or subject to the registered mortgage. This was the effect of the agreements in this case. Therefore, the only actual notice that the mortgagee had of the purchase agreements entered into before the mortgage was notice of a subordinate interest. While no issue arose with respect to the subsequent agreements, the same result would have prevailed. This was not a case of C Holdings enforcing an agreement to which it was not a party; rather, it was a question of the extent of notice of a purchaser's lien that would otherwise be assertable against the mortgage. Further, since a purchaser's lien arises by force of the purchaser's contract, the equitable liens of the purchasers

in this case under the agreements were within the meaning of the postponement clause found in the agreements.

There was no trust obligation imposed on C Club with respect to the deposits after the deposit receipts had been delivered. The agreements were drafted against the framework of the Condominium Act, which provided that deposits only had to be retained until prescribed security, i.e., the deposit receipts, were delivered. Had the parties to the agreement intended a trust arrangement different from that contemplated by the Condominium Act, they would have said so expressly. The purchasers accepted deposit receipts and acted on them. There was nothing in the material that suggested it was intended under the agreements that the purchasers were to be entitled to deposit receipts and to have C Club hold their deposits in trust. C Holdings was not a party to the purchase agreements but if it had trust obligations, they could be no higher than C Club's obligations. Accordingly, C Holdings had priority with respect to the proceeds of the receivership.

Cases referred to

Bramber Consulting Management Service Corp. v. Commerce Capital Mortgage Corp. (1981), 36 O.R. (2d) 601, 22 R.P.R. 17 (H.C.J.); Canada Trust Co. v. Queensland Management Services Ltd. (1980), 13 R.P.R. 156 (Ont. H.C.J.); Castellain v. Preston (1883), 11 Q.B.D. 380, 52 L.J.Q.B. 366, 49 L.T. 29, 31 W.R. 557 (C.A.); Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 8 O.A.C. 1, 16 D.L.R. (4th) 289, 54 C.B.R. (N.S.) 65, 4 P.P.S.A.C. 270 (C.A.); Harwood-Scully v. King-Frederick Realty Ltd., [1986] O.J. No. 1250 (H.C.J.); Molgat Holdings Ltd. v. Zephyr Development Ltd. (1979), 98 D.L.R. (3d) 104 (B.C.S.C.); Rose v. Watson (1864), 10 H.L. Cas. 672, 33 L.J. Ch. 385, 3 New Rep. 673, 10 L.T. 106, 10 Jur. N.S. 297, 12 W.R. 585, 11 E.R. 1187 (H.L.); Royal Trust Co. v. H.A. Roberts Group Ltd., [1995] 4 W.W.R. 305, 17 B.L.R. (2d) 263, 31 C.B.R. (3d) 207, 44 R.P.R. (2d) 255 (Sask. Q.B.); Whitbread & Co. v. Watt, [1902] 1 Ch. 835, 71 L.J. Ch. 424, 86 L.T. 395, 50 W.R. 442, 18 T.L.R. 465, 40 Sol. Jo. 378 (C.A.)

Statutes referred to

Condominium Act, R.S.O. 1990, c. C.26, s. 53(1), (2)
Courts of Justice Act, R.S.O. 1990, c. C.43
Land Titles Act, R.S.O. 1990, c. L.5, s. 78
Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, ss. 14(1), 23(1)(m)
Registry Act, R.S.O. 1990, c. R.20, ss. 70, 71, 72

Rules and regulations referred to

R.R.O. 1990, Reg. 121 (Condominium Act), s. 35(2)
R.R.O. 1990, Reg. 726 (Ontario New Home Warranties Plan Act), ss. 6(1), (2), 17

ACTION to determine the priority to the proceeds of a receivership.

Benjamin Zarnett and R. Bernstein, for plaintiff.
H.C.G. Underwood, for Ontario New Home Warranty Program.

ADAMS J.: -- This is a proceeding to determine who has priority to the proceeds of a receivership which arose from the insolvency of a condominium developer known as Chanel Club Limited ("Chanel") and the default under a mortgage in favour of the plaintiff, Counsel Holdings Canada Limited ("Counsel"), which secured its loans to Chanel. Counsel claims priority on the basis that it held the first registered mortgage on the lands which were realized upon in the receivership. The Ontario New Home Warranty Program ("ONHWP"), however, claims priority to a portion of the proceeds on the basis that it is subrogated to the lien claims of purchasers arising from their deposits made at the time of purchase of the proposed condominium units and in respect of which counsel had notice.

I

In 1986, Chanel commenced construction of an 89-unit

residential condominium project on College Street in the City of Toronto. The owner of the lands on which the project was to be constructed was the Toronto United Church Council (the "Church"). Chanel entered into an agreement with the Church to permit the construction of the condominium and, on registration, to obtain title to it. Accordingly, Chanel was the "proposed declarant" of the condominium.

Chanel sold units in the project and required the purchasers to pay deposits. The Condominium Act, R.S.O. 1990, c. C.26, provides that a proposed declarant is required to hold a deposit received from a purchaser in a trust account at a specified financial institution until their disposition to the person entitled to them or until the purchaser is provided with "prescribed security": see s. 53(1). Pursuant to regulations under the Condominium Act, "prescribed security" is defined to include a "deposit receipt" issued by ONHWP: see R.R.O. 1990, Reg. 121, s. 35(2). Accordingly, once a purchaser has received a deposit receipt, the proposed declarant is no longer required, under the terms of the Condominium Act, to hold a purchaser's deposit in trust to the extent the deposit is covered by that receipt.

In November 1986, Chanel registered with ONHWP and paid an enrollment fee in respect of all 89 units in the project. ONHWP is a non-profit corporation designated by the Lieutenant Governor in Council to administer the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31. Pursuant to s. 14(1) of the ONHWP Act, a person who has contracted with a vendor for the purchase of a new home (including a condominium unit) and who has a cause of action in damages against the vendor for financial loss resulting from the vendor's failure to perform the contract is entitled to be paid by ONHWP the amount of such damages subject to the limits fixed by the regulations. Sections 6(1) and (2) of R.R.O. 1990, Reg. 726 provide that the maximum amount that can be claimed by the purchaser of a condominium unit on account of damages is $20,000 as well as interest. Pursuant to s. 23(1)(m) of the ONHWP Act and Reg. 726, s. 17, ONHWP is subrogated to all rights of recovery of a person to whom it has made payment in respect of a claim made pursuant to s. 14(1)(a) of the Act.

Chanel entered into a vendor-builder agreement dated November 10, 1986 with ONHWP. Pursuant to that agreement, ONHWP agreed to provide Chanel with deposit receipts and Chanel was entitled to deliver those receipts to its purchasers in respect of deposits received from them. The deposit receipts provided to Chanel by ONHWP provided:

(a) that if the deposit paid by the purchaser to Chanel would become owing to the purchaser upon the bankruptcy of Chanel or upon Chanel's failure to perform its obligations under the purchase agreement, and if Chanel failed to pay the deposit to the purchaser, the purchaser would be entitled to payment from ONHWP in an amount equal to such deposit plus interest provided that the maximum amount payable under the deposit receipt would be $20,000 plus interest; and

(b) upon payment of any claim to the purchaser, ONHWP would be subrogated, to the extent of such payment, to all rights of recovery of the purchaser against Chanel.

ONHWP's potential exposure under the deposit receipts it issued to Chanel was $1,780,000 (i.e. 89 X $20,000) plus interest. ONHWP obtained a covenant from Chanel to reimburse it for any sums ONHWP might have to pay under the deposit receipts. As security for Chanel's obligations, ONHWP requested a letter of credit in the sum of $1,789,100 as well as personal guarantees from the principals of Chanel. In March 1987, ONHWP provided Chanel with 89 blank deposit receipts. Chanel was then at liberty to release these deposit receipts to purchasers who paid deposits in the manner contemplated by the Condominium Act. Under the Act, once a deposit receipt is issued to a purchaser, deposit moneys provided by the purchaser and covered by the deposit receipt can be removed by the vendor from the trust account. Thus, pursuant to the legislation, Chanel had access to the purchaser's deposit at that time.

The project was originally financed by Financial Trust Company ("Financial"). In December 1987, however, the plaintiff provided replacement financing in the form of an interim

construction loan and a letter of credit facility. At the time, approximately 75 per cent of the units had been pre-sold. Fifty-eight of these "initial purchase agreements" stipulated in para. 1(a) that the deposits were to be payable jointly to Chanel and Financial Trust Company and to be credited towards the purchase price on closing date.

All the initial purchase agreements provided, inter alia:

(2) The meaning of words and phrases used in this Agreement shall have the meaning described to them in the Act, unless otherwise provided for herein.

"Act" means the Condominium Act (Ontario) and any amendments and regulations thereto;

(3) The Vendor shall pay interest to the Purchaser in accordance with the Act (interest to be credited on the statement of adjustments on the Closing Date). The Deposits shall be paid into an interest bearing trust account of a Canadian chartered bank or Trust Company. Interest shall accrue to the Purchaser from and after the fifteenth (15th) day following the date upon which the Purchaser pays the second deposit required pursuant to paragraph 1(a)(ii) at the rate prescribed in the Act, unless the purchaser shall forfeit the Deposits (in which event the vendor shall be entitled to such interest). The balance of any interest earned shall be paid to the vendor.

(24) The Purchaser agrees that he will not register or cause or permit this agreement to be registered and that no reference to it or notice of it or any caution shall be registered on title. The Purchaser further agrees until Title Closing not to sell, lease, mortgage or in any way encumber the Unit or the Condominium directly or indirectly or permit any lease, notice of agreement, lien or any other interest to be registered with respect thereto. The Purchaser shall be deemed to be in default under this Agreement if he creates any encumbrance or makes any registration or causes or

permits any encumbrance or registration to be made on title prior to the Closing Date.

(26) This Agreement and the Purchaser's rights hereunder are subject and subordinate to (i) any mortgage arranged by the Vendor and any advances from time to time thereunder, (ii) any agreements entered or to be entered into by the Vendor with any public utility or any municipal or other governmental authority having jurisdiction relating to the development and/or servicing of the Building and (iii) the Creating Documents.

Counsel was not a signatory to any of the initial purchase agreements. All of them were between the purchasers and Chanel.

Chanel, the Church and Counsel executed a loan agreement dated December 1, 1987 which provided that Counsel would lend up to $9,420,000 to finance construction of the project and up to $1,500,000 to finance the acquisition of a letter of credit to be provided to ONHWP as security for the issuance of the deposit receipts and that, as security for the loan, Counsel would receive a first registered mortgage and charge on the project and its lands. Prior to entering into the loan agreement, Counsel reviewed the initial purchase agreements. On December 16, 1987, a charge/mortgage of land in the principal amount of $11,500,000 was executed by the Church as owner of the lands and registered in favour of Counsel.

After Counsel advanced its loan, some of the initial purchaser agreements were amended to provide that the reference to Financial Trust Company in para. 1(a) was to be amended to refer to Counsel. After December 1987, Chanel entered into 30 additional agreements of purchase and sale. These "subsequent agreements" contained the same provisions as set out above except that para. 1(a) provided, in the case of 22 agreements, that the deposit was to be paid jointly to Chanel and Counsel and, in the case of eight agreements, the deposit was to be paid to Chanel alone. Counsel was not signatory to any of the subsequent agreements.

The deposits paid by purchasers under the initial purchase agreements were received by Chanel and deposited in an account at Financial Trust Company. After Counsel became the lender to the project, the funds on deposit at the Financial Trust Company were transferred to Counsel. It deposited $1,141,163.08 with the National Bank of Canada to secure the issuance of the letter of credit in favour of ONHWP. The balance of the funds were paid into a trust account of Chanel designated as the "Excess Deposit Account" and were held there. Chanel received all deposits paid under the "subsequent" purchase agreements, i.e., subsequent to Counsel's involvement. Deposits up to and including $20,000 were transferred to Chanel's construction account and used to pay trade suppliers on the project. Deposits in excess of $20,000 were held in the Excess Deposit Account.

The loan agreement was amended by an amending agreement dated July 31, 1989 and was made between Chanel, Counsel and the Church. Counsel agreed to increase the construction loan. The loan amending agreement provided that a new first mortgage in favour of Counsel in the sum of $13,500,000 was to be provided and that it would constitute a first charge on the lands in question. Thus, a new mortgage of $13,500,000 was executed by the Church in Counsel's favour and registered to replace the original mortgage of $11,500,000. The registration of the new mortgage was on August 11, 1989.

In November 1989, Chanel defaulted under the terms of the loan agreement, the loan amending agreement, and the mortgage. Pursuant to an order of Farley J. dated December 15, 1989, Price Waterhouse Limited was appointed as receiver-manager of Chanel and of the lands which were subject to Counsel's mortgage. The receiver was found to have no obligation to complete the outstanding purchase agreements. Accordingly, the purchasers, under these agreements, were entitled to the return of their deposits. The portions of the deposits over $20,000, which were being held in trust in the Excess Deposit Account, were distributed to the purchasers as entitled. The portions of the deposits up to $20,000 were not returned by Chanel because of its insolvency. ONHWP paid to purchasers $1,628,141 including interest of $322,346 pursuant to the deposit receipts

issued to them under the initial purchase agreements and the subsequent purchase agreements.

On January 22, 1990, ONHWP realized on the letter of credit, placing the sum of $1,078,910 in its account. After application of the proceeds from the letter of credit, the difference between ONHWP's payment out to purchasers and the amount it received pursuant to the letter of credit was $549,231 (before crediting interest earned by ONHWP on its receipt of $1,078,910). Counsel also suffered a shortfall on its mortgage loan. After the sale of the lands and application of the net sale proceeds against the amount owing on the mortgage, the sum of $4,436,979.09 was still owing as of April 30, 1995. Pursuant to an order of this court, a surety bond has been posted by Counsel in the amount of $670,000.

II

Counsel holds the first registered mortgage/charge against the lands which were realized in the receivership. Accordingly, by reason of the provisions of the Registry Act, R.S.O. 1990, c. R.20, ss. 70, 71 and 72 and the Land Titles Act, R.S.O. 1990, c. L.5, s. 78(3), it claims first right to the proceeds of the disposition of those assets. ONHWP, however, submits that it is subrogated to the rights of the purchasers who were entitled to have their deposits refunded to them and that those rights have priority to Counsel's rights. ONHWP makes the following arguments:

(a) The purchasers held purchasers' liens against the lands mortgaged to Counsel and the liens are enforceable in priority to Counsel's mortgage, notwithstanding that the purchasers each signed purchase and sale agreements providing that their rights were subordinate and subject to a mortgage arranged by the vendor.

(b) Chanel was required to hold a purchaser's deposit in trust under the agreement of purchase and sale and was not entitled to release it, notwithstanding the delivery of prescribed security to the purchaser as permitted by the Condominium Act.

(c) ONHWP submits that Counsel, where deposits were to be paid jointly to Chanel and Counsel, is equally responsible with Chanel for the release of the funds from a trust account, notwithstanding that Counsel was not a party to those purchase agreements.

While I accept that a purchaser's lien arose in the context of all of these purchase and sale agreements, the liens were not registered and do not take priority over the first registered charge against the lands and premises of Chanel in favour of Counsel. Although the priority of a registered mortgage may be affected by actual notice of a prior equitable lien, the priority will not be affected where the lien, by its own terms, is expressed to be subordinate or subject to the registered mortgage; That is the effect of para. 26 of all of the agreements of purchase and sale concerning these condominium units. Therefore, the only actual notice that the initial purchase agreements gave to the plaintiff was notice of a subordinate interest of each purchaser to the rights of a mortgagee under a mortgage arranged by the vendor. While no issue of priority arises with respect to the subsequent purchase agreements, the same result would prevail in light of para. 26.

The issue was first considered in Harwood-Scully v. King-Frederick Realty Ltd., [1986] O.J. No. 1250 (H.C.J.) where an agreement of purchase and sale between Harwood-Scully as purchaser of a proposed condominium unit and the vendor provided (at p. 26):

> This Agreement is subordinate to and the Purchaser hereby postpones it to any Mortgage arranged by the Vendor and any advances from time to time . . .

In an action for the return of a deposit, the purchaser argued that she had priority over the first mortgagee because it had actual notice of her deposit and her agreement prior to making its mortgage advances and before it registered its interest. The court rejected all of the arguments now relied on by ONHWP in these proceedings. It was held that the mortgagee

had notice only of a subordinated interest which therefore ranked behind the mortgage. In my view, the Harwood-Scully decision is determinative of the issues raised by ONHWP in these proceedings.

This is not a case where Counsel is seeking to enforce a provision of an agreement to which it is not a party, i.e., para. 26 of the purchase agreement. Rather, this matter concerns the extent of notice Counsel had of a purchaser's lien in respect of a priority that it would otherwise be able to assert under its mortgage. Thus, Counsel is not seeking to "enforce" the purchase and sale agreements entered into between Chanel and the buyers of the condominium units. In rejecting a similar argument put forward in Royal Trust Co. v. H.A. Roberts Group Ltd. (1995), 44 R.P.R. (2d) 255 at p. 276, [1995] 4 W.W.R. 305 (Sask. Q.B.), it was stated:

> CIBC is not privy to the trust deed executed by Roberts and Royal Trust. But, in my view, CIBC is not attempting, per se, to enforce the trust deed. Rather, it is simply resisting the attempt of Royal Trust to take a prior security position to that of CIBC that is inconsistent with what Royal Trust has declared and agreed to in the trust deed regarding the priority of the respective securities.

Accordingly, notice of an interest which is stated to be subordinate is not actual notice of a prior interest which defeats a mortgagee's registered priority: see also Molgat Holdings Ltd. v. Zephyr Development Ltd. (1979), 98 D.L.R. (3d) 104 (B.C.S.C.); Bramber Consulting Management Service Corp. v. Commerce Capital Mortgage Corp. (1981), 36 O.R. (2d) 601, 22 R.P.R. 17 (H.C.J.); and Canada Trust Co. v. Queensland Management Services Ltd. (1980), 13 R.P.R. 156 (Ont. H.C.J.).

I am also of the view that Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4th) 289 (C.A.) does not dictate a contrary result. That case did not involve the question of notice. Rather, a party with a second unprotected interest in personalty was attempting to subordinate the rights of a party with a first registered interest and a statutory right in priority to that personalty

on the basis of an agreement between the first registered party and another party. In the instant case, Counsel has the first registered interest and statutory right to priority which ONHWP is attempting to defeat with an argument of actual notice. The issue then arises as to the content of that notice.

Further, the equitable liens of the purchasers in this case arise under the agreements of purchase and sale and, therefore, fall within the meaning of the postponement clause found at para. 26 of those same agreements. As Lord Westbury L.C. expressed in Rose v. Watson (1864), 10 H.L. Cas. 672 at pp. 678-79, 33 L.J. Ch. 385 (H.L.):

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract in the sense that the ownership of the estate is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.
>
> My Lords, that being so, we only have to enquire under the terms of the present contract whether the sums of money paid by the Respondent were, or were not, paid in pursuance of that contract. About that my Lords, there is no controversy whatever. They were bonafide payments made by the Respondent, in conformity with the contract which required such payments to be made in part of the purchase-money; and they were accepted by the vendor as portions of that purchase-money. In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.

In my view, there was no intent in Whitbread & Co. v. Watt, [1902] 1 Ch. 835, 71 L.J. Ch. 424 (C.A.), to disagree with the notion that a purchaser's lien arises "by force of the

contract". Accordingly, in the facts at hand, any lien is subordinated by para. 26 of the standard form purchase agreement.

ONHWP admits there was no breach of the trust imposed on the deposits by the Condominium Act. However, it now argues that a separate trust arose under the purchase agreements. In my view, this was not the intent of the purchase agreements. These purchase agreements were negotiated "in the shadow of" the Condominium Act. Indeed, the agreements make explicit reference to that legislation. This all being the case, I find the references in the purchase agreement to a deposit and to a trust account only require the maintenance of the trust account until such time as the prescribed security is delivered. The provisions of the Condominium Act permit the release of deposits from a trust on the delivery of prescribed security. Had the parties to the agreement intended a trust arrangement different from that contemplated by the provisions of the Condominium Act, they would have said so expressly.

ONHWP voluntarily entered into an agreement with Chanel whereby deposit receipts would be provided and took security from Chanel against the obligations which it might incur under the deposit receipts. ONHWP has admitted that upon delivery of a deposit receipt, a vendor is no longer required under the terms of the Condominium Act to hold the deposit moneys covered by that deposit receipt in trust. Given that the purchase agreement was drafted against the framework of the Condominium Act and specifically provides that words and phrases used in the agreement have the meaning ascribed to them in the Condominium Act, I am not prepared to hold that para. 3 of the agreement intended a deposit to remain in an interest-bearing trust account after a deposit receipt was given to a purchaser.

The purchasers in this case accepted deposit receipts and acted on them to collect payment of their deposits. The purpose of a deposit receipt is to permit a vendor to release deposit funds from trust. Nothing in the material before me supports a contractual intention that the purchasers were to be entitled to deposit receipts and to have Chanel hold their deposits in trust. Furthermore, any claim against Chanel on a trust basis

does not give priority over Counsel, by reason of para. 26 of the purchase agreements. Accordingly, whether or not (and I find not) Counsel was obligated to hold deposit funds in trust, there could be no breach of trust once deposit receipts were issued to the purchasers. Counsel, of course, was not a party to the purchase agreements. But if it had trust obligations pursuant to those agreements, they could be no higher than Chanel's.

III

Accordingly, the questions in the list of issues to be tried are answered as follows:

1. Q. Are the net receivership proceeds impressed with an express, constructive or resulting trust for any amount in respect of purchasers' claims for dwelling unit deposits?

   A. No.

2. Q. If a trust has been created with respect to the deposits, which of the following parties are constituted a trustee for which deposits:

   (a) The Chanel Club Limited?

   (b) Counsel Trust Company and its assignee Counsel Holdings Canada Limited?

   A. Only Chanel was required to hold deposits in trust until the delivery of deposit receipts, which terminated any trust.

3. Q. If any trust was created, was the trustee released from its obligations to hold those moneys in trust by the deposit receipt provisions of the Condominium Act or otherwise?

   A. Yes, under both the Act and the purchase agreements.

4. Q. If any trust was created between certain purchasers and some party or parties, are such trust claims enforceable in priority to the plaintiff's claims to the extent that the

deposits cannot be identified or traced into receivership assets?

A. No. I find those moneys "went into" the building of the condominium for the purposes of tracing. However, the tracing does not arise.

5. Q. What is the effect of cl. 26 of the agreements of purchase and sale providing for subordination of purchasers' claims to the plaintiff's mortgage advances:

(a) If a trust was created with respect to the deposits in question?

(b) If no trust was created?

A. No claims or rights of the purchasers can be advanced in priority to Counsel as a result of cl. 26 of the agreements of purchase and sale whether or not a trust was created.

6. Q. With respect to the trust issues aforesaid, is ONHWP in any different position than the purchasers to whose claims ONHWP is subrogated?

A. No.

7. Q. Did the purchasers acquire an equitable lien in respect of their dwelling unit for the amount of their deposits when they made their deposits?

A. Yes, until they received deposit receipts.

8. Q. If the purchasers did acquire equitable liens, are their equitable liens thereunder subject and subordinate to the plaintiff's mortgage claims pursuant to the provisions of cl. 26 of the agreements of purchase and sale?

A. Yes.

9. Q. If the provisions of the said cl. 26 are found to provide for the subordination of the purchasers' deposit

claims to the plaintiff's mortgage claim, but such subordination is unenforceable at the instance of the plaintiff, should the court authorize and direct the enforcement of such subordination provisions at the instance of the court-appointed receiver and manager of the Chanel Club Limited?

A. No, although this issue does not arise in light of my other conclusions.

10. Q. With respect to the aforesaid equitable lien issues, is ONHWP in any different position than the purchasers to whose claims ONHWP is subrogated?

A. No.

11. Q. Where agreements of purchase and sale provide for deposits to be payable jointly to the Chanel Club Limited and to Financial Trust Company, or to the Chanel Club Limited and to the plaintiff, are the purchasers entitled to recover the amounts paid as deposits from the plaintiff?

A. No, it was not a party.

12. Q. Where the purchasers provided deposit cheques made payable jointly to the Chanel Club Limited and Financial Trust Company, or the Chanel Club Limited and the plaintiff, are the purchasers entitled to recover the amounts paid from the plaintiff as well as from the Chanel Club Limited?

A. No. Only Chanel was a party to the purchase agreements.

13. Q. In the event either of the questions in 10 or 11 is answered affirmatively, should the net receivership proceeds payable to the plaintiff be impressed with a constructive trust to the extent of the moneys found to be due to purchasers from the plaintiff?

A. No.

14. Q. With respect to the aforesaid "jointly payable" issues,

is ONHWP in any different position than the purchasers to whose claims it is subrogated?

A. No.

15. Q. On the theory of detrimental reliance is ONHWP estopped from asserting or proving any claim in priority to the plaintiff's mortgage claims for the following reasons:

(a) ONHWP concluded an arrangement with Chanel whereby, instead of holding a first $20,000 of each dwelling unit deposited in trust, the Chanel Club Limited provided security to ONHWP in the form of a letter of credit of $1,078,910; and,

(b) Counsel Trust Company made advances under its mortgage with knowledge of the said arrangement and in reliance upon the said arrangement being satisfactory to ONHWP?

A. No. In making its subrogated claim, ONHWP stands in the shoes of the purchasers. It is only their conduct that is relevant: see Castellain v. Preston (1883), 11 Q.B.D. 380, 52 L.J.Q.B. 366 (C.A.).

16. Q. Did ONHWP fail to mitigate its damages by failing to invest the moneys realized from drawing on the letter of credit in some form of reasonable and commercial investment which would realize a greater interest rate than that actually realized?

A. No. ONHWP earned interest at 2.5 per cent below the Toronto Dominion Bank prime rate. There is no evidence that a better rate could have or should have been obtained.

17. Q. In the event that question 15 is answered affirmatively, by what amount should ONHWP's recovery, if any, be reduced on account of the failure to mitigate?

A. There was no failure to mitigate.

18. Q. In the event that ONHWP is entitled to recover some amount as a result of the answers to questions aforesaid:

(a) Are the purchasers in question entitled to interest on the claims in question to which ONHWP is subrogated and at what rate?

(b) Is ONHWP in any different position than the purchasers to whose claims it is subrogated in respect of its claims for interest?

A. No, in the sense that there is no entitlement at all. However, if there was an entitlement, I note the purchaers are entitled to interest on deposits pursuant to s. 53(2) of the Condominium Act and ONHWP is subrogated to that right. ONHWP itself paid interest on purchasers' claims at the same rate. Accordingly, ONHWP would have been entitled to claim the same rate at which it allowed interest on the proceeds of the letter of credit so long as there was an unexpended balance. That rate is lower than ONHWP would be entitled to claim pursuant to the Courts of Justice Act, R.S.O. 1990, c. C.43.

Order accordingly.

RPLT

Tab 6

2008 CarswellOnt 6914
Ontario Superior Court of Justice

Holborn Property Investments Inc. v. Romspen Investment Corp.

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

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

Wilton-Siegel J.

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

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

Subject: Property; Corporate and Commercial; Contracts; Torts

Headnote

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

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

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

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. covenanted not to register agreement on title to property — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement, and did not obtain any protection against default or increase in encumbrances

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

Real property --- Mortgages — Priorities — General principles — Notice

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

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

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

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

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

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

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

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

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

H Inc. was purchaser of property under agreement of purchase and sale with W Inc. — H Inc. was not aware that R Corp. held three mortgages over property before entering into agreement — W Inc. refinanced mortgages by way

of new first mortgage in amount of $17 million which was also secured against another property, and new second mortgage in amount of $545,000 — When H Inc. identified mortgages, it sought and received comfort letter that R Corp. would deliver partial discharge if H Inc. completed purchase of property under agreement — H Inc. tendered, but W Inc. advised that it could not provide clear title because first mortgage was in arrears and R Corp. required payment of further $3.545 million as condition of granting discharge — H Inc. applied for ruling on amount to be paid to obtain partial discharge of first mortgage and discharge of second mortgage — Amounts determined — Evidence did not support existence of agreement between W Inc. and R Corp. to "principal repayment holiday," deferring W Inc.'s obligation to pay principal on first mortgage — R Corp. was entitled to require that default on first mortgage be cured as condition of delivery of partial discharge on property — Amount required to cure default under $17 million mortgage was $3,907,995.40 or 3,607,995.40, depending on whether $300,000 ground lease payment being held in escrow was treated as received by W Inc. — H Inc. failed to demonstrate that W Inc. agreed to "draft" statement of adjustments showing net sales proceeds of $9,629,276.19 — Net proceeds of sales transaction was $10,187,835.22 or $10,487,835.22, subject to credit adjustment in respect of rental payments — Second mortgage was enforceable obligation of W Inc. — H Inc. was entitled to discharge of lien constituted by second mortgage, without payment of principal amount, on satisfaction of requirements to obtain partial discharge under first mortgage.

Table of Authorities

Cases considered by *Wilton-Siegel J.*:

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

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

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

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

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

Statutes considered:

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

s. 91 — referred to

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

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

s. 93(3) — considered

Rules considered:

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

Words and phrases considered

actual notice

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

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

Wilton-Siegel J.:

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

finance redevelopment of the Raglan Property in order to move the tenants of the Property to the Raglan Property upon completion of the sale transaction with Holborn.

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

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

17 The First Mortgage contained the following partial discharge provision:

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

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

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

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

20 This letter prompted a telephone call between Berg and Gutstadt. The result of the telephone call was a different approach embodied in a letter of August 10, 2006 from Berg to Gutstadt. In this letter, Holborn requested comfort from

Romspen that it would deliver a partial discharge if Holborn completed the purchase of the Property in accordance with the terms of the Agreement. The letter reads as follows:

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

21 Berg drafted the form of comfort letter that Holborn wished to obtain from Romspen and forwarded it by e-mail to Gutstadt. Gutstadt forwarded the letter by e-mail to Sheldon Esbin ("Esbin"), the president of Romspen who was temporarily attending to this matter in the absence of Roitman, who was responsible for the Woods/TDCI relationship at Romspen. At Esbin's request, Gutstadt also prepared and enclosed a preliminary statement of adjustments to reflect the net sales proceeds, before any adjustments apart from deposits paid to date, that Romspen could expect to receive on closing.

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

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

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

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

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

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

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

28 When Woods informed Romspen of the proposed date for completion of the Holborn purchase of the Property in March 2008, Romspen responded by letter dated March 10, 2008 stating that the terms of the First Mortgage "did not provide for partial Discharges of the secured properties". The letter went on to say "[h]owever, considerations to such

a proposal will only be considered once the Mortgage is brought into good standing". Romspen enclosed a mortgage statement showing an outstanding amount of $2,235,590.66. This amount included principal payments for the period August 15, 2007 to March 15, 2008 of $1,040,000 together with interest for the period December 5, 2007 to March 26, 2008 of $514,249.12.

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

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

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

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

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

Issues

34 The following issues require determination by the Court:

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

Priority of the Agreement Based on Actual Notice

Positions of the Parties

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

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

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

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

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

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

Analysis and Conclusions

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

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

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

42 Subsection 93(3) specifically addresses the operation of actual notice in the phrase "free from any unregistered interest in the land". This wording is sufficiently explicit to satisfy the test in *United Trust*. There is nothing in that decision that requires language substantially similar to the wording in the Alberta legislation to exclude actual notice. Moreover, both sections 52 (now section 45) and section 91 (now section 87) of the Act, which were considered by the Supreme Court

in *United Trust*, expressly contemplate the possibility of unregistered rights or interests having priority over the rights of a first-registered owner or a transferee, respectively. In contrast, subsection 93(3) expressly contemplates the opposite. On this basis, I think that a registered chargee can rely on the provisions of subsection 93(3) to defeat an unregistered agreement of purchase and sale even if the chargee has actual notice of the agreement prior to registration of the charge.

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

> While I accept that a purchaser's lien arose in the context of all of these purchase and sale agreements, the liens were not registered and do not take priority over the first registered charge against the lands and premises of Chanel in favour of Counsel. Although the priority of a registered mortgage may be affected by actual notice of a prior equitable lien, *the priority will not be affected where the lien, by its own terms, is expressed to be subordinate or subject to the registered mortgage*. That is the effect of paragraph 26 of all of the agreements of purchase and sale concerning these condominium units. Therefore, *the only actual notice that the initial purchase agreements gave to the plaintiff was notice of a subordinate interest of each purchaser to the rights of a mortgagee* under a mortgage arranged by the vendor. While no issue of priority arises with respect to the subsequent purchase agreements, the same result would prevail in light of paragraph 26.
>
> [emphasis added]

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

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

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

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

Alleged Subrogation Right of Romspen

Positions of the Parties

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

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

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

Analysis and Conclusions

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

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

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

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

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

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

57 With respect to Romspen, it cannot be unjustly enriched. Its claim is limited to the principal and interest payable on the First Mortgage and the Second Mortgage. The most that can be said is that the value of the Property has increased as

a result of a voluntary decision on the part of Holborn, in which Romspen took no part, to invest in the re-development of the Property. This does not constitute unjust enrichment.

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

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

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

61 I would add that I do not consider the decision in *Armatage* to be applicable to the present circumstances for several reasons. First, *Armatage* involved a contest between two lenders. Second, Armatage Motors relied on the title abstract after discovering the error. It therefore had a strong claim to equitable relief itself. The effect of the decision was to recognize that, where the equities are balanced, the Court should give effect to the priorities resulting from the order of registration under the Act. Third, in *Armatage* Royal Trust had a very strong claim against the solicitor who negligently advised that it had a first mortgage. Romspen does not have a similar claim in the present proceeding, apart from its claim against TDCI. It would not be appropriate, however, by denying a right of subrogation, to shift the risk associated with the value of the Raglan Property from Holborn to Romspen.

Holborn Claim Based on Reliance on the Romspen Comfort Letter

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

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

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

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

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

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

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

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

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

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

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

Alleged Duty of Care of Romspen to Holborn

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

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

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

76 I disagree with all of these statements.

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

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

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

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

81 The legal significance of the Romspen Comfort Letter and the letter of November 2, 2006 have been addressed above. The Romspen Comfort Letter constituted a representation of Romspen. It did not create a contractual relationship between Holborn and Romspen. It cannot be the basis for a duty of care. In the absence of a contractual

relationship between Holborn and Romspen, there is no basis for imposing a duty of care or a duty of good faith upon Romspen in favour of Holborn based upon the Romspen Comfort Letter.

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

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

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

85 For the same reasons, there are also significant difficulties of causation with Holborn's position. Holborn could have minimized, if not excluded its loss altogether, by closing the sale prior to any default by Woods. It chose not to do so for economic reasons. It could also have minimized its re-development costs, which were entirely discretionary, until it had acquired the Property. It chose instead to proceed with these expenditures thereby increasing the value of the Property. It also chose not to pursue contractual protections in the Agreement or, after it was alerted to the potential risks, to pursue an amendment to the Agreement. After it received comfort that a partial discharge right existed, it also did not monitor Woods' financial status. It cannot be said, therefore, that any loss that Holborn might suffer would not have been suffered but for Romspen's decision to withhold its advice to Holborn of Woods' financial difficulties and resulting defaults under the First Mortgage and/or its decision not to take enforcement action.

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

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

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

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

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

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

Amount Required to Cure the Default under the First Mortgage

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

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

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

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

Did Romspen and Woods Agree to a Principal Repayment Holiday?

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

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

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

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

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

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

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

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

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

99 In this context, the decisions of Romspen to refinance the original mortgages on the Property as well as the Raglan Mortgage, and to accede to Figueira's pleas not to enforce after Woods went into default in September 2007, are ordinary course decisions that do not evidence any agreement between these parties to act to the detriment of Holborn. There was also some force to Figueira's argument to Roitman in September 2007 that enforcement proceedings could

complicate and therefore delay the closing of the sale of the Property, which was not in the interest of either Woods or Romspen. In addition, Roitman provided reasonable explanations for the waiver of a number of the standard terms in the Commitment Letter pertaining to the construction advances under the First Mortgage.

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

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

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

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

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

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

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

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

Amount Required to Obtain a Partial Discharge

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

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

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

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

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

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

Net Sales Proceeds of the Sale of the Property

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

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

116 Holborn has failed to satisfy the onus on it of demonstrating that the statement of adjustments marked "draft" was agreed to by Woods. While Berg says it was, there is no documentary evidence to support this position. Moreover,

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

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

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

2. rental adjustments.

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

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

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

Home Depot Ground Lease Payments

121 The remaining items are to be addressed:

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

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

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

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

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

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

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

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

Development Credits

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

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

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

Legal Fees

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

129 Clause 17 of the Agreement required Holborn to take the Property on closing subject to the existing leases on the Property. Holborn has not established that it was entitled by agreement between the parties to reimbursement from Woods or to a credit in its favour on the completion of the sale of the Property. As Holborn was required to take the Property subject to the lease of this particular tenant, there is no compelling reason why Woods should have borne this expense. Holborn suggests that the fees are properly a credit under clause 10(a)(ii) of the Agreement. This provision addresses the costs of physical renovations or repairs to rental areas of the Property. It does contemplate these legal fees.

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

The Second Mortgage

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

1. is the Second Mortgage an enforceable obligation? and

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

Is the Second Mortgage an Enforceable Obligation?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

> 1. net sales proceeds of the sale transaction, being either $10,187,835.22 or $10,487,835.22 depending upon whether the $300,000 payment from Home Depot in escrow is treated as received by Woods, subject to any necessary adjustment of the credit in respect of rental payments to the date of payment; and
>
> 2. the amount necessary to cure the existing defaults under the First Mortgage, being either $3,907,995.40 or 3,607,995.40, depending upon whether or not the payment from Home Depot in escrow is treated as received by Woods, plus interest from July 24, 2008 to the date of payment.

Costs

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

Order accordingly.

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