

COURT OF APPEAL FOR ONTARIO

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30

B E T W E E N:

C & K MORTGAGE SERVICES INC.

Applicant
(Respondent in Appeal)

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

BOOK OF AUTHORITIES OF C & K MORTGAGE SERVICES INC.

November 27, 2020

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TAB 1

Ledcor Construction Limited *Appellant*

v.

**Northbridge Indemnity Insurance Company,
Royal & Sun Alliance Insurance Company
of Canada and Chartis Insurance Company
of Canada** *Respondents*

- and -

Station Lands Ltd. *Appellant*

v.

**Commonwealth Insurance Company,
GCAN Insurance Company and
American Home Assurance Company**
Respondents

**INDEXED AS: LEDCOR CONSTRUCTION LTD. v.
NORTHBRIDGE INDEMNITY INSURANCE CO.**

2016 SCC 37

File No.: 36452.

2016: March 30; 2016: September 15.

Present: McLachlin C.J. and Abella, Cromwell,
Moldaver, Karakatsanis, Wagner, Gascon, Côté and
Brown JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA**

*Insurance — Property insurance — All risks policy
— Exclusion clauses — Interpretation — Builders' risk
policy excluding from coverage cost of making good faulty
workmanship — Windows of building under construction
scratched by contractor hired to clean them and windows
needing replacement — Whether faulty workmanship ex-
clusion to coverage applicable.*

*Appeals — Courts — Standard of review — Contractual
interpretation — Standard of appellate review ap-
plicable to trial judge's interpretation of standard form
insurance contract.*

Ledcor Construction Limited *Appelante*

c.

**Société d'assurance d'indemnisation
Northbridge, Royal & Sun Alliance
du Canada, société d'assurances et
Compagnie d'assurance Chartis
du Canada** *Intimées*

- et -

Station Lands Ltd. *Appelante*

c.

**Commonwealth Insurance Company,
GCAN Insurance Company et
American Home Assurance Company**
Intimées

**RÉPERTORIÉ : LEDCOR CONSTRUCTION LTD. c.
SOCIÉTÉ D'ASSURANCE D'INDEMNISATION
NORTHBRIDGE**

2016 CSC 37

N° du greffe : 36452.

2016 : 30 mars; 2016 : 15 septembre.

Présents : La juge en chef McLachlin et les juges Abella,
Cromwell, Moldaver, Karakatsanis, Wagner, Gascon,
Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

*Assurances — Assurances de biens — Police d'assu-
rance tous risques — Clauses d'exclusion — Interpré-
tation — Police d'assurance chantier soustrayant à la
garantie les frais engagés pour remédier à une malfa-
çon — Besoin de remplacer les fenêtres d'un immeuble
en construction égratignées par l'entrepreneur qui avait
été engagé pour les nettoyer — L'exclusion relative à la
malfaçon s'applique-t-elle?*

*Appels — Tribunaux — Norme de contrôle — In-
terprétation contractuelle — Norme de contrôle qu'il
convient d'appliquer en appel à l'interprétation d'un
contrat d'assurance type retenue par le juge de première
instance.*

During construction, a building's windows were scratched by the cleaners hired to clean them. The cleaners used improper tools and methods in carrying out their work, and as a result, the windows had to be replaced. The building's owner and the general contractor in charge of the construction project claimed the cost of replacing the windows against a builders' risk insurance policy issued in their favour and covering all contractors involved in the construction. The insurers denied coverage on the basis of an exclusion contained in the policy for the "cost of making good faulty workmanship".

The trial judge held the insurers liable, finding that the exclusion clause was ambiguous and that the rule of *contra proferentem* applied against the insurers. The Court of Appeal reversed that decision. Applying the correctness standard of review to the interpretation of the policy, the court held that the trial judge had improperly applied the rule of *contra proferentem* because the exclusion clause was not ambiguous. The court devised a new test of physical or systemic connectedness to determine whether physical damage was excluded as the "cost of making good faulty workmanship" or covered as "resulting damage". Based on this test, the court concluded that the damage to the windows was physical loss excluded from coverage, because it was not accidental or fortuitous, but was directly caused by the intentional scraping and wiping motions involved in the cleaners' work.

Held: The appeals should be allowed.

Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.: The appropriate standard of review in this case is correctness. The interpretation of a standard form contract should be recognized as an exception to the Court's holding in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. The first reason given in *Sattva* for concluding that contractual interpretation is a question of mixed fact and law — the importance of the factual matrix — carries less weight in cases involving standard form contracts. Indeed, while a proper understanding of the factual matrix of a case is crucial to the interpretation of many contracts, it is less relevant for standard form contracts because the parties do not negotiate the terms. The contract is put to the receiving party as a take-it-or-leave-it proposition. Factors

Durant la construction, les fenêtres d'un immeuble ont été égratignées par les nettoyeurs engagés pour les laver. Les nettoyeurs ont utilisé les mauvais outils et méthodes pour exécuter leur travail et les fenêtres ont dû, en conséquence, être remplacées. La propriétaire de l'immeuble et l'entrepreneur général responsable du projet de construction ont présenté une réclamation pour le coût de remplacement des fenêtres en vertu d'une police d'assurance chantier émise en leur faveur ainsi qu'en faveur de tous les entrepreneurs qui participaient aux travaux. Les assureurs leur ont opposé un refus en raison d'une exclusion de la police visant les « frais engagés pour remédier à une malfaçon ».

Le juge de première instance a conclu à la responsabilité des assureurs, estimant que la clause d'exclusion était ambiguë et que la règle *contra proferentem* s'appliquait contre les assureurs. La Cour d'appel a infirmé cette décision. Appliquant la norme de la décision correcte à l'interprétation de la police, la Cour d'appel a conclu que le juge de première instance avait irrégulièrement appliqué la règle *contra proferentem* puisque la clause d'exclusion n'était pas ambiguë. La Cour d'appel a élaboré un nouveau critère de connexité matérielle ou systémique pour décider si les dommages matériels étaient exclus au titre des « frais engagés pour remédier à une malfaçon » ou couverts en tant que « dommages [. . .] découlant » de la malfaçon. À l'aune de ce critère, la Cour d'appel a conclu que les dommages causés aux fenêtres constituaient une perte matérielle exclue de la garantie parce qu'ils n'étaient ni accidentels ni fortuits, mais directement causés par les mouvements intentionnels de grattage et de frottage effectués par les nettoyeurs dans l'exécution de leur travail.

Arrêt : Les pourvois sont accueillis.

La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown : La norme de contrôle qu'il convient d'appliquer dans la présente affaire est celle de la décision correcte. L'interprétation d'un contrat type doit être reconnue comme une exception à la conclusion tirée par la Cour dans *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, que l'interprétation contractuelle est une question mixte de fait et de droit dont le contrôle en appel doit être empreint de déférence. Le premier motif donné dans *Sattva* à l'appui de la conclusion que l'interprétation d'un contrat est une question mixte de fait et de droit — l'importance du fondement factuel — a moins de force dans le cas des contrats types. En effet, bien qu'une compréhension adéquate du fondement factuel d'un dossier soit cruciale pour l'interprétation de nombreux contrats, le fondement factuel est moins pertinent dans le cas des contrats types parce que

such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract, but they are generally not inherently fact specific and will usually be the same for everyone who may be a party to a standard form contract.

Moreover, the interpretation of a standard form contract itself has precedential value and can therefore fit under the definition of a pure question of law. In general, the interpretation of a contract has no impact beyond the parties to a dispute. While precedents interpreting similar contractual language may be of some persuasive value, it is often the intentions of the parties, as reflected in the particular contractual wording at issue and informed by the surrounding circumstances of the contract, that predominate. In the case of standard form contracts, however, judicial precedent is more likely to be controlling. Establishing the proper interpretation of a standard form contract amounts to establishing the correct legal test, as the interpretation may be applied in future cases involving identical or similarly-worded provisions. The mandate of appellate courts — ensuring consistency in the law — is also advanced by permitting them to review the interpretation of standard form contracts for correctness. The result of applying the interpretation in future cases will of course depend on the facts of those cases.

In this case, while the base coverage under the relevant clause of the policy is for physical loss or damages, the exclusion clause need not necessarily encompass physical damage because perfect mutual exclusivity between exclusions and the initial grant of coverage is neither provided for under the policy nor required when interpreting the exclusion clause. Accordingly, the physical or systemic connectedness test established by the Court of Appeal was unnecessary.

While the language of the exclusion clause is ambiguous, the general principles of contractual interpretation lead to the conclusion that the exclusion clause serves to exclude from coverage only the cost of redoing the faulty work, that is, the cost of recleaning the windows. The damage to the windows and therefore the cost of their replacement is covered. Given that the general rules of contract construction resolve the ambiguity, it is not necessary to turn to the *contra proferentem* rule.

les parties ne négocient pas les modalités. Le contrat est présenté comme une proposition à prendre ou à laisser. Il y a lieu de prendre en considération des facteurs comme l'objet du contrat, la nature de la relation qu'il crée et le marché ou l'industrie où il est employé pour interpréter un contrat type, mais ces considérations ne sont généralement pas, de par leur nature même, axées sur les faits et elles sont habituellement les mêmes pour toute personne qui peut être partie à un contrat type.

De plus, l'interprétation en soi d'un contrat type a valeur de précédent et peut donc correspondre à la définition de « pure question de droit ». L'interprétation d'un contrat n'a généralement d'incidence que sur les parties au litige. Les précédents dans lesquels les tribunaux interprètent un libellé contractuel semblable peuvent avoir une certaine valeur persuasive, mais ce sont souvent les intentions des parties en cause exprimées dans le libellé particulier du contrat en litige et considérées à l'aune des circonstances entourant le contrat qui ont préséance. Toutefois, dans le cas des contrats types, le précédent judiciaire est probablement déterminant. Établir la juste interprétation d'un contrat type revient à établir le bon critère juridique, puisque cette interprétation peut être appliquée dans l'avenir à des dispositions identiques ou formulées de façon semblable. Le rôle des cours d'appel — assurer la cohérence du droit — est également servi lorsqu'on leur permet de contrôler l'interprétation d'un contrat type selon la norme de la décision correcte. Le résultat de l'application de l'interprétation dans des affaires à venir dépendra bien entendu des faits de celles-ci.

En l'espèce, même si la garantie de base prévue à la clause applicable de la police vise les pertes ou dommages matériels, la clause d'exclusion n'a pas nécessairement besoin d'englober des dommages matériels parce que l'exclusivité mutuelle parfaite entre des exclusions et la protection initiale n'est pas prévue dans la police et n'est pas non plus requise lorsqu'il s'agit d'interpréter la clause d'exclusion. En conséquence, le critère de connexité matérielle ou systémique établi par la Cour d'appel était inutile.

Bien que le texte de la clause d'exclusion soit ambigu, les principes généraux d'interprétation des contrats mènent à la conclusion que la clause d'exclusion ne vise qu'à exclure le coût de la nouvelle exécution du travail défectueux, en l'occurrence le coût du nouveau nettoyage des fenêtres. Les dommages causés aux fenêtres, et donc le coût de leur remplacement, sont couverts. Puisque les règles générales d'interprétation des contrats permettent de résoudre l'ambiguïté, il n'est pas nécessaire de recourir à la règle *contra proferentem*.

This interpretation is consistent with the reasonable expectations of the parties and reflects and promotes the purpose of builders' risk policies. The broad coverage provided in exchange for relatively high premiums provides certainty, stability and peace of mind, and ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst various contractors involved. An interpretation of the exclusion clause that precludes from coverage any and all damage resulting from a contractor's faulty workmanship merely because the damage results to that part of the project on which the contractor was working would undermine the purpose behind builders' risk policies and would deprive insureds of the coverage for which they contracted. Moreover, interpreting the exclusion clause to preclude from coverage only the cost of re-doing the faulty work aligns with commercial reality and leads to realistic and sensible results, given both the purpose underlying builders' risk policies and their spreading of risk on construction projects. Such an interpretation is also consistent with the jurisprudence.

Per Cromwell J.: There is agreement as to the disposition of the appeals. The trial judge made no legal error because he properly described and applied the Court's decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245.

However, the applicable standard of review is that of palpable and overriding error. As the Court held in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the general principles of appellate review in civil cases turn on characterizing the nature of the question being reviewed as one of fact, law or mixed fact and law. Questions of law are reviewed for correctness and questions of fact are reviewed for palpable and overriding error. Applying a legal standard to the facts is a question of mixed fact and law and is generally reviewable on appeal for palpable and overriding error. In rare cases, where the basis for a finding under review can be traced to a pure legal error, such as a wrong characterization of the legal test or the failure to consider a required element of the applicable standard, the reviewing court can extricate a purely legal question from the trial court's analysis and apply the correctness standard to it.

Cette interprétation est conforme aux attentes raisonnables des parties, en plus de traduire et servir l'objet des polices d'assurance chantier. La large garantie offerte en échange de primes relativement élevées confère certitude, stabilité et tranquillité d'esprit et évite que les projets de construction se retrouvent paralysés par des différends ou des actions en justice éventuelles sur la question de savoir qui, parmi les divers entrepreneurs participant aux travaux, est responsable du remplacement ou de la réparation découlant de la malfaçon. Une interprétation de la clause d'exclusion qui soustrait à la garantie tous les dommages découlant de la malfaçon de l'entrepreneur simplement parce que les dommages sont causés à la partie du projet sur laquelle l'entrepreneur travaillait minerait l'objet sous-jacent des polices d'assurance chantier et priverait les assurés de la garantie à laquelle ils ont souscrit. En outre, interpréter la clause d'exclusion pour soustraire à la garantie seulement le coût de la nouvelle exécution du travail défectueux correspond à la réalité commerciale et mène à un résultat réaliste et sensé, compte tenu de l'objet qui sous-tend les polices d'assurance chantier et de leur répartition du risque pour les projets de construction. Cette interprétation est aussi conforme à la jurisprudence.

Le juge Cromwell : Il y a accord quant au dispositif. Le juge de première instance n'a commis aucune erreur de droit parce qu'il a correctement décrit et appliqué l'arrêt *Progressive Homes Ltd. c. Cie canadienne d'assurances générales Lombard*, 2010 CSC 33, [2010] 2 R.C.S. 245.

La norme de contrôle applicable est toutefois celle de l'erreur manifeste et dominante. Tel que la Cour l'a décidé dans *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, les principes généraux de contrôle en appel dans les affaires civiles s'attachent à la qualification de la nature de la question faisant l'objet du contrôle en tant que question de fait, question de droit ou encore question mixte de droit et de fait. Les questions de droit sont examinées selon la norme de la décision correcte tandis que les questions de fait le sont en fonction de la norme de l'erreur manifeste et dominante. L'application d'une norme juridique à des faits constitue une question mixte de droit et de fait, qui est généralement susceptible de révision en appel selon la norme de l'erreur manifeste et dominante. Dans les rares cas où le fondement de la conclusion contrôlée est imputable à une pure erreur de droit, telle une mauvaise qualification du critère juridique ou omission d'examiner un élément essentiel de la norme applicable, la cour siégeant en révision peut dégager une pure question de droit et appliquer à cette question la norme de la décision correcte.

The Court's recent decision in *Sattva* brought appellate review in contract cases within this general framework. Applying the text of a contract to a particular fact situation involves applying the legal standard set by the contract to the facts of the situation at hand. Accordingly, a trial judge's interpretation of the contract generally gives rise to a mixed question of law and fact and should be reviewable on appeal for palpable and overriding error. Contractual interpretation is generally not a pure question of law because it involves understanding the words used in light of a number of contextual factors beyond negotiation, including the purpose of the agreement, the nature of the relationship between the parties, and the market in which the parties are operating.

There is no reason for the interpretation of certain types of contracts such as standard form contracts to be excluded from the general principles that apply to appellate review in civil cases. Whether or not a contract is a standard form does not indicate anything about the degree to which it is concerned with a general legal proposition so as to attract correctness review. To ask the question in terms of precedential value rather than the generality of the legal principle in issue simply sends the analysis back to the question of the degree of generality. The more general the principle, the more the precedential value. Moreover, the absence of a factual matrix is not of much assistance, because like all contracts, standard form contracts have many surrounding circumstances — they have a purpose, they create a relationship of a particular nature between the parties, and they frequently operate within a particular market or industry — which must be taken into account in interpreting the text of the contract.

The question the present case raises involves applying a legal standard to a set of facts and does not give rise to any extricable question of law. The legal principle is that “making good faulty workmanship” means “the cost of redoing the faulty work”. This principle does not operate at a very high level of generality. Applying that principle turns on the scope of the faulty work and the nature of redoing it, and its application in other cases will ultimately be decided on a case-by-case basis in light of the particular circumstances of the particular case.

La Cour a inscrit dans son récent arrêt *Sattva* le contrôle en appel dans les affaires contractuelles à l'intérieur de ce cadre général. L'application du texte d'un contrat à une situation factuelle particulière suppose l'application de la norme juridique établie par le contrat aux faits de la situation en cause. Par conséquent, l'interprétation donnée par un juge de première instance au contrat soulève généralement une question mixte de droit et de fait qui devrait être contrôlée en appel selon la norme de l'erreur manifeste et dominante. L'interprétation contractuelle n'est généralement pas une pure question de droit parce qu'elle implique de comprendre les mots utilisés eu égard à plusieurs facteurs contextuels autres que la négociation, dont l'objet de l'entente, la nature de la relation entre les parties et le marché dans lequel les parties exercent leurs activités.

Il n'y a aucune raison de penser que les principes généraux applicables au contrôle en appel dans les affaires civiles ne devraient pas régir l'interprétation de certaines catégories de contrats tels que les contrats types. Le point de savoir si un contrat est ou non un contrat type ne permet de tirer aucune conclusion sur la mesure dans laquelle il concerne une proposition juridique générale et appelle par le fait même un contrôle selon la norme de la décision correcte. Poser la question sous l'angle de la valeur de précédent plutôt que du caractère général du principe juridique en cause fait uniquement porter l'analyse sur la question du degré de généralité. Plus le principe est général, plus sa valeur comme précédent est grande. De plus, l'absence de fondement factuel n'est pas d'un grand secours car, à l'instar de tous les autres contrats, les contrats types s'inscrivent dans un contexte beaucoup plus large : ils ont un objet, créent une relation particulière entre les parties et sont fréquemment utilisés dans une industrie ou un marché donné. Il faut tenir compte de ce contexte pour interpréter le texte du contrat.

La question soulevée en l'espèce suppose l'application d'une norme juridique à un ensemble de faits et elle ne pose aucune question de droit isolable. Selon le principe juridique, l'expression « remédier à une malfaçon » s'entend « du coût de la nouvelle exécution du travail défectueux ». Ce principe n'atteint pas un très haut niveau de généralité. L'application de ce principe repose sur l'étendue de la malfaçon et la nature de sa nouvelle exécution et les tribunaux décideront de son application en dernière analyse au cas par cas à la lumière des circonstances propres à chaque affaire.

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By Wagner J.

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Jurisprudence

Citée par le juge Wagner

Distinction d'avec l'arrêt : *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633; **arrêts mentionnés :** *Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306; *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Vallieres c. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28; *Portage LaPrairie Mutual Insurance Co. c. Sabeau*, 2015 NSCA 53, 386 D.L.R. (4th) 449; *Precision Plating Ltd. c. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281; *Stewart Estate c. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1; *MacDonald c. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663; *Monk c. Farmers' Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710; *Daverne c. John Switzer Fuels Ltd.*, 2015 ONCA 919, 128 O.R. (3d) 188; *True Construction Ltd. c. Kamloops (City)*, 2016 BCCA 173; *Sankar c. Bell Mobility Inc.*, 2016 ONCA 242; *Kassburg c. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171; *Anderson c. Bell Mobility Inc.*, 2015 NWTCA 3, 593 A.R. 79; *Van Camp c. Chrome Horse Motorcycle Inc.*, 2015 ABCA 83, 599 A.R. 201; *Industrial Alliance Insurance and Financial Services Inc. c. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575; *Ontario Society for the Prevention of Cruelty to Animals c. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581; *Acciona Infrastructure Canada Inc. c. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223; *GCAN Insurance Co. c. Univar Canada Ltd.*, 2016 QCCA 500; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Association des parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général)*, 2015 NWTCA 2, 593 A.R. 180; *Tenneco Canada Inc. c. British Columbia Hydro and Power Authority*, 1999 BCCA 415, 126 B.C.A.C. 9; *Co-operators Compagnie d'assurance-vie c. Gibbens*, 2009 CSC 59, [2009] 3 R.C.S. 605; *Progressive Homes Ltd. c. Cie canadienne d'assurances générales Lombard*, 2010 CSC 33, [2010] 2 R.C.S. 245; *Non-Marine Underwriters, Lloyd's of London c. Scalera*, 2000 CSC 24, [2000] 1 R.C.S. 551; *Exportations Consolidated Bathurst Ltée c. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 R.C.S. 888; *Commonwealth Construction Co. c. Imperial Oil Ltd.*, [1978] 1 R.C.S. 317; *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *Privest Properties Ltd. c. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2d) 88; *Sayers & Associates Ltd. c. Insurance Corp. of Ireland Ltd.* (1981),

v. Royal Insurance, [1981] O.J. No. 215 (QL); *Bird Construction Co. v. United States Fire Insurance Co.* (1985), 24 D.L.R. (4th) 104; *Greene v. Canadian General Insurance Co.* (1995), 133 Nfld. & P.E.I.R. 151; *British Columbia v. Royal Insurance Co. of Canada* (1991), 7 B.C.A.C. 172; *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada* (2003), 50 C.C.L.I. (3d) 107; *Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada* (1982), 36 A.R. 553; *Foundation Co. of Canada v. Aetna Casualty Co. of Canada*, [1976] I.L.R. ¶ 1-757; *Commercial union cie d'assurance du Canada v. Pentagon Construction Canada Inc.*, [1989] R.J.Q. 1399.

By Cromwell J.

Applied: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Vallieres v. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28; *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281; *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663; *Monk v. Farmers' Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173; *Sankar v. Bell Mobility Inc.*, 2016 ONCA 242; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575; *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581; *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223; *GCAN Insurance Co. v. Univar Canada Ltd.*, 2016 QCCA 500; *Greene v. Canadian General Insurance Co.* (1995), 133 Nfld. & P.E.I.R. 151; *Bird Construction Co. v. United States Fire Insurance Co.* (1985), 24 D.L.R. (4th) 104; *Ontario Hydro v. Royal Insurance*, [1981] O.J. No. 215 (QL); *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245.

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Citée par le juge Cromwell

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APPEALS from a judgment of the Alberta Court of Appeal (Côté, Watson and Slatter J.J.A.), 2015 ABCA 121, 599 A.R. 363, 42 B.L.R. (5th) 190, 386 D.L.R. (4th) 482, 16 Alta. L.R. (6th) 397, 47 C.C.L.I. (5th) 218, [2015] 8 W.W.R. 466, [2015] A.J. No. 338 (QL), 2015 CarswellAlta 511 (WL Can.), setting aside a decision of Clackson J., 2013 ABQB 585, [2013] I.L.R. ¶ I-5495, [2013] A.J. No. 1088 (QL), 2013 CarswellAlta 1943 (WL Can.). Appeals allowed.

POURVOIS contre un arrêt de la Cour d’appel de l’Alberta (les juges Côté, Watson et Slatter), 2015 ABCA 121, 599 A.R. 363, 42 B.L.R. (5th) 190, 386 D.L.R. (4th) 482, 16 Alta. L.R. (6th) 397, 47 C.C.L.I. (5th) 218, [2015] 8 W.W.R. 466, [2015] A.J. No. 338 (QL), 2015 CarswellAlta 511 (WL Can.), qui a infirmé une décision du juge Clackson, 2013 ABQB 585, [2013] I.L.R. ¶ I-5495, [2013] A.J. No. 1088 (QL), 2013 CarswellAlta 1943 (WL Can.). Pourvois accueillis.

Eugene Meehan, Q.C., and Stacey Boothman, for the appellant Ledcor Construction Limited.

Dennis L. Picco, Q.C., and Marie-France Major, for the appellant Station Lands Ltd.

Gregory J. Tucker, Q.C., and Scott H. Stephens, for the respondents.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. was delivered by

WAGNER J. —

I. Introduction

[1] The outcome of these appeals hinges on the interpretation of an exclusion clause in a common form of all-risk property insurance, variably referred to as “builders’ risk”, “contractors’ risk”, “all risks”, “multi-risk” or “course of construction” insurance.¹ This type of insurance covers physical damage on a construction site. It is usually issued to the owner of the property under construction and the general contractor, providing coverage for them as well as for all contractors and subcontractors working on the project. The exclusion clause at the heart of these appeals is a standard form clause that denies coverage for the “cost of making good faulty workmanship” but, as an exception to that exclusion, nonetheless covers “physical damage” that “results” from the faulty workmanship.

[2] In the present case, a contractor was hired to clean the windows of a building under construction. In the course of the cleaning, the contractor scratched the building’s windows, which ultimately

¹ Although builders’ risk policies can provide coverage on either an all-risk or named-peril basis, only the former type of policy is at issue in these appeals. It is also the more common type of policy. Therefore, when I refer to builders’ risk policies in these reasons, I specifically mean builders’ risk policies that provide coverage on an all-risk basis.

Eugene Meehan, c.r., et Stacey Boothman, pour l’appelante Ledcor Construction Limited.

Dennis L. Picco, c.r., et Marie-France Major, pour l’appelante Station Lands Ltd.

Gregory J. Tucker, c.r., et Scott H. Stephens, pour les intimées.

Version française du jugement de la juge en chef McLachlin et des juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown rendu par

LE JUGE WAGNER —

I. Introduction

[1] L’issue de ces pourvois repose sur l’interprétation d’une clause d’exclusion dans une forme courante d’assurance tous risques de biens, l’« assurance chantier », aussi appelée notamment « assurance des risques des entrepreneurs », « assurance tous risques », « assurance multirisque » ou encore « assurance des ouvrages en construction »¹. Ce type d’assurance, qui couvre les dommages matériels sur un chantier, est habituellement offert au propriétaire de l’ouvrage en construction et à l’entrepreneur général. Cette assurance leur confère une protection, ainsi qu’à tous les entrepreneurs et sous-traitants qui travaillent sur le projet. La clause d’exclusion au cœur des pourvois est une clause type qui soustrait à la garantie les [TRADUCTION] « frais engagés pour remédier à une malfaçon », mais prévoit une exception pour les « dommages matériels » « en découlant ».

[2] Dans le cas qui nous occupe, un entrepreneur a été engagé pour nettoyer les fenêtres d’un immeuble en construction. Lors du nettoyage, il a égratigné les fenêtres de l’immeuble, qui ont dû être remplacées

¹ Même si les polices d’assurance chantier peuvent offrir une protection soit sur une base tous risques, soit contre un risque désigné, seul le premier type de police est en cause dans les présents pourvois. Il s’agit également du type de police le plus répandu. Ainsi, quand je parle des polices d’assurance chantier dans les présents motifs, j’entends par là les polices d’assurance chantier qui offrent une protection sur une base tous risques.

needed to be replaced. The windows' replacement cost was claimed by the building's owner and the general contractor in charge of the project under a builders' risk policy issued in favour of the owner and all contractors involved in the construction, but the insurers denied coverage on the basis of the "cost of making good faulty workmanship" exclusion. The issue before the courts was thus to determine, where windows of a construction project are damaged from post-installation cleaning by a contractor responsible for only their cleaning, if the cost of the windows' replacement was excluded from coverage under the faulty workmanship exclusion.

[3] After determining that the work performed by the contractor amounted to faulty workmanship, the trial judge applied the *contra proferentem* rule against the insurers and concluded that the faulty workmanship exclusion did not exclude from coverage the damage that the contractor had caused to the building's windows. Applying a correctness standard of review to the interpretation of the insurance policy, the Court of Appeal of Alberta overturned the trial judge's decision and declared that the damage to the building's windows was excluded from coverage, as the damage was physically or systematically connected to the very work the contractor had performed.

[4] In my opinion, the appropriate standard of review in this case is correctness. Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[5] Regarding the appropriate interpretation of the faulty workmanship exclusion in all builders' risk policies, I am of the view that the exclusion clause serves to exclude from coverage only the

par la suite. La propriétaire de l'immeuble et l'entrepreneur général responsable du projet ont réclamé à leurs assureurs le coût de remplacement des fenêtres en vertu d'une police d'assurance chantier émise en leur faveur ainsi qu'en faveur de tous les entrepreneurs qui participaient aux travaux, mais les assureurs leur ont opposé un refus en raison de l'exclusion visant les « frais engagés pour remédier à une malfaçon ». Les cours saisies de l'affaire étaient donc appelées à décider si, dans le cas où les fenêtres d'un projet de construction sont endommagées après leur installation par l'entrepreneur chargé seulement de leur nettoyage, le coût de remplacement des fenêtres est exclu de la garantie d'assurance au titre de l'exclusion relative à la malfaçon.

[3] Après avoir conclu que le travail effectué par l'entrepreneur constituait une malfaçon, le juge de première instance a appliqué la règle *contra proferentem* contre les assureurs et a conclu que l'exclusion relative à la malfaçon ne visait pas les dommages que l'entrepreneur avait causés aux fenêtres de l'immeuble. Après avoir appliqué la norme de la décision correcte à l'interprétation de la police d'assurance, la Cour d'appel de l'Alberta a infirmé la décision du juge de première instance et a déclaré que les dommages causés aux fenêtres de l'immeuble n'étaient pas couverts, car ils étaient connexes, sur le plan matériel ou systémique, au travail même de l'entrepreneur.

[4] Selon moi, la norme de contrôle qu'il convient d'appliquer dans la présente affaire est celle de la décision correcte. Lorsque, comme en l'espèce, l'appel porte sur l'interprétation d'un contrat type, que l'interprétation en litige a valeur de précédent et que l'exercice d'interprétation ne repose sur aucun fondement factuel significatif qui est propre aux parties concernées, il est plus juste de dire que cette interprétation est une question de droit assujettie à un contrôle selon la norme de la décision correcte.

[5] En ce qui concerne la juste interprétation de la clause d'exclusion relative à la malfaçon dans les polices d'assurance chantier, j'estime que cette clause ne vise à exclure que le coût de la nouvelle

cost of redoing the faulty work. This interpretation is dictated by the general rules of contractual interpretation. It best represents the parties' reasonable expectations, as informed by the purpose of builders' risk policies, aligns with commercial reality, and is consistent with the jurisprudence on the matter. In this case, the cost of redoing the faulty work is that of recleaning the windows. Therefore, I would allow the appeals and hold that the windows' replacement cost is covered under the insurance policy.

II. Facts

[6] Station Lands Ltd. ("Station Lands") is the owner of the recently built EPCOR Tower ("Tower"), an office building in Edmonton. Ledcor Construction Limited ("Ledcor") was the general contractor for the Tower's construction.

[7] During construction, the Tower's installed windows were dirtied with paint specks, dirt and concrete splatter. To clean these windows prior to the completion of construction, Station Lands hired Bristol Cleaning ("Bristol"). The service contract between Station Lands and Bristol stipulated that Station Lands would provide all-risk property insurance for the project, which Station Lands did in the form of a builders' risk policy (the "Policy"). The scope of Bristol's work under the service contract was to "[p]rovide all necessary equipment, manpower, [and] materials required to complete a construction clean" of the Tower's exterior windows.

[8] Unfortunately, Bristol used improper tools and methods in carrying out its cleaning work, scratching the Tower's windows, which consequently had to be replaced. Station Lands estimated the replacement cost of the windows to be \$2.5 million. Both Station Lands and Ledcor claimed this replacement cost against the Policy through their insurers at the time, the respondents Commonwealth Insurance Company, GCAN Insurance Company, and American Home Assurance Company (together,

exécution du travail défectueux. Ce sont les règles générales d'interprétation des contrats qui dictent cette interprétation, laquelle reflète le mieux les attentes raisonnables des parties fondées sur l'objectif des polices d'assurance chantier, correspond à la réalité commerciale et est conforme à la jurisprudence sur ce point. En l'espèce, le coût de la nouvelle exécution du travail déficient est celui d'un nouveau nettoyage des fenêtres. En conséquence, je suis d'avis d'accueillir les pourvois et de décider que le coût de remplacement des fenêtres est couvert par la police d'assurance.

II. Faits

[6] Station Lands Ltd. (« Station Lands ») est la propriétaire de l'EPCOR Tower (« Tour »), construite récemment, un immeuble à bureaux d'Edmonton. Ledcor Construction Limited (« Ledcor ») était l'entrepreneur général chargé de construire la Tour.

[7] Durant la construction, les fenêtres de la Tour ont été salies par des petites taches de peinture et des éclaboussures de terre et de béton. Pour nettoyer les fenêtres avant la fin des travaux, Station Lands a embauché Bristol Cleaning (« Bristol »). Il était stipulé dans le contrat de service conclu entre Station Lands et Bristol que Station Lands fournirait une assurance de biens tous risques pour le projet, ce qu'elle a fait au moyen d'une police d'assurance chantier (la « police »). Aux termes du contrat de service, Bristol devait [TRADUCTION] « [f]ournir tout l'équipement, la main d'œuvre [et] les produits nécessaires pour effectuer, lors de la construction, un nettoyage » du côté extérieur des fenêtres de la Tour.

[8] Malheureusement, Bristol a utilisé les mauvais outils et méthodes pour effectuer le travail de nettoyage et a égratigné les fenêtres de la Tour, lesquelles ont dû, en conséquence, être remplacées. Station Lands a estimé le coût de leur remplacement à 2,5 millions de dollars. Station Lands et Ledcor ont toutes deux présenté, sur la base de la police, une réclamation pour le coût de remplacement à leurs assureurs de l'époque, les intimées la Commonwealth Insurance Company, GCAN Insurance

the “Insurers”).² The Insurers denied the claim on the basis of clause 4(A)(b) of the Policy (the “Exclusion Clause”), which is an exclusion for faulty workmanship.

[9] The relevant coverage provisions of the Policy provide that all risks of direct physical loss or damage to the property undergoing construction are insured, subject to certain outlined exclusions:

1. Property Insured

- (a) Property undergoing site preparation, demolition, construction, reconstruction, fabrication, installation, erection, repair or testing (hereinafter called the “Construction Operations”) while at the risk of the insured and while at the location of the insured project(s), provided the value thereof is included in the declared estimated value of construction operations;

2. Perils Insured and Territorial Limits

This policy section insures against “All Risks” of direct physical loss or damage except as hereinafter provided.

[10] The Exclusion Clause excludes from coverage the “cost of making good faulty workmanship”, but provides an exception for “resulting damage”:

4(A) Exclusions

This policy section does not insure:

- (a) Any loss of use or occupancy or consequential loss of any nature howsoever caused including

² Between the date of the Policy and the date of judgment at trial, these respondents became the remaining respondents Northbridge Indemnity Insurance Company, Royal & Sun Alliance Insurance Company of Canada, and Chartis Insurance Company of Canada, respectively.

Company et American Home Assurance Company (collectivement appelées les « assureurs »)². Les assureurs ont rejeté cette réclamation en invoquant la clause 4(A)(b) de la police (la « clause d’exclusion »), qui prévoit une exclusion en cas de malfaçon.

[9] Les dispositions pertinentes de la police quant à la garantie prévoient que tous les risques de perte ou de dommages matériels directs touchant l’ouvrage en construction sont assurés, sous réserve de certaines exclusions énumérées :

[TRADUCTION]

1. Biens assurés

- a) Les biens faisant l’objet d’une préparation de chantier, démolition, construction, reconstruction, fabrication, installation, érection, réparation ou d’un essai (ci-après appelés les « travaux de construction ») pendant que l’assuré en a la charge et qu’ils se trouvent sur les lieux du ou des projets assurés, pourvu que leur valeur ne dépasse pas les estimations déclarées des travaux de construction;

2. Risques couverts et limites territoriales

Sous réserve des exceptions stipulées ci-après, la présente police couvre « tous les risques » de perte ou de dommages matériels directs.

[10] La clause d’exclusion vise notamment les [TRADUCTION] « frais engagés pour remédier à une malfaçon », mais prévoit une exception pour les « dommages en découlant » :

[TRADUCTION]

4(A) Exclusions

La présente police ne couvre pas :

- a) La perte d’usage ou d’occupation ou perte indirecte de quelque nature que ce soit, y compris les

² Entre la date de signature de la police et la date du jugement de première instance, les intimées en question étaient devenues les autres intimées à la présente affaire, soit, respectivement, la Société d’assurance d’indemnisation Northbridge, Royal & Sun Alliance du Canada, société d’assurances, et la Compagnie d’assurance Chartis du Canada.

penalties for non-completion of or delay in completion of contract or non-compliance with contract conditions;

- (b) The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage. [Emphasis added.]

[11] Station Lands and Ledcor (together, the “Insureds”) submitted their statement of claim before the Court of Queen’s Bench of Alberta, seeking enforcement of the Policy and coverage for the replacement cost of the damaged windows.

III. Decisions Below

A. *Court of Queen’s Bench of Alberta, 2013 ABQB 585, [2013] I.L.R. ¶ 1-5495*

[12] The trial judge concluded that the cleaning work Bristol had carried out constituted “workmanship” and that it had been faulty. He declared, however, that the Exclusion Clause did not exclude from coverage the damage that Bristol’s faulty workmanship had caused to the Tower’s windows. In coming to this determination, he found the Exclusion Clause ambiguous and the interpretations of “making good” advanced by the Insureds and Insurers equally plausible. He therefore applied the rule of *contra proferentem* against the Insurers. The Insureds had argued that the “cost of making good” encompassed only the cost of redoing the cleaning work, whereas the Insurers had argued that it encompassed both the cost of redoing the cleaning work and the damage to the windows, as they were the very thing on which Bristol had performed the faulty workmanship.

B. *Court of Appeal of Alberta, 2015 ABCA 121, 599 A.R. 363*

[13] On appeal, the Court of Appeal reversed the trial judge’s decision and declared that the damage to the Tower’s windows was excluded from coverage. Applying a correctness standard of review to the

pénalités pour non-exécution du contrat, retard dans l’exécution du contrat ou non-respect des conditions du contrat;

- b) Les frais engagés pour remédier à une malfaçon, des matériaux de construction défectueux ou une conception défailante, à moins qu’il n’en découle des dommages matériels non autrement exclus par la présente police, auquel cas la présente police couvre ces dommages en découlant. [Je souligne.]

[11] Station Lands et Ledcor (collectivement appelées les « assurées ») ont présenté à la Cour du Banc de la Reine de l’Alberta une déclaration dans laquelle elles sollicitaient l’application de la police et la reconnaissance de la garantie pour le coût de remplacement des fenêtres endommagées.

III. Décisions des juridictions inférieures

A. *Cour du Banc de la Reine de l’Alberta, 2013 ABQB 585, [2013] I.L.R. ¶ 1-5495*

[12] Le juge de première instance a conclu que le nettoyage effectué par Bristol constituait le « travail » et qu’il avait été mal exécuté. Il a toutefois déclaré que la clause d’exclusion ne soustrayait pas à la garantie d’assurance les dommages causés aux fenêtres de la Tour par la malfaçon de Bristol. Pour parvenir à cette conclusion, il a estimé que la clause d’exclusion était ambiguë et que les interprétations des mots « pour remédier » avancées par les assurées et les assureurs étaient aussi plausibles l’une que l’autre. En conséquence, il a appliqué la règle *contra proferentem* contre les assureurs. Les assurées ont fait valoir que les « frais engagés pour remédier » à la malfaçon ne visaient que le coût d’un nouveau nettoyage, alors que les assureurs ont soutenu que cette expression visait non seulement le coût de ce nouveau nettoyage, mais aussi les dommages causés aux fenêtres, puisque c’était justement sur celles-ci que Bristol avait exécuté le travail déficient.

B. *Cour d’appel de l’Alberta, 2015 ABCA 121, 599 A.R. 363*

[13] La Cour d’appel a infirmé la décision du juge de première instance et déclaré que les dommages causés aux fenêtres de la Tour n’étaient pas couverts par la police. Appliquant la norme de la décision

interpretation of the Policy, the court held the trial judge had improperly applied the rule of *contra proferentem* because the Exclusion Clause was not ambiguous.

[14] The Court of Appeal proceeded from the premise that because the base coverage under the Policy was for “physical loss or damage”, as provided by clause 2, the Exclusion Clause had to exclude physical damage of some kind, or else it would be redundant. For the court, then, the key was to determine the dividing line between the physical damage that was excluded as the “cost of making good faulty workmanship” and the physical damage that was covered as “resulting damage”. To establish this dividing line, the court devised a new test of physical or systemic connectedness, based on three primary considerations, outlined at para. 50 of its reasons: (1) the “extent or degree to which the damage was to a portion of the project actually being worked on at the time, or was collateral damage to other areas”; (2) the “nature of the work being done, how the damage related to the way that work is normally done, and the extent to which the damage is a natural or foreseeable consequence of the work”; and (3) “[w]hether the damage was within the purview of normal risks of poor workmanship, or whether it was unexpected and fortuitous.”

[15] In applying this newly formulated test, the Court of Appeal concluded that the damage to the windows was physical loss excluded as the “cost of making good faulty workmanship”, because it was not accidental or fortuitous but was directly caused by the scraping and wiping motions involved in Bristol’s cleaning work. According to the court, Bristol intentionally applied these motions to the windows, a core part of the work to be done, and the damage was not only foreseeable but highly likely.

correcte à l’interprétation de la police, la Cour d’appel a conclu que le juge de première instance avait irrégulièrement appliqué la règle *contra proferentem* puisque la clause d’exclusion n’était pas ambiguë.

[14] La Cour d’appel est partie de la prémisse suivante : comme la garantie de base de la police visait, aux termes de la clause 2, les [TRADUCTION] « perte ou [. . .] dommages matériels », la clause d’exclusion devait exclure une forme de dommages matériels, à défaut de quoi elle serait redondante. La Cour d’appel a donc jugé qu’il fallait tracer la ligne de démarcation entre, d’une part, les dommages matériels exclus au titre des « frais engagés pour remédier à une malfaçon » et, d’autre part, les dommages matériels qui sont couverts en tant que « dommages [. . .] découlant » de cette malfaçon. Pour ce faire, la Cour d’appel a élaboré un nouveau critère de connexité matérielle ou systémique. Ce critère comportait trois volets principaux, décrits au par. 50 des motifs de la cour : (1) la [TRADUCTION] « mesure dans laquelle les dommages ont touché une section du projet qui était alors en cours d’exécution ou touché indirectement d’autres zones »; (2) la « nature du travail effectué, le lien entre les dommages causés et l’exécution normale du travail et la mesure dans laquelle les dommages constituaient une conséquence naturelle ou prévisible du travail »; (3) « le point de savoir si les dommages faisaient partie des risques normaux liés à un travail de piètre qualité ou s’ils étaient imprévus et fortuits. »

[15] Après application de ce nouveau critère, la Cour d’appel a conclu que les dommages causés aux fenêtres constituaient une perte matérielle exclue au titre des [TRADUCTION] « frais engagés pour remédier à une malfaçon » parce qu’ils n’étaient ni accidentels ni fortuits, mais directement causés par les mouvements de grattage et de frottement effectués par Bristol lors de son nettoyage. Selon la Cour d’appel, Bristol a intentionnellement soumis les fenêtres à ce traitement, qui constituait l’essentiel du travail à accomplir, et les dommages étaient non seulement prévisibles, mais hautement probables.

IV. Issues on Appeal

[16] The Exclusion Clause in the standard form builders' risk insurance policy at issue in these appeals raises two questions that this Court must answer.

[17] First, what standard of appellate review applies to a trial judge's interpretation of a standard form insurance contract?

[18] Second, what is the proper interpretation to be given to the faulty workmanship exclusion clause and the "resulting damage" exception to that exclusion contained in builders' risk insurance policies?

V. Analysis

A. *The Standard of Review Is Correctness*

[19] In my view, the trial judge's interpretation of the Policy should be reviewed for correctness.

[20] These appeals present an opportunity to clarify how *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, applies to the interpretation of standard form contracts, sometimes called contracts of adhesion.

[21] In *Sattva*, Rothstein J. held that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50). As a result, the palpable and overriding error standard of review applies to a trial court's interpretation of a contract: *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 21-24. However, Rothstein J. acknowledged that the correctness standard of review still applies to the "rare" extricable questions of law that arise in the interpretation process, such as "the application of an incorrect principle, the failure to consider a required element of a legal test,

IV. Questions en litige

[16] La clause d'exclusion figurant dans la formule type d'assurance chantier en cause dans les pourvois soulève deux questions auxquelles notre Cour doit répondre.

[17] Premièrement, quelle norme de contrôle s'applique en appel à l'interprétation d'un contrat d'assurance type retenue par le juge de première instance?

[18] Deuxièmement, quelle est l'interprétation que doit recevoir la clause d'exclusion relative à la malfaçon et l'exception visant les « dommages en découlant » contenues dans les polices d'assurance chantier?

V. Analyse

A. *La norme de contrôle est celle de la décision correcte*

[19] À mon avis, il faut contrôler l'interprétation de la police retenue par le juge de première instance selon la norme de la décision correcte.

[20] Les présents pourvois offrent une occasion de clarifier l'application de *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, à l'interprétation des contrats types, parfois appelés contrats d'adhésion.

[21] Dans l'arrêt *Sattva*, le juge Rothstein conclut que « [l']interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel » (par. 50). En conséquence, la norme de l'erreur manifeste et dominante s'applique à l'interprétation donnée par le tribunal de première instance à un contrat (*Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306, par. 21-24). Le juge Rothstein a cependant reconnu que la norme de la décision correcte s'applique toujours aux « rares » questions de droit qui peuvent se dégager au cours de l'exercice d'interprétation, par exemple lorsque le décideur a « appliqu[é] le

or the failure to consider a relevant factor”: *Sattva*, at paras. 53 and 55, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21. This is consistent with the jurisprudence on the standard of review for questions of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36. However, in this case, the Court of Appeal did not purport to identify an extricable question of law that arose in the interpretation process. Rather, it concluded that the interpretation of the contract itself should be reviewed for correctness, despite *Sattva*’s holding that contractual interpretation is a question of mixed fact and law and is owed deference on appeal: paras. 18-19.

[22] Appellate courts have disagreed on whether this Court’s holding in *Sattva* on the standard of review of contractual interpretation applies to standard form contracts. Many appellate courts have held that *Sattva* does not apply, and have conducted correctness review: *Vallieres v. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, at paras. 11-13; *Portage LaPrairie Mutual Insurance Co. v. Sabeau*, 2015 NSCA 53, 386 D.L.R. (4th) 449, at para. 13; *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, at paras. 28-30; *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1, at para. 273, per McDonald J.A.; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at paras. 40-41; *Monk v. Farmers’ Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, at paras. 22-24; *Daverne v. John Switzer Fuels Ltd.*, 2015 ONCA 919, 128 O.R. (3d) 188, at paras. 12-14; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, at para. 34 (CanLII); and *Sankar v. Bell Mobility Inc.*, 2016 ONCA 242, at para. 26 (CanLII).

[23] In other cases, however, courts of appeal have applied *Sattva* and have deferred to trial courts’ interpretations of standard form contracts: *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at para. 33; *Anderson v.*

mauvais principe ou néglig[é] un élément essentiel d’un critère juridique ou un facteur pertinent » (*Sattva*, par. 53 et 55, citant *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 21). Cela s’accorde avec la jurisprudence sur la norme de contrôle applicable aux questions mixtes de fait et de droit (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 36). Toutefois, en l’espèce, la Cour d’appel n’a pas dégagé une question de droit qui s’est posée au cours de l’exercice d’interprétation. Elle a plutôt conclu qu’il y a lieu de contrôler l’interprétation du contrat lui-même selon la norme de la décision correcte malgré la conclusion tirée dans *Sattva* selon laquelle l’interprétation contractuelle est une question mixte de fait et de droit et commande la déférence en appel (par. 18-19).

[22] Les cours d’appel ont exprimé des avis contradictoires au sujet de la question de savoir si la conclusion tirée dans *Sattva* sur la norme de contrôle applicable en matière d’interprétation contractuelle vise aussi les contrats types. Elles ont été nombreuses à juger que *Sattva* n’est pas applicable et ont effectué un contrôle selon la norme de la décision correcte (*Vallieres c. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, par. 11-13; *Portage LaPrairie Mutual Insurance Co. c. Sabeau*, 2015 NSCA 53, 386 D.L.R. (4th) 449, par. 13; *Precision Plating Ltd. c. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, par. 28-30; *Stewart Estate c. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1, par. 273, le juge McDonald; *MacDonald c. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, par. 40-41; *Monk c. Farmers’ Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, par. 22-24; *Daverne c. John Switzer Fuels Ltd.*, 2015 ONCA 919, 128 O.R. (3d) 188, par. 12-14; *True Construction Ltd. c. Kamloops (City)*, 2016 BCCA 173, par. 34 (CanLII); *Sankar c. Bell Mobility Inc.*, 2016 ONCA 242, par. 26 (CanLII)).

[23] En revanche, dans d’autres affaires, les cours d’appel ont appliqué *Sattva* et s’en sont remises aux interprétations des contrats types retenues par les tribunaux de première instance (*Kassburg c. Sun Life Assurance Co. of Canada*, 2014 ONCA 922,

Bell Mobility Inc., 2015 NWTCA 3, 593 A.R. 79, at paras. 9 and 33-35; *Van Camp v. Chrome Horse Motorcycle Inc.*, 2015 ABCA 83, 599 A.R. 201; *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575, at paras. 40-41; *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581, at paras. 34-36; *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223, at para. 35; and *GCAN Insurance Co. v. Univar Canada Ltd.*, 2016 QCCA 500, at para. 40 (CanLII). See also *Stewart Estate*, at para. 63, per Rowbotham J.A. (dissenting on this point).

[24] I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[25] The statements made in *Sattva* on the standard of review of contractual interpretation must be considered in their full context. That case concerned a complex commercial agreement between two sophisticated parties — not a standard form contract. Professor John D. McCamus has described standard form contracts as follows:

... the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a “take it or leave it” basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense,

124 O.R. (3d) 171, par. 33; *Anderson c. Bell Mobility Inc.*, 2015 NWTCA 3, 593 A.R. 79, par. 9 et 33-35; *Van Camp c. Chrome Horse Motorcycle Inc.*, 2015 ABCA 83, 599 A.R. 201; *Industrial Alliance Insurance and Financial Services Inc. c. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575, par. 40-41; *Ontario Society for the Prevention of Cruelty to Animals c. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581, par. 34-36; *Acciona Infrastructure Canada Inc. c. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223, par. 35; *GCAN Insurance Co. c. Univar Canada Ltd.*, 2016 QCCA 500, par. 40 (CanLII). Voir aussi *Stewart Estate*, par. 63, la juge Rowbotham (dissidente sur ce point)).

[24] Je suis d'avis de reconnaître une exception à la conclusion tirée dans *Sattva* selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit dont le contrôle en appel doit être empreint de déférence. Selon moi, lorsqu'un appel porte sur l'interprétation d'un contrat type, que l'interprétation en litige a valeur de précédent et que l'exercice d'interprétation ne repose sur aucun fondement factuel significatif qui est propre aux parties concernées, il est plus juste de dire que cette interprétation est une question de droit assujettie à un contrôle selon la norme de la décision correcte.

[25] Les affirmations dans *Sattva* au sujet de la norme de contrôle applicable en matière d'interprétation contractuelle doivent être replacées dans leur contexte global. L'arrêt *Sattva* portait sur une entente commerciale complexe intervenue entre deux parties avisées, et non sur un contrat type. Le professeur John D. McCamus a décrit ainsi les contrats types :

[TRADUCTION] ... il s'agit typiquement d'une formule type imprimée à laquelle a toujours recours la partie qui la propose pour ce type d'opération. La formule est souvent présentée comme étant une offre « à prendre ou à laisser ». Normalement, l'autre partie n'aura comme choix que d'accepter ou de refuser l'intégralité des modalités de la formule type. Les contrats d'adhésion types sont omniprésents et constituent une caractéristique indispensable de l'activité commerciale moderne. Il n'est tout simplement pas possible de négocier réellement les

the terms of many of the transactions entered into in the course of daily life.

(*The Law of Contracts* (2nd ed. 2012), at p. 185)

Sattva did not consider the unique issues that standard form contracts raise.

[26] Moreover, the Court in *Sattva* gave two reasons for concluding that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. As a general matter, those reasons are less compelling in the context of standard form contracts.

(1) Factual Matrix

[27] The first reason is that the surrounding circumstances of the contract, or the factual matrix in which it was formed, are important considerations in contractual interpretation: *Sattva*, at para. 46. Rothstein J. stated that determining the intention of the parties is a “fact-specific goal” that requires a trial court to “read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: paras. 47 and 49.

[28] While a proper understanding of the factual matrix is crucial to the interpretation of many contracts, it is often less relevant for standard form contracts, because “the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition”: *MacDonald*, at para. 33. Standard form contracts are particularly common in the insurance industry, as Professor Barbara Billingsley observed in *General Principles of Canadian Insurance Law* (2nd ed. 2014), at p. 56:

As part of its business considerations and in advance of meeting with any particular client, an insurance company decides the terms and conditions under which it is willing to provide insurance coverage for certain common

modalités d’un grand nombre des opérations conclues quotidiennement.

(*The Law of Contracts* (2^e éd. 2012), p. 185)

La Cour n’a pas examiné dans *Sattva* les questions uniques que soulèvent les contrats types.

[26] Par ailleurs, dans *Sattva*, la Cour a donné deux motifs à l’appui de sa conclusion selon laquelle l’interprétation contractuelle est une question mixte de fait et de droit dont le contrôle en appel doit être empreint de déférence. En règle générale, ces motifs sont moins convaincants lorsqu’il est question de contrats types.

(1) Fondement factuel

[27] Le premier motif est que les circonstances entourant le contrat, ou le fondement factuel de sa formation, sont des considérations importantes pour son interprétation (*Sattva*, par. 46). Selon le juge Rothstein, le but de l’exercice consistant à déterminer l’intention des parties est « axé sur les faits » et requiert qu’un tribunal de première instance « interprète le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s’harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat » (par. 47 et 49).

[28] Certes, une compréhension adéquate du fondement factuel est cruciale pour l’interprétation de nombreux contrats. Toutefois, dans le cas des contrats types, le fondement factuel est souvent moins pertinent parce que [TRADUCTION] « les parties ne négocient pas les modalités et le contrat est présenté comme une proposition à prendre ou à laisser » (*MacDonald*, par. 33). Les contrats types sont particulièrement communs dans l’industrie des assurances, comme l’a fait observer la professeure Barbara Billingsley dans *General Principles of Canadian Insurance Law* (2^e éd. 2014), p. 56 :

[TRADUCTION] Eu égard aux considérations commerciales qui lui sont propres et avant de rencontrer tout client, la compagnie d’assurance décide des conditions dans lesquelles elle est disposée à fournir une garantie d’assurance

types of risk. This means that, in most situations, an insurance company does not negotiate the detailed terms of insurance coverage with individual customers. Instead, before entering into any insurance agreements, an insurer typically drafts a series of pre-fabricated contracts outlining the terms upon which particular kinds of coverage will be provided. These contracts are known as “standard form policies”. The insurer then provides the appropriate standard form policy to clients purchasing insurance coverage.

[29] Parties to an insurance contract may negotiate over matters like the cost of premiums, but the actual conditions of the insurance coverage are generally determined by the standard form contract: Billingsley, at p. 58.

[30] My colleague Justice Cromwell accepts that, for standard form contracts, there are usually no relevant surrounding circumstances relating to negotiation (para. 106). However, he observes that other elements of the surrounding circumstances — such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates — have a role in the interpretation process.

[31] I agree that factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract. However, those considerations are generally not “inherently fact specific”: *Sattva*, at para. 55. Rather, they will usually be the same for everyone who may be a party to a particular standard form contract. This underscores the need for standard form contracts to be interpreted consistently, a point to which I will return below.

[32] In sum, for standard form contracts, the surrounding circumstances generally play less of a role in the interpretation process, and where they are relevant, they tend not to be specific to the particular parties. Accordingly, the first reason given in *Sattva* for concluding that contractual interpretation is a question of mixed fact and law — the importance of the factual matrix — carries less weight in cases involving standard form contracts.

pour certains risques courants. Ainsi, dans la plupart des cas, la compagnie d’assurance ne négocie pas les modalités détaillées de la garantie avec un client en particulier. Ce qui se passe plutôt, c’est qu’avant de conclure un contrat d’assurance, l’assureur rédige généralement une série de contrats préétablis décrivant dans quelles conditions certains types de garantie seront offerts. Ces contrats sont appelés des « polices d’assurance types ». L’assureur fournit ainsi la police d’assurance type appropriée à chaque client qui achète une garantie d’assurance.

[29] Les parties à un contrat d’assurance peuvent négocier des éléments comme le coût des primes, mais les véritables conditions de la garantie sont généralement établies par le contrat type (Billingsley, p. 58).

[30] Mon collègue le juge Cromwell convient que, dans le cas des contrats types, il n’y a habituellement aucune circonstance pertinente touchant les négociations (par. 106). Il fait toutefois remarquer que d’autres éléments des circonstances — tels l’objet du contrat, la nature de la relation qu’il crée et le marché ou l’industrie où il est employé — ont un rôle à jouer dans l’exercice d’interprétation.

[31] Je reconnais qu’il y a lieu de prendre en considération des facteurs comme l’objet du contrat, la nature de la relation qu’il crée et le marché ou l’industrie où il est employé pour interpréter un contrat type. Par contre, ces considérations ne sont généralement pas, « de par [leur] nature même, axé[es] sur les faits » (*Sattva*, par. 55). Elles sont plutôt habituellement les mêmes pour toute personne qui peut être partie à un contrat type donné. Cela fait ressortir la nécessité d’interpréter uniformément les contrats types, un point sur lequel je reviendrai plus loin.

[32] Bref, dans le cas des contrats types, les circonstances les entourant ont généralement un rôle moins important à jouer dans l’exercice d’interprétation et, lorsqu’elles sont pertinentes, elles ne sont généralement pas propres aux parties en cause. En conséquence, le premier motif donné dans *Sattva* à l’appui de la conclusion que l’interprétation d’un contrat est une question mixte de fait et de droit — l’importance du fondement factuel — a moins de force dans les cas des contrats types.

(2) The Definitions of “Question of Law” and “Question of Mixed Fact and Law”

[33] In *Sattva*, this Court gave a second reason for concluding that contractual interpretation is a question of mixed fact and law: contractual interpretation does not fit within the definition of a pure question of law. Questions of law are “about what the correct legal test is”: para. 49, quoting *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. For instance, the content of a particular legal principle of contractual interpretation is a question of law. However, in interpreting contracts, courts apply the legal principles of contractual interpretation to determine the parties’ objective intentions: *Sattva*, at para. 49. Therefore, according to *Sattva*, contractual interpretation is a question of mixed fact and law, which is defined as “applying a legal standard” (the legal principles of contractual interpretation) “to a set of facts” (the words of the contract and the factual matrix): para. 49, quoting *Housen*, at para. 26.

[34] In my view, however, while contractual interpretation is generally a question of mixed fact and law, in situations involving standard form contracts, it is more appropriately classified as a question of law in most circumstances.

[35] The law of standard of review — including the distinction between questions of law and those of mixed fact and law — seeks to achieve an appropriate division of labour between trial and appellate courts in accordance with their respective roles. The main function of trial courts is to resolve the particular disputes before them: *Housen*, at para. 9. Appellate courts, however, “operate at a higher level of legal generality”: *Association des parents ayants droit de Yellowknife v. Northwest Territories (Attorney General)*, 2015 NWTCA 2, 593 A.R. 180, at para. 23. They ensure that “the same legal rules are applied in similar situations”, as the rule of law demands: *Housen*, at para. 9. Appellate courts also

(2) Les définitions de « question de droit » et de « question mixte de fait et de droit »

[33] Dans l’arrêt *Sattva*, la Cour avance un deuxième motif pour justifier sa conclusion selon laquelle l’interprétation des contrats est une question mixte de fait et de droit : l’interprétation contractuelle ne cadre pas avec la définition de la pure question de droit. Les questions de droit « concernent la détermination du critère juridique applicable » (par. 49, citant *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35). À titre d’exemple, la teneur d’un principe juridique particulier d’interprétation contractuelle est une question de droit. Toutefois, dans l’interprétation des contrats, les tribunaux appliquent les principes juridiques d’interprétation contractuelle pour déterminer les intentions objectives des parties (*Sattva*, par. 49). En conséquence, selon *Sattva*, l’interprétation contractuelle est une question mixte de fait et de droit, définie comme « l’application d’une norme juridique » (les principes juridiques de l’interprétation contractuelle) « à un ensemble de faits » (les termes du contrat et le fondement factuel) (par. 49, citant *Housen*, par. 26).

[34] J’estime toutefois que, si l’interprétation contractuelle est généralement une question mixte de fait et de droit, lorsqu’il s’agit de contrats types, il est plus juste de la considérer comme une question de droit dans la plupart des cas.

[35] Le droit applicable aux normes de contrôle — notamment en ce qui a trait à la distinction entre les questions de droit et les questions mixtes de fait et de droit — vise à établir une répartition appropriée des tâches entre les tribunaux de première instance et les cours d’appel, conformément à leurs rôles respectifs. La principale fonction des tribunaux de première instance est de résoudre les litiges qui leur sont soumis (*Housen*, par. 9). Quant aux cours d’appel, elles « exercent leurs fonctions à un niveau élevé de généralité » (*Association des parents ayants droit de Yellowknife c. Territoires du Nord-Ouest (Procureur général)*, 2015 NWTCA 2, 593 A.R. 180, par. 23). Elles veillent à ce que « les mêmes règles de droit

have a law-making function, which requires them to “delineate and refine legal rules”: *ibid.*

[36] These particular functions of appellate courts — ensuring consistency in the law and reforming the law — justify reviewing pure questions of law on the standard of correctness. By contrast, appellate courts defer to findings of fact in part because they can discharge their mandate without second-guessing trial courts’ factual determinations: *Housen*, at paras. 11-14. For questions of mixed fact and law, the correctness standard applies to extricable errors of law (such as the application of an incorrect principle) because, again, a review on the standard of correctness is necessary to allow appellate courts to fulfill their role. However, where it is “difficult to extricate the legal questions from the factual”, appellate courts defer on questions of mixed fact and law: *Housen*, at para. 36; see also paras. 33-35.

[37] In many cases, appellate courts need not review for correctness the contractual interpretation *itself* in order to perform their functions — namely, ensuring the consistent application of the law and reforming the law. That is because, in general, the interpretation of a contract has no impact beyond the parties to a dispute. As Rothstein J. commented in *Sattva*, at para. 52:

... this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of

soient appliquées dans des situations similaires », comme l’exige la primauté du droit (*Housen*, par. 9). Elles jouent aussi un rôle dans l’élaboration du droit, ce qui les oblige à « préciser et [à] raffiner les règles de droit » (*ibid.*).

[36] Ces fonctions particulières des cours d’appel — veiller à l’application uniforme du droit et à sa réforme — justifient qu’elles exercent un contrôle selon la norme de la décision correcte pour les pures questions de droit. En revanche, les cours d’appel font preuve de déférence à l’égard des conclusions de fait, et ce, notamment parce qu’elles peuvent s’acquitter de leur mandat sans avoir à se prononcer après coup sur les conclusions factuelles des tribunaux de première instance (*Housen*, par. 11-14). Pour les questions mixtes de fait et de droit, la norme de la décision correcte s’applique aux erreurs de droit susceptibles d’être isolées (comme l’application du mauvais principe) parce que, dans ce cas aussi, un contrôle selon la norme de la décision correcte est nécessaire pour permettre aux cours d’appel de jouer leur rôle. Par contre, lorsqu’il est « difficile de départager les questions de droit et les questions de fait », les cours d’appel font preuve de déférence à l’égard des questions mixtes de fait et de droit (*Housen*, par. 36; voir aussi par. 33-35).

[37] Dans bien des cas, les cours d’appel n’ont pas besoin de procéder à un examen de l’interprétation contractuelle *en soi* selon la norme de la décision correcte pour s’acquitter de leurs fonctions — qui consistent à veiller à l’application uniforme du droit et à sa réforme — et ce, parce que l’interprétation d’un contrat donné n’a généralement d’incidence que sur les parties au litige. Comme l’a fait observer le juge Rothstein dans *Sattva*, par. 52 :

... la Cour dans l’arrêt *Housen* conclut que la retenue à l’égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l’autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l’endroit des décideurs de première instance en matière d’interprétation contractuelle. Les obligations juridiques issues d’un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions

first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[38] For the interpretation of many contracts, precedents interpreting similar contractual language may be of some persuasive value. However, it is the intentions of the particular parties, as reflected in the particular contractual wording at issue and informed by the surrounding circumstances of the contract, that predominate, and “[i]f that intention differs from precedent, the intention will govern and the precedent will not be followed”: G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 129-30; see also *Tenneco Canada Inc. v. British Columbia Hydro and Power Authority*, 1999 BCCA 415, 126 B.C.A.C. 9, at para. 43.

[39] These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are “highly specialized contracts that are sold widely to customers without negotiation of terms”: *MacDonald*, at para. 37. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers: *Monk*, at para. 23. In others, a standard form agreement may be common throughout an entire industry: *Precision Plating*, at para. 28. Either way, the interpretation of the standard form contract could affect many people, because “precedent is more likely to be controlling” in the interpretation of such contracts: Hall, at p. 131. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — “ensuring the consistency of the law” (*Sattva*, at para. 51) — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.

d’application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l’interprétation contractuelle est une question mixte de fait et de droit.

[38] Pour interpréter de nombreux contrats, on peut recourir aux précédents dans lesquels les tribunaux interprètent un libellé contractuel semblable et leur accorder une certaine valeur persuasive, mais ce sont les intentions des parties en cause exprimées dans le libellé particulier du contrat en litige et considérées à l’aune des circonstances entourant le contrat qui ont préséance; ainsi, [TRADUCTION] « [s]i l’intention des parties concernées est différente de celle des parties dans le précédent, c’est l’intention des parties concernées qui compte et le précédent ne sera pas appliqué » (G. R. Hall, *Canadian Contractual Interpretation Law* (3^e éd. 2016), p. 129-130; voir aussi *Tenneco Canada Inc. c. British Columbia Hydro and Power Authority*, 1999 BCCA 415, 126 B.C.A.C. 9, par. 43).

[39] Ces enseignements ne valent toutefois pas nécessairement pour les contrats types, à l’égard desquels un contrôle selon la norme de la décision correcte peut être requis pour que les cours d’appel puissent s’acquitter de leurs fonctions. Les contrats types sont [TRADUCTION] « des contrats hautement spécialisés qui sont largement vendus à des clients sans qu’il y ait négociation des modalités » (*MacDonald*, par. 37). Dans certains cas, une entreprise unique, comme une banque ou un fournisseur de services téléphoniques, peut utiliser son propre contrat type auprès de tous ses clients (*Monk*, par. 23). Dans d’autres cas, un contrat type peut être commun à l’ensemble d’une industrie (*Precision Plating*, par. 28). Dans les deux situations, l’interprétation du contrat type peut toucher de nombreuses personnes, parce que [TRADUCTION] « le précédent est probablement déterminant » pour l’interprétation de tels contrats (Hall, p. 131). Il ne serait pas souhaitable que les cours interprètent différemment des contrats types identiques ou très similaires sans bonne raison. Le rôle des cours d’appel — « assurer la cohérence du droit » (*Sattva*, par. 51) — est servi lorsqu’on leur permet de contrôler l’interprétation d’un contrat type selon la norme de la décision correcte.

[40] Indeed, consistency is particularly important in the interpretation of standard form insurance contracts. In *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 27, Binnie J. recognized that “‘courts will normally be reluctant to depart from [authoritative] judicial precedent interpreting the policy in a particular way’ . . . where the issue arises subsequently in a similar context, and where the policies are similarly framed”, because both insurance companies and customers benefit from “[c]ertainty and predictability”. And where an insurance policy is ambiguous, courts “strive to ensure that similar insurance policies are construed consistently”: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 23.

[41] The definition of questions of law — “questions about what the correct legal test is” (*Southam*, at para. 35) — does not preclude classifying some questions of contractual interpretation as questions of law. There is no bright-line distinction between questions of law and those of mixed fact and law. Rather, “the degree of generality (or ‘precedential value’)” is the key difference between the two types of questions: *Sattva*, at para. 51. As Iacobucci J. stated in *Southam*, at para. 37:

If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. . . . Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[40] En effet, la constance revêt une importance particulière dans l’interprétation des contrats d’assurance types. Dans *Co-operators Compagnie d’assurance-vie c. Gibbens*, 2009 CSC 59, [2009] 3 R.C.S. 605, par. 27, le juge Binnie a reconnu que « [TRADUCTION] “les tribunaux hésitent habituellement à s’écarter de l’interprétation attribuée à une police dans une décision antérieure [faisant autorité]” [. . .] lorsqu’ils sont saisis de la même question d’interprétation dans un contexte semblable et que les polices ont un libellé analogue », parce que tant les compagnies d’assurance que les clients bénéficient de « [l]a certitude et [de] la prévisibilité ». Par ailleurs, lorsqu’une police d’assurance est ambiguë, les tribunaux « f[ont] en sorte que les polices d’assurance semblables soient interprétées d’une manière uniforme » (*Progressive Homes Ltd. c. Cie canadienne d’assurances générales Lombard*, 2010 CSC 33, [2010] 2 R.C.S. 245, par. 23).

[41] La définition des questions de droit — « [ces questions] concernent la détermination du critère juridique applicable » (*Southam*, par. 35) — ne nous empêche pas de considérer certaines questions d’interprétation contractuelle comme des questions de droit. Il n’y a pas de ligne de démarcation nette entre les questions de droit et les questions mixtes de fait et de droit. C’est plutôt « le degré de généralité (ou “la valeur comme précéd[en]t”) » qui constitue la principale différence entre ces deux catégories de question (*Sattva*, par. 51). Comme l’a affirmé le juge Iacobucci dans *Southam*, par. 37 :

Si une cour décidait que le fait d’avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l’affaire prend le caractère d’une question d’application pure, et s’approche donc d’une question de droit et de fait parfaite. [. . .] Il va de soi qu’il n’est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n’est pas susceptible de présenter beaucoup d’intérêt pour les juges et les avocats dans l’avenir.

[42] Contractual interpretation is often the “pure application” of contractual interpretation principles to a unique set of circumstances. In such cases, the interpretation is not “of much interest to judges and lawyers in the future” because of its “utter particularity”. These questions of contractual interpretation are appropriately classified as questions of mixed fact and law, as the Court explained in *Sattva*.

[43] However, the interpretation of a standard form contract could very well be of “interest to judges and lawyers in the future”. In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a “pure question of law”, i.e., “questions about what the correct legal test is”: *Sattva*, at para. 49; *Southam*, at para. 35. Establishing the proper interpretation of a standard form contract amounts to establishing the “correct legal test”, as the interpretation may be applied in future cases involving identical or similarly worded provisions.

[44] My colleague Cromwell J. suggests that the interpretation of a standard form contract will not be of much precedential value because “its application in other cases will ultimately be decided on a case-by-case basis in light of the particular circumstances of the particular case” (para. 120). I respectfully disagree. Settling on a consistent interpretation of a standard form provision is useful. Of course, the result of applying the interpretation in future cases will depend on the facts of those cases. The facts are for the trial judge to find, and those findings will be owed deference.

[45] For instance, in this case, the Court of Appeal interpreted the Exclusion Clause as excluding damages physically or systemically connected to the faulty work. For the reasons I will give below, I am of the view that the Exclusion Clause excludes only the cost of redoing the faulty work. These are two different interpretations of the same standard form language. Selecting one interpretation over the other as correct will give parties certainty and

[42] L’interprétation contractuelle participe souvent de l’« application pure » des principes d’interprétation contractuelle à un ensemble unique de circonstances. Dans ces cas, l’interprétation ne présente pas « beaucoup d’intérêt pour les juges et les avocats dans l’avenir » en raison de sa « particularité absolue ». Ces questions d’interprétation contractuelle sont classées à bon droit dans la catégorie des questions mixtes de fait et de droit, comme l’explique la Cour dans *Sattva*.

[43] Or, l’interprétation d’un contrat type pourrait fort bien présenter de l’« intérêt pour les juges et les avocats dans l’avenir ». Autrement dit, l’interprétation en soi a valeur de précédent. L’interprétation d’un contrat type peut donc correspondre à la définition de « pure question de droit », c.-à-d. une « questio[n] [. . .] “concern[ant] la détermination du critère juridique applicable” » (*Sattva*, par. 49; *Southam*, par. 35). Établir la juste interprétation d’un contrat type revient à établir le « bon critère juridique », puisque cette interprétation peut être appliquée dans l’avenir à des dispositions identiques ou formulées de façon semblable.

[44] D’après mon collègue le juge Cromwell, l’interprétation d’un contrat type n’a pas une grande valeur de précédent car « les tribunaux décideront [. . .] de son application en dernière analyse au cas par cas à la lumière des circonstances propres à chaque affaire » (par. 120). Soit dit en tout respect, je ne suis pas d’accord. Il est utile de s’entendre sur une interprétation constante d’une clause type. Bien sûr, le résultat de l’application de l’interprétation dans des affaires à venir dépendra des faits de celles-ci. Il revient au juge de première instance d’établir les faits et ses conclusions de fait commanderont la déférence.

[45] À titre d’exemple, en l’espèce, la Cour d’appel a jugé que la clause d’exclusion vise les dommages connexes, sur le plan matériel ou systémique, à la malfaçon. Pour les motifs exposés ci-dessous, j’estime que la clause d’exclusion vise seulement le coût de la nouvelle exécution du travail déficient. Il s’agit là de deux interprétations différentes d’une même disposition type. Le fait de retenir une interprétation aux dépens de l’autre assurera une certitude

predictability. This is true even though what constitutes the cost of redoing the faulty work will depend on the facts of future cases.

(3) Conclusion on Standard of Review

[46] *Sattva* should not be read as holding that contractual interpretation is always a question of mixed fact and law, and always owed deference on appeal. I would recognize an exception to *Sattva*'s holding on the standard of review of contractual interpretation. Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[47] These criteria are met in the present case, so the standard of review applicable to the trial judge's interpretation of the Policy is correctness. The trial judge's underlying factual findings remain subject to deferential review, as mentioned above.

[48] Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam*, the line between questions of law and those of mixed fact and law is not always easily drawn. Appellate courts should consider

et une prévisibilité aux parties. Cela vaut même si ce qui constitue le coût de la nouvelle exécution du travail défectueux dépendra des faits des affaires à venir.

(3) Conclusion sur la norme de contrôle

[46] L'arrêt *Sattva* ne devrait pas être interprété comme prescrivant que l'interprétation d'un contrat est toujours une question mixte de fait et de droit, et qu'il faut toujours faire montre de déférence envers cette interprétation en appel. Je suis d'avis de reconnaître une exception à la conclusion de *Sattva* sur la norme de contrôle applicable en matière d'interprétation contractuelle. Lorsque, comme en l'espèce, l'appel porte sur l'interprétation d'un contrat type, que l'interprétation en litige a valeur de précédent et que l'exercice d'interprétation ne repose sur aucun fondement factuel significatif qui est propre aux parties concernées, il est plus juste de dire que cette interprétation constitue une question de droit assujettie à un contrôle selon la norme de la décision correcte.

[47] Ces conditions sont satisfaites en l'espèce, de sorte que la norme de contrôle applicable à l'interprétation de la police retenue par le juge de première instance est celle de la décision correcte. Comme je l'ai déjà mentionné, les conclusions de fait sous-jacentes tirées par le juge de première instance doivent toujours faire l'objet d'un contrôle empreint de déférence.

[48] Toutefois, selon les circonstances, l'interprétation d'un contrat type peut être une question mixte de fait et de droit devant faire l'objet d'un contrôle empreint de déférence en appel. À titre d'exemple, la déférence est justifiée si le fondement factuel d'un contrat type qui est propre aux parties concernées aide à l'interpréter. La déférence est aussi justifiée si les parties ont négocié et modifié ce qui était au départ un contrat type, parce que l'interprétation n'aura probablement que peu ou pas de valeur comme précédent. Il peut y avoir d'autres cas où le contrôle empreint de déférence reste de mise. Comme l'a reconnu le juge Iacobucci dans *Southam*, il n'est pas toujours facile de tracer la ligne entre les questions de droit et les questions mixtes de fait et de droit.

whether “the dispute is over a general proposition” or “a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future” (para. 37).

B. *The Exclusion Clause*

(1) Rules Governing the Interpretation of the Policy

[49] The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in *Progressive Homes*. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole: para. 22, citing *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71.

[50] Where, however, the policy’s language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. See *Progressive Homes*, at para. 23, citing *Scalera*, at para. 71; *Gibbens*, at paras. 26-27; and *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 900-902.

[51] Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer: *Progressive Homes*, at para. 24, citing *Scalera*, at para. 70; *Gibbens*, at para. 25; and *Consolidated-Bathurst*, at pp. 899-901. *Progressive Homes* provides that a corollary of this rule is that

Les cours d’appel devraient se demander si « le litige porte sur une proposition générale » ou « sur un ensemble très particulier de circonstances qui n’est pas susceptible de présenter beaucoup d’intérêt pour les juges et les avocats dans l’avenir » (par. 37).

B. *La clause d’exclusion*

(1) Les règles régissant l’interprétation de la police

[49] Les parties s’entendent pour dire que les principes d’interprétation des polices d’assurance sont ceux qu’a résumés le juge Rothstein dans *Progressive Homes*. Selon le premier principe d’interprétation, lorsque le texte de la police n’est pas ambigu, le tribunal doit donner effet à ce texte clair et considérer le contrat dans son ensemble (par. 22, citant *Non-Marine Underwriters, Lloyd’s of London c. Scalera*, 2000 CSC 24, [2000] 1 R.C.S. 551, par. 71).

[50] Toutefois, lorsque le texte de la police est ambigu, on doit recourir aux règles générales d’interprétation des contrats pour résoudre cette ambiguïté, entre autres : retenir une interprétation conforme aux attentes raisonnables des parties, pourvu que le texte de la police était cette interprétation; éviter une interprétation qui aboutirait à un résultat irréaliste ou que n’auraient pas envisagé les parties dans le climat commercial où la police d’assurance a été contractée; l’interprétation retenue doit s’accorder avec celles des polices d’assurance semblables. Voir *Progressive Homes*, par. 23, citant *Scalera*, par. 71; *Gibbens*, par. 26-27; *Exportations Consolidated Bathurst Ltée c. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 R.C.S. 888, p. 900-902.

[51] Ce n’est que s’il subsiste une ambiguïté après l’application des principes susmentionnés que les tribunaux peuvent recourir à la règle *contra proferentem* pour interpréter la police contre l’assureur (*Progressive Homes*, par. 24, citant *Scalera*, par. 70; *Gibbens*, par. 25; et *Consolidated Bathurst*, p. 899-901. Selon *Progressive Homes*, le corollaire de cette

coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.

[52] It is also important to bear in mind this Court's guidance in *Progressive Homes* on the "generally advisable" order in which to interpret insurance policies (para. 28). Although that case involved commercial general liability policies and not builders' risk policies, the two types of policies share a similar alternating structure: they set out the type of coverage followed by specific exclusions, with some exclusions containing exceptions. As such, the insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage. The parties in these appeals have conceded that this particular onus has been met: trial judge's reasons, at para. 9. The onus then shifts to the insurer to establish that one of the exclusions to coverage applies. If the insurer is successful at this stage, the onus then shifts back to the insured to prove that an exception to the exclusion applies: see *Progressive Homes*, at paras. 26-29 and 51. Contrary to the Court of Appeal's statement at para. 26 of its reasons that the exclusion and exception in this case must be interpreted "symbiotically", I see no reason to depart from the generally accepted order of interpretation in analyzing the Policy and the Exclusion Clause.

(2) The Court of Appeal's Approach to the Exclusion Clause

[53] Before engaging in the interpretation of the Exclusion Clause, I believe it necessary to properly set out the Court of Appeal's reasoning and explain why its new physical or systemic connectedness test was unnecessary.

[54] At paras. 29 and 48 of its reasons, the Court of Appeal explained that because the base coverage under clause 2 of the Policy is for "physical loss

règle est que les dispositions relatives à la garantie dans les polices d'assurance doivent recevoir une interprétation large, et les clauses d'exclusion, une interprétation étroite.

[52] Il importe également de garder à l'esprit les indications données par notre Cour dans *Progressive Homes* quant à l'ordre « généralement recommandé » pour l'interprétation des polices d'assurance (par. 28). L'affaire *Progressive Homes* concernait des polices d'assurance de responsabilité civile des entreprises et non des polices d'assurance chantier, mais les deux types de police partagent la même structure alternative, en ce sens qu'elles prévoient le type de garantie puis des exclusions précises, et certaines exclusions comportent des exceptions. En conséquence, l'assuré a le fardeau d'établir en premier lieu que le dommage ou la perte faisant l'objet de la réclamation relevait de la garantie initiale. Les parties aux présents pourvois ont concédé que les assurées s'étaient acquittées de ce fardeau (motifs du juge de première instance, par. 9). Il y a alors déplacement du fardeau de la preuve et l'assureur doit établir que l'une des exclusions de la garantie s'applique. S'il y parvient, le fardeau de la preuve se déplace à nouveau et il incombe à l'assuré de prouver qu'une exception à l'exclusion s'applique (voir *Progressive Homes*, par. 26-29 et 51). Contrairement à l'affirmation de la Cour d'appel au par. 26 de ses motifs selon laquelle l'exclusion et l'exception en l'espèce doivent être interprétées [TRADUCTION] « en symbiose », je ne vois aucune raison de déroger à l'ordre d'interprétation généralement reconnu pour analyser la police et la clause d'exclusion.

(2) La façon dont la Cour d'appel a abordé la clause d'exclusion

[53] Avant de procéder à l'interprétation de la clause d'exclusion, je crois qu'il est nécessaire de bien situer le raisonnement de la Cour d'appel et d'expliquer pourquoi son nouveau critère de connexité matérielle ou systémique était inutile.

[54] Aux paragraphes 29 et 48 de ses motifs, la Cour d'appel a expliqué que la clause d'exclusion doit soustraire à la garantie certaines pertes

or damage”, it follows that the Exclusion Clause needs to exclude from coverage some physical loss. In the Court of Appeal’s opinion, a different reading of the Exclusion Clause would risk rendering it redundant. Under this view, the “cost of making good faulty workmanship” cannot be limited to the cost of redoing the faulty work. Rather, that exclusion must be construed more broadly to also exclude from coverage some type of physical loss or damage.

[55] As mentioned above, the Court of Appeal’s acceptance of this initial premise led it to search for a dividing line between physical damage that is part of the “cost of making good” and therefore excluded from coverage, and physical damage that is “resulting damage” and therefore covered as an exception to the exclusion. In its quest to establish this dividing line, the court fashioned a new test of “degree of physical or systemic connectedness”, which it said was “the key to determining the boundary between ‘making good faulty workmanship’ and ‘resulting damage’”: para. 50.

[56] In my respectful view, the premise from which the Court of Appeal proceeded is flawed. The “faulty workmanship” exclusion need not encompass physical damage. Although “[e]xclusions should . . . be read in light of the initial grant of coverage” (*Progressive Homes*, at para. 27; see also M. G. Lichty and M. B. Snowden, *Annotated Commercial General Liability Policy* (loose-leaf), at p. 1-10), this Court has stressed that “perfect mutual exclusivity [between exclusions and the initial grant of coverage] in an insurance contract is not required”: *Progressive Homes*, at para. 40.

[57] Bearing the above-mentioned principle in mind, the Policy in this case contains exclusions that do not pertain to “physical loss or damage” otherwise covered under clause 2. For instance, clause 4(A)(a) of the Policy excludes from coverage “[a]ny loss of use or occupancy or consequential loss of any nature howsoever caused including penalties for non-completion of or delay in completion of contract

matérielles parce que la garantie de base prévue à la clause 2 de la police vise les « perte ou [. . .] dommages matériels ». Selon la Cour d’appel, toute autre interprétation de la clause d’exclusion risquerait de rendre cette disposition redondante. D’après ce point de vue, les « frais engagés pour remédier à une malfaçon » ne peuvent se limiter au coût de la nouvelle exécution du travail défectueux; ils doivent plutôt être interprétés plus largement de manière à exclure également de la garantie certains types de perte ou de dommages matériels.

[55] Comme je l’ai mentionné précédemment, l’acceptation de cette prémisse initiale par la Cour d’appel a amené cette dernière à chercher une ligne de démarcation entre les dommages matériels qui relèvent des « frais engagés pour remédier à une malfaçon » et qui sont exclus par le fait même de la garantie et les dommages matériels assimilables à des « dommages [. . .] découlant » de la malfaçon, couverts à titre d’exception à l’exclusion. En tentant d’établir cette ligne de démarcation, la cour a conçu un nouveau critère de [TRADUCTION] « degré de connexité matérielle ou systémique[,] la clé pour fixer la limite entre la “réparation d’une malfaçon” et les “dommages en découlant” » (par. 50).

[56] À mon humble avis, la prémisse de la Cour d’appel est erronée. L’exclusion relative à la « malfaçon » n’a pas besoin d’englober des dommages matériels. Bien que les exclusions « doivent [. . .] être lues à la lumière de la protection initiale » (*Progressive Homes*, par. 27; voir aussi M. G. Lichty et M. B. Snowden, *Annotated Commercial General Liability Policy* (feuilles mobiles), p. 1-10), notre Cour a souligné qu’une « exclusivité mutuelle parfaite [entre des exclusions et la protection initiale] n[’est] pas obligatoire dans un contrat d’assurance » (*Progressive Homes*, par. 40).

[57] Compte tenu du principe susmentionné, la police en l’espèce contient des exclusions qui ne touchent pas les « perte ou [. . .] dommages matériels » autrement couverts aux termes de la clause 2. À titre d’exemple, la clause 4(A)a) de la police soustrait à la garantie « [l]a perte d’usage ou d’occupation ou perte indirecte de quelque nature que ce soit, y compris les pénalités pour non-exécution

or non-compliance with contract conditions”. This exclusion deals with a form of pure economic loss stemming from contractual breach, not physical loss or damage. Additionally, clause 28 of the “standard conditions” section excludes “costs, fines, penalties or expenses” imposed by governments under environmental legislation. This also does not relate to the Policy’s base coverage for physical loss or damage.

[58] As such, perfect mutual exclusivity is neither provided for under the Policy nor should it be required when interpreting the Exclusion Clause. The Court of Appeal consequently erred by approaching its analysis of the Exclusion Clause from a premise that was not supported by the text of the Exclusion Clause or the Policy as a whole. Adopting this premise led the Court of Appeal down an improper analytical path toward establishing a new and unnecessary test. Indeed, as I will explain below, the general rules of contractual interpretation provide the answer to whether the damage to the Tower’s windows is covered under the Policy.

(3) Interpretation of the Exclusion Clause and the Policy

(a) *The Language of the Exclusion Clause Is Ambiguous*

[59] The Insureds argue that the plain language of the Exclusion Clause, read in the context of the Policy as a whole, is unambiguous. They say it leads to the conclusion that only the cost of redoing the faulty work — in this case, cleaning the windows — is excluded from coverage. The consequences of the faulty work — here, the damage to the windows, necessitating their replacement — are covered as “resulting damage”.

du contrat, retard dans l’exécution du contrat ou non-respect des conditions du contrat ». Cette exclusion porte sur une forme de perte purement financière découlant de la violation du contrat, et non sur les pertes ou dommages matériels. En outre, la clause 28 de la section concernant les [TRADUCTION] « conditions types » exclut les « frais, amendes, pénalités ou dépenses » imposés par les gouvernements en vertu des lois environnementales. Cette exclusion ne se rapporte pas non plus à la garantie de base prévue par la police en cas de perte ou de dommages matériels.

[58] En conséquence, l’exclusivité mutuelle parfaite n’est pas prévue dans la police et ne devrait pas non plus être requise lorsqu’il s’agit d’interpréter la clause d’exclusion. La Cour d’appel a donc commis une erreur en faisant reposer son analyse de la clause d’exclusion sur une prémisse qui n’était étayée ni par le texte de la clause d’exclusion ni par la police dans son ensemble. En adoptant cette prémisse, la Cour d’appel s’est engagée dans un cheminement analytique vicié qui l’a menée à établir un nouveau critère inutile. En fait, comme je l’expliquerai plus loin, les règles générales d’interprétation contractuelle fournissent la réponse à la question de savoir si les dommages causés aux fenêtres de la Tour sont couverts par la police.

(3) Interprétation de la clause d’exclusion et de la police

a) *Le texte de la clause d’exclusion est ambigu*

[59] Les assurées prétendent que le texte clair de la clause d’exclusion, considéré dans le contexte de l’ensemble de la police, n’est pas ambigu. Selon elles, il mène à la conclusion que seul le coût de la nouvelle exécution du travail défectueux, en l’occurrence le nettoyage des fenêtres, est exclu de la garantie. Les conséquences de la malfaçon, en l’occurrence les dommages causés aux fenêtres en raison desquels celles-ci ont dû être remplacées, sont couvertes en tant que « dommages [. . .] découlant » de la malfaçon.

[60] The Insurers similarly argue that the Exclusion Clause is unambiguous, yet they arrive at a different conclusion as to its meaning. They say that which is excluded is not only the cost of redoing the faulty work, but also the cost of repairing that part of the insured property or project that is the subject of the faulty work. That which is covered as “resulting damage” is consequential damage to some other part of the insured property or project. They point to the case law in support, contending that the courts have consistently interpreted the language of the Exclusion Clause to bear this meaning. Accordingly, in this case, the Insurers say the Policy excludes both the cost of recleaning the windows and the cost of replacing the windows, the subject of the faulty work.

[61] I am of the view that the language of the Exclusion Clause slightly favours the interpretation advanced by the Insureds, but is nonetheless ambiguous. The word “damage” figures only in the exception to the Exclusion Clause; it is not included in the language setting out the exclusion itself, i.e., the “cost of making good faulty workmanship”. As such, “making good faulty workmanship” can, on its plain, ordinary and popular meaning, be construed as redoing the faulty work, and “resulting damage” can be seen as including damages resulting from such faulty work.

[62] That said, the language of the Exclusion Clause does not clearly point to one interpretation of “cost of making good faulty workmanship” and “resulting damage” over the other. The Policy does not define these terms. The general coverage provisions, clauses 1 and 2, do not resolve the ambiguity, and neither do the other provisions in the Policy.

[63] Therefore, we must look to the general principles of contract interpretation. As I will detail below, the application of these principles points to one interpretation that is consistent with the reasonable expectations of the parties and commercial reality: the faulty workmanship exclusion serves to exclude from coverage only the cost of redoing the faulty

[60] Les assureurs prétendent eux aussi que la clause d'exclusion n'est pas ambiguë. Or, ils arrivent à une conclusion différente sur sa signification. Selon eux, ce qui est exclu est non seulement le coût de la nouvelle exécution du travail défectueux, mais aussi le coût de la réparation de la partie du bien ou du projet assuré qui est touchée par la malfaçon. Ainsi, ce qui est couvert à titre de « dommages en découlant », ce sont les dommages indirects qui ont été causés à une autre partie du bien ou du projet assuré. Ils invoquent à l'appui la jurisprudence, faisant valoir que les tribunaux ont toujours attribué ce sens au texte de la clause d'exclusion. En conséquence, dans la présente affaire, les assureurs disent que la police exclut à la fois le coût du nouveau nettoyage des fenêtres et le coût de remplacement de ces fenêtres, qui faisaient l'objet de la malfaçon.

[61] Je suis d'avis que le texte de la clause d'exclusion milite légèrement en faveur de l'interprétation proposée par les assurées, mais qu'il est néanmoins ambigu. Le mot « dommages » ne figure que dans l'exception à la clause d'exclusion; il ne fait pas partie des mots énonçant l'exclusion elle-même, soit les « frais engagés pour remédier à une malfaçon ». Voilà pourquoi les termes « remédier à une malfaçon » peuvent, selon leur sens ordinaire et courant, être interprétés comme voulant dire la nouvelle exécution du travail déficient, et « dommages en découlant », comme les dommages découlant de cette malfaçon.

[62] Cela dit, le texte de la clause d'exclusion ne favorise pas clairement une interprétation des termes « frais engagés pour remédier à une malfaçon » et « dommages en découlant » au détriment de l'autre. La police ne définit pas ces expressions. Les dispositions générales relatives à la garantie, les clauses 1 et 2, ne dissipent pas l'ambiguïté, pas plus que les autres dispositions de la police.

[63] En conséquence, nous devons nous reporter aux principes généraux d'interprétation des contrats. Comme je l'expliquerai en détail plus loin, l'application de ces principes mène à une interprétation conforme aux attentes raisonnables des parties et à la réalité commerciale : l'exclusion relative à la malfaçon sert à exclure de la garantie uniquement le coût

work, as the resulting damage exception covers costs or damages apart from the cost of redoing the faulty work. As such, excluded under the Policy is the cost of recleaning the windows, but the damage to the windows and therefore the cost of their replacement is covered. This is consistent with previous interpretations of similar clauses in the jurisprudence. Indeed, as I explain below, I disagree with the Insurers' contention that the case law consistently supports their interpretation of the Exclusion Clause.

[64] In light of this determination, it is not necessary to turn to the *contra proferentem* rule to answer the second issue raised in these appeals.

(b) *Reasonable Expectations of the Parties*

[65] Parties' reasonable expectations with respect to the meaning of a contractual provision can often be gleaned from the circumstances surrounding the contract's formation: *Sattva*, at paras. 46-47. However, as discussed above, there is no factual matrix here that would assist in ascertaining the parties' understanding of and intent regarding the Exclusion Clause. The Policy is a standard form contract. And, as the Court of Appeal noted at para. 15 of its reasons, there is no evidence that the parties gave any thought to the cleaning of the windows, the relationship of faulty workmanship to resulting damage, or anything else that would help in determining their reasonable expectations.

[66] Therefore, in my view, the purpose behind builders' risk policies is crucial in determining the parties' reasonable expectations as to the meaning of the Exclusion Clause. In a nutshell, the purpose of these policies is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage — in exchange for relatively high premiums — provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of

de la nouvelle exécution du travail défectueux, alors que l'exception relative aux « dommages en découlant » vise les coûts ou dommages autres que le coût de la nouvelle exécution du travail défectueux. En conséquence, est exclu aux termes de la police le coût du nouveau nettoyage des fenêtres, mais les dommages causés aux fenêtres, et donc le coût de leur remplacement, sont couverts. Cette interprétation s'accorde avec celles données à des clauses similaires dans la jurisprudence. En fait, comme je l'expliquerai ci-après, je ne suis pas d'accord avec l'affirmation des assureurs selon laquelle les tribunaux ont toujours interprété la clause d'exclusion de la même façon qu'eux.

[64] Vu cette conclusion, il n'est pas nécessaire de recourir à la règle *contra proferentem* pour répondre à la deuxième question soulevée dans les présents pourvois.

b) *Attentes raisonnables des parties*

[65] Les attentes raisonnables des parties en ce qui concerne la signification d'une disposition contractuelle peuvent souvent être dégagées des circonstances de la formation du contrat (*Sattva*, par. 46-47). Toutefois, comme nous l'avons vu dans l'analyse de la norme de contrôle, il n'y a pas de fondement factuel en l'espèce qui pourrait nous aider à cerner la conception qu'ont les parties de la clause d'exclusion et de leur intention à son égard. La police est un contrat type. En outre, comme la Cour d'appel l'a indiqué au par. 15 de ses motifs, rien ne prouve que les parties ont songé au nettoyage des fenêtres, au lien entre une malfaçon et les dommages en découlant ou à quoi que ce soit d'autre qui aiderait à établir leurs attentes raisonnables.

[66] En conséquence, j'estime que l'objet sous-jacent des polices d'assurance chantier est crucial pour déterminer les attentes raisonnables des parties en ce qui concerne la signification de la clause d'exclusion. En résumé, ces polices visent à offrir une large garantie pour les projets de construction, qui sont particulièrement vulnérables aux accidents et aux erreurs. Cette large garantie — offerte en échange de primes relativement élevées — confère aux assurés certitude, stabilité et tranquillité

disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. In my view, the purpose of broad coverage in the construction context is furthered by an interpretation of the Exclusion Clause that excludes from coverage only the cost of redoing the faulty work itself — in this case, the cost of recleaning the windows.

[67] “The *raison d’être* of insurance is coverage”: D. Boivin, *Insurance Law* (2nd ed. 2015), at p. 288. The purpose of builders’ risk policies in particular is to offer broad coverage, which benefits both insureds and insurers:

Urbanization and industrialization in the past 100 years have made the concept of an insurance policy covering all conceivable risks advantageous to both insureds and their insurers. The insured benefits from the extensive nature and scope of the coverage, and insurers benefit from the economies of managing and marketing a policy which, in terms of its scope, has certainty. For these reasons, the “all risk policy,” which creates a special type of coverage extending to many risks not customarily covered under other types of insurance policies, is attractive to both the insurance industry and consumers.

(E. A. Dolden, “All Risk and Builders’ Risk Policies: Emerging Trends” (1990-91), 2 *C.I.L.R.* 341, at pp. 341-42)

[68] This Court stated in *Commonwealth Construction Co. v. Imperial Oil Ltd.*, [1978] 1 S.C.R. 317, that the purpose of builders’ risk policies is to provide certainty and stability by granting coverage that reduces the need for private law litigation. The Court also recognized the complexity of industrial life and large-scale construction projects that involve many different individual contractors:

d’esprit. Elle évite que les projets de construction se retrouvent paralysés par des différends ou des actions en justice éventuelles sur la question de savoir qui, parmi les divers entrepreneurs participant aux travaux, est responsable du remplacement ou de la réparation découlant de la malfaçon. À mon avis, une interprétation de la clause d’exclusion qui sous-traits à la garantie uniquement le coût, en soi, de la nouvelle exécution du travail défectueux — en l’occurrence le coût du nouveau nettoyage des fenêtres — favorise la réalisation de l’objectif d’une garantie d’assurance large dans le contexte du droit de la construction.

[67] [TRADUCTION] « La raison d’être de l’assurance est de conférer une protection » (D. Boivin, *Insurance Law* (2^e éd. 2015), p. 288). L’objectif des polices d’assurance chantier en particulier est d’offrir une large garantie, qui bénéficie tant aux assurés qu’aux assureurs :

[TRADUCTION] L’urbanisation et l’industrialisation des 100 dernières années ont rendu l’idée d’une police d’assurance couvrant tous les risques concevables avantageuse pour les assurés comme pour leurs assureurs. Les assurés bénéficient de la grande étendue de la garantie, et les assureurs, des économies résultant de la gestion et de la commercialisation d’une police qui confère une certitude quant à sa portée. Pour ces raisons, la « police tous risques », qui crée un type de garantie s’étendant à de nombreux risques qui ne sont pas habituellement couverts par d’autres types de police d’assurance, est intéressante tant pour l’industrie des assurances que pour les consommateurs.

(E. A. Dolden, « All Risk and Builders’ Risk Policies : Emerging Trends » (1990-91), 2 *C.I.L.R.* 341, p. 341-342)

[68] Dans *Commonwealth Construction Co. c. Imperial Oil Ltd.*, [1978] 1 R.C.S. 317, notre Cour a indiqué que l’objectif des polices d’assurance chantier est de conférer certitude et stabilité en fournissant une garantie qui réduit le besoin de recourir à la justice, vu la complexité de la vie industrielle et des projets de construction à grande échelle qui font intervenir de nombreux entrepreneurs :

As already noted, the multi-peril policy under consideration is called . . . a course of construction insurance. In England, it is usually called a “Contractors’ all risks insurance” and in the United States, it is referred to as “Builders’ risk policy”. Whatever its label, its function is to provide to the owner the promise that the contractors will have the funds to rebuild in case of loss and to the contractors the protection against the crippling cost of starting afresh in such an event, the whole without resort to litigation in case of negligence by anyone connected with the construction, a risk accepted by the insurers at the outset. This purpose recognizes the importance of keeping to a minimum the difficulties that are bound to be created by the large number of participants in a major construction project, the complexity of which needs no demonstration. It also recognizes the realities of industrial life. [p. 328]

[69] Although such policies are said to insure against all risks, this description is not entirely accurate. As a general rule, insurance offers protection only for fortuitous contingent risk: *Progressive Homes*, at para. 45. Moreover, builders’ risk policies contain various exclusions, meaning indemnity is precluded in many circumstances of fortuitous loss: Dolden, at pp. 342-44.

[70] Despite these qualifiers, builders’ risk construction policies are the norm, if not a requirement, on construction sites in Canada. In purchasing these policies, “contractors believe indemnity will be available in the event of an accident or damage on the construction site arising as a result of a party’s carelessness or negligent acts”, which are *the most common* source of loss on construction sites: Dolden, at pp. 345-46. And, in selling these policies, insurers

are prepared to insure risks relating to problems caused by faulty . . . workmanship, but they are not prepared to insure the quality of . . . the workmanship in a construction project per se. The argument is that the contractor is responsible for doing [its] job right and the insurance company is not there to provide compensation for

Comme je l’ai déjà fait remarquer, la police d’assurance multi-risques en cause est appelée [. . .] une assurance de construction en cours. En Angleterre, ce type d’assurance s’appelle habituellement [TRADUCTION] « une assurance tout risque des entrepreneurs » et aux États-Unis, [TRADUCTION] « une assurance des risques des entrepreneurs en construction ». Quelle que soit son étiquette, son rôle est de fournir au propriétaire la promesse que les entrepreneurs auront les fonds nécessaires pour reconstruire en cas de sinistre et de protéger les entrepreneurs contre le prix désastreux d’un départ à zéro dans une telle éventualité; le tout se fait sans recourir à la justice en cas de négligence de la part d’une personne engagée dans la construction, risque accepté par les assureurs au départ. On reconnaît ainsi l’importance de maintenir au minimum les difficultés qui ne peuvent pas manquer de surgir, vu le grand nombre de participants à un ouvrage important, dont la complexité n’a pas besoin d’être démontrée. Son objet est également en accord avec la réalité de la vie industrielle. [p. 328-329]

[69] Même si l’on soutient que de telles polices protègent contre tous les risques, le terme « tous risques » n’est pas tout à fait exact. En règle générale, l’assurance offre une protection uniquement à l’égard du risque fortuit éventuel (*Progressive Homes*, par. 45). De plus, les polices d’assurance chantier contiennent diverses exclusions. Ainsi, il n’y a pas d’indemnité dans de nombreux cas de perte fortuite (Dolden, p. 342-344).

[70] Malgré les bémols susmentionnés, les polices d’assurance chantier sont la norme, voire l’exigence, sur les chantiers de construction au Canada. En achetant ces polices, [TRADUCTION] « les entrepreneurs s’attendent à être indemnisés en cas d’accident ou de dommages causés sur le chantier de construction à la suite de l’incurie ou de la négligence d’une partie », source de perte *la plus courante* dans les chantiers (Dolden, p. 345-346). Lorsqu’ils vendent ces polices, les assureurs sont quant à eux

[TRADUCTION] disposés à assurer les risques liés aux problèmes imputables à [. . .] une malfaçon, mais pas à assurer la qualité en tant que telle [. . .] du travail effectué sur un chantier. La prémisse est que l’entrepreneur a la responsabilité de bien faire son travail et la compagnie d’assurance n’a pas pour rôle de fournir une indemnité

inadequate performance by a contractor of the very work the contractor agreed to perform.

(Canadian College of Construction Lawyers, report of the Insurance & Surety Committee, “Covered for What?: Faulty Materials and Workmanship Coverage under Canadian Construction Insurance Policies” (2007), 1 *J.C.C.C.L.* 101, at p. 104)

Consequently, an interpretation of the Exclusion Clause that precludes from coverage any and all damage resulting from a contractor’s faulty workmanship merely because the damage results to that part of the project on which the contractor was working would, in my view, undermine the purpose behind builders’ risk policies. It would essentially deprive insureds of the coverage for which they contracted.

[71] In my opinion, therefore, the Insureds’ position on the meaning of the Exclusion Clause better reflects and promotes the purpose of builders’ risk policies. In the words of this Court in *Commonwealth Construction*, it keeps “to a minimum the difficulties . . . created by the large number of participants in a major construction project” and “recognizes the realities of industrial life” (p. 328). Their position finds additional support in some of this Court’s other comments in that case, at pp. 323-24, where it was emphasized that these policies exist to account for the fact that work of different contractors overlaps in a complex construction site and “there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole”.

[72] Further support for the Insureds’ position can be found in commentary contending that all-risk coverage under builders’ risk policies was intended to be broad, and the faulty workmanship exclusion narrow. For instance, Maurice G. Audet has discussed the original intent of the exclusion, reviewing the case law as well as annotated insurance policies and manuals: “Part II — Insurance” (2002), 12 *C.L.R.* (3d) 100; and “All Risks — a promise made or a promise broken?” (1983), 50:10

en cas de mauvaise exécution du travail même que l’entrepreneur s’est engagé à faire.

(Collège canadien des avocats en droit de la construction, rapport du Insurance & Surety Committee, « “Covered for What?” : Faulty Materials and Workmanship Coverage under Canadian Construction Insurance Policies » (2007), 1 *J.C.C.C.L.* 101, p. 104)

En conséquence, une interprétation de la clause d’exclusion qui soustrait à la garantie tous les dommages découlant de la malfaçon de l’entrepreneur simplement parce que les dommages sont causés à la partie du projet sur laquelle l’entrepreneur travaillait minerait, à mon avis, l’objet sous-jacent des polices d’assurance chantier. Une telle interprétation priverait pour ainsi dire les assurés de la garantie à laquelle ils ont souscrit.

[71] Je suis donc d’avis que la thèse des assurées sur le sens de la clause d’exclusion traduit et sert mieux l’objet des polices d’assurance chantier. Pour reprendre les mots employés par notre Cour dans *Commonwealth Construction*, une police d’assurance de cette nature permet de maintenir « au minimum les difficultés qui [. . .] surgi[ssent], vu le grand nombre de participants à un ouvrage important » et est « en accord avec la réalité de la vie industrielle » (p. 328-329). Cette thèse est également appuyée par certaines autres observations aux p. 323-324 de cet arrêt, où notre Cour a souligné que ces polices ont été conçues pour tenir compte du fait que le travail de différents entrepreneurs se chevauche dans un chantier complexe et de « la possibilité [omniprésente] qu’un homme de métier cause un dommage, aux biens d’un autre et à la construction dans son ensemble ».

[72] La thèse des assurées est aussi étayée par la doctrine selon laquelle la garantie d’assurance tous risques fournie par les polices d’assurance chantier se veut large, alors que l’exclusion pour malfaçon se veut étroite. À titre d’exemple, Maurice G. Audet a examiné l’objet initial de l’exclusion et, pour ce faire, il a passé en revue la jurisprudence ainsi que les manuels et polices d’assurance annotés (« Part II — Insurance » (2002), 12 *C.L.R.* (3d) 100; « All Risks — a promise made or a promise broken? »

Canadian Underwriter 34, at pp. 40-42 and 93-96. He concludes that the faulty workmanship, materials and design exclusion was meant to be narrow, to exclude only the cost of replacing the fault or defect but to provide coverage for damage caused by it.

[73] Other authors have remarked that the trend in the common law jurisprudence interpreting builders' risk policies has been to widen the scope of the above-mentioned exclusion or narrow the ambit of the exception to the exclusion. See e.g. Dolden, at pp. 350 and 358; R. B. Reynolds and S. C. Vogel, *A Guide to Canadian Construction Insurance Law* (2013), at pp. 140 and 150; and P.-S. Poitras, "L'assurance et l'industrie de la construction", in Service de la formation permanente du Barreau du Québec, vol. 147, *Développements récents en droit des assurances* (2001), 181, at p. 195. I would not go so far as to question the jurisprudence. Consistency of interpretation is important, and these judicial interpretations have undoubtedly shaped parties' reasonable expectations with respect to builders' risk policies and their exclusion clauses. I simply note that the interpretation of the Exclusion Clause advanced by the Insureds in these appeals best reflects the original intent of such exclusion clauses, as compared to the interpretation advanced by the Insurers.

[74] It should be mentioned that the service contract between Station Lands and Bristol has no bearing on the reasonable expectations of the parties to the Policy with respect to the meaning of the Exclusion Clause and whether the damage to the windows would be covered. The Insurers and Ledcor were not parties to that service contract, and it was entered into on June 16, 2011, almost three years after the Policy's effective date of June 27, 2008. At most, the service contract could shed light on Station Lands' understanding of the Policy and the Exclusion Clause, as it was a party to both. Still, the service contract was itself based on a slightly modified standard form contract published by the Canadian Construction Association.

(1983), 50:10 *Canadian Underwriter* 34, p. 40-42 et 93-96). Il conclut que l'exclusion visant la mal-façon, les matériaux défectueux et la conception défailante est censée être étroite, pour n'exclure que le coût de correction de la faute ou du vice mais pour fournir une garantie d'assurance pour les dommages causés par cette faute ou ce vice.

[73] D'autres auteurs ont fait remarquer que la tendance observée dans la jurisprudence de common law sur l'interprétation des polices d'assurance chantier était d'élargir la portée de l'exclusion mentionnée ci-dessus ou de restreindre la portée de l'exception à l'exclusion. Voir p. ex. Dolden, p. 350 et 358; R. B. Reynolds et S. C. Vogel, *A Guide to Canadian Construction Insurance Law* (2013), p. 140 et 150; P.-S. Poitras, « L'assurance et l'industrie de la construction », dans Service de la formation permanente du Barreau du Québec, vol. 147, *Développements récents en droit des assurances* (2001), 181, p. 195. Je n'irais pas jusqu'à remettre en question la jurisprudence. Il est important de maintenir une interprétation constante, et ces interprétations des tribunaux ont sans aucun doute nourri les attentes raisonnables des parties quant aux polices d'assurance chantier et à leurs clauses d'exclusion. Je tiens simplement à ajouter que l'interprétation donnée à la clause d'exclusion par les assurées en l'espèce traduit mieux l'objet initial de ces clauses que l'interprétation proposée par les assureurs.

[74] Il convient de mentionner que le contrat de service conclu entre Station Lands et Bristol n'a aucune incidence sur les attentes raisonnables des parties à la police en ce qui concerne le sens de la clause d'exclusion et la question de savoir si les dommages causés aux fenêtres seraient couverts. Les assureurs et Ledcor n'étaient pas parties à ce contrat de service signé le 16 juin 2011, soit presque trois ans après la prise d'effet de la police, le 27 juin 2008. Le contrat de service peut tout au plus nous éclairer sur la manière dont Station Lands concevait la police et la clause d'exclusion, puisqu'elle était partie tant au contrat de service qu'à la police. Néanmoins, le contrat de service était lui-même fondé sur un contrat type légèrement modifié publié par l'Association canadienne de la construction.

[75] Despite the service contract's irrelevance to the parties' reasonable expectations, at various points in its reasons the Court of Appeal seemed to use it to bolster its interpretation of the Exclusion Clause. For instance, at para. 35, the court determined it was artificial to draw the dividing line between the "cost of making good faulty workmanship" and "resulting damage" as falling between Bristol's work and the work of other contractors, in part because under the service contract Bristol was responsible for repairing damage it did to the work of other contractors. Further, at para. 49, the court highlighted that an interpretation of "making good faulty workmanship" that included redoing the work *and* fixing the damage directly caused by the work was consistent with the service contract, because, again, the contract required Bristol to repair damage it did to the work of other contractors.

[76] Even if the service contract were relevant to the reasonable expectations of the parties to the Policy, there are two other reasons why the Court of Appeal's reliance on it — to the extent that there was such reliance — was problematic. First, a contractor's or subcontractor's stipulated responsibility under its work contract to repair or pay for certain damage does not necessarily preclude coverage under a builders' risk policy, as recognized by this Court in *Commonwealth Construction*, at p. 330. For instance, insurance policies often have deductible amounts. In fact, clause 5 of the Policy provides that the Insurers' liability is limited to the amount by which the loss or damage exceeds the deductible amount, and clause GC 11.1.6 of the service contract provides that Bristol shall be responsible for deductible amounts under the various insurance policies except where such amounts may be excluded from its responsibility by other terms of the contract, including those adverted to by the Court of Appeal. The stipulation in the service contract could thus serve to confirm responsibility for that deductible amount, even where loss or damage is covered under the Policy. In other words, the contract stipulation does not necessarily suggest the parties expected

[75] Malgré l'absence de pertinence du contrat de service en ce qui a trait aux attentes raisonnables des parties, la Cour d'appel semble y référer à divers endroits dans ses motifs pour appuyer son interprétation de la clause d'exclusion. À titre d'exemple, au par. 35, la cour a conclu qu'il était factice de tracer une ligne de démarcation entre les [TRADUCTION] « frais engagés pour remédier à une malfaçon » et les « dommages en découlant » pour distinguer les travaux accomplis par Bristol des travaux des autres entrepreneurs, étant donné, notamment, que Bristol devait réparer les dommages qu'elle avait causés aux travaux des autres entrepreneurs aux termes du contrat de service. De plus, au par. 49, la cour a souligné qu'une interprétation des mots « remédier à une malfaçon » selon laquelle ils visent la nouvelle exécution du travail *et* la réparation des dommages directement causés par les travaux était compatible avec le contrat de service parce que, là encore, le contrat obligeait Bristol à réparer les dommages qu'elle avait causés aux travaux d'autres entrepreneurs.

[76] Même à supposer que le contrat de service soit pertinent relativement aux attentes raisonnables des parties à la police, il existe deux autres raisons pour lesquelles le choix de la Cour d'appel de s'appuyer sur ce document — dans la mesure où elle s'est effectivement appuyée sur celui-ci — posait problème. Premièrement, la responsabilité de réparer ou de payer certains dommages qui est imposée à l'entrepreneur ou au sous-traitant par son contrat de travail n'a pas nécessairement pour effet d'écarter la protection d'une police d'assurance chantier, comme l'a reconnu notre Cour dans *Commonwealth Construction*, p. 330. À titre d'exemple, les polices d'assurance ont souvent des franchises. En effet, la clause 5 de la police prévoit que la responsabilité des assureurs se limite au montant de la perte ou du dommage qui excède la franchise, et la clause GC 11.1.6 du contrat de service prévoit que Bristol est responsable des franchises prévues dans les diverses polices d'assurance, sauf indication contraire dans le contrat, notamment dans les situations mentionnées par la Cour d'appel. La stipulation du contrat de service pourrait donc servir à confirmer la responsabilité pour la franchise, même lorsque la perte ou les dommages sont couverts par la police.

that Bristol would ultimately bear the entire cost of damages it caused to the work of other contractors.

[77] Second, even if the stipulation did indicate such an expectation, the Court of Appeal’s new physical and systemic connectedness test does not reflect it. Under the court’s new test, and using its language, certain unforeseeable, collateral damage to areas on which Bristol was not working would likely be covered under the resulting damage exception in the Exclusion Clause. Yet Bristol would also be responsible for this damage under the service contract, which makes no such distinction with respect to the foreseeability or remoteness of the damage caused. In effect, there would be dual responsibility for payment, under both the Policy and the service contract, even though, as discussed above, the Court of Appeal stated it would be artificial to draw the dividing line where such dual responsibility would result.

(c) *No Unrealistic Results*

[78] In discussing the interpretation of insurance policies in *Consolidated-Bathurst*, at pp. 901-2, Estey J. stressed the need to avoid interpretations that would bring about unrealistic results or results that the parties would not have contemplated in the commercial atmosphere in which they sold or purchased the policy. The interpretation should respect the intentions of the parties and “their objective in entering into the commercial transaction in the first place”, as well as “promot[e] a sensible commercial result” (p. 901). See also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 62, where this Court restated the importance of commercial reality, albeit in a different context. Interpreting the Exclusion Clause to preclude from coverage only the cost of redoing the faulty work aligns with commercial reality and leads to realistic and sensible results, given both the

Autrement dit, la stipulation ne donne pas nécessairement à penser que les parties s’attendaient à ce que Bristol supporte en fin de compte le coût total des dommages qu’elle a causés aux travaux des autres entrepreneurs.

[77] Deuxièmement, même si la stipulation exprimait effectivement une telle attente, le nouveau critère de connexité matérielle et systémique de la Cour d’appel ne la traduit pas. Pour reprendre les termes de la cour, selon ce nouveau critère, certains dommages imprévisibles et indirects causés à des zones où Bristol ne travaillait pas seraient probablement visés par l’exception relative aux « dommages [. . .] découlant » de la malfaçon qui figure à la clause d’exclusion, mais Bristol serait aussi responsable de ces dommages aux termes du contrat de service, qui ne fait pas de telle distinction sur l’imprévisibilité ou sur le caractère éloigné des dommages causés. En effet, il y aurait une double responsabilité pour le paiement — tant aux termes de la police que du contrat de service — même si, comme nous l’avons vu, la Cour d’appel a affirmé qu’il serait factice de tracer une ligne de démarcation lorsqu’une telle double responsabilité pourrait en découler.

c) *Aucun résultat irréaliste*

[78] Dans son analyse concernant l’interprétation des polices d’assurance aux p. 901-902 de *Consolidated Bathurst*, le juge Estey a insisté sur le besoin d’éviter les interprétations qui pourraient entraîner un résultat irréaliste ou un résultat que les parties n’auraient pas envisagé dans le climat commercial dans lequel elles ont vendu ou contracté la police d’assurance. L’interprétation devrait respecter les intentions des parties et le « but pour lequel elles ont à l’origine conclu une opération commerciale » et « favorise[r] un résultat commercial raisonnable » (p. 901). Voir aussi *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, par. 62, où notre Cour a réaffirmé l’importance de la réalité commerciale, quoique dans un contexte différent. Interpréter la clause d’exclusion pour soustraire à la garantie seulement le coût de la nouvelle exécution du travail défectueux correspond à

purpose underlying builders' risk policies and their spreading of risk on construction projects.

[79] As already discussed above, the interpretation advanced by the Insureds in these appeals best fulfills the broad coverage objective underlying builders' risk policies. These policies are commonplace on construction projects, where multiple contractors work side by side and where damage to their work or the project as a whole commonly arises from faults or defects in workmanship, materials or design. In this commercial reality, a broad scope of coverage creates certainty and economies for both insureds and insurers. In my opinion, it is commercially sensible in this context for only the cost of redoing a contractor's faulty work to be excluded under the faulty workmanship exclusion. Such an interpretation strikes the right balance between the two undesirable extremes described by Estey J. in *Consolidated-Bathurst*, at pp. 901-2: "... the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract". Under the Policy, the Insurers did not undertake to cover the "cost of making good faulty workmanship", but they did promise to cover "physical damage [that] results" from that "faulty workmanship". It can hardly be said that recovery for the damages to the Tower's windows in the circumstances of this case could not have been sensibly sought or anticipated when the Policy was purchased.

[80] Furthermore, such an interpretation does not, in my view, transform the insurance policy into a construction warranty. It does not inappropriately spread risk, nor would it allow or encourage contractors to perform their work improperly or negligently. Importantly, Bristol is precluded from receiving initial payment for its faulty work and

la réalité commerciale et mène à un résultat réaliste et sensé, compte tenu de l'objet qui sous-tend les polices d'assurance chantier et de leur répartition du risque pour les projets de construction.

[79] Comme nous l'avons déjà vu, l'interprétation préconisée par les assurés en l'espèce répond le mieux à l'objectif de garantie d'assurance large qui sous-tend les polices d'assurance chantier. Celles-ci sont monnaie courante dans les projets de construction, où de multiples entrepreneurs travaillent côte à côte et où les dommages causés à leurs travaux ou à l'ensemble du projet découlent généralement d'une malfaçon, de matériaux défectueux ou d'une conception défaillante. Vu cette réalité commerciale, une garantie d'assurance étendue crée une certitude et entraîne des économies tant pour les assurés que pour les assureurs. J'estime que, dans ce contexte, il est sensé sur le plan commercial que seuls soient exclus au titre de l'exclusion relative à la malfaçon les frais engagés pour remédier au travail mal exécuté par l'entrepreneur. Une telle interprétation établit un juste équilibre entre les deux situations extrêmes non souhaitées dont parle le juge Estey dans *Consolidated Bathurst*, p. 901-902 : « ... les cours devraient être réticentes à appuyer une interprétation qui permettrait soit à l'assureur de toucher une prime sans risque soit à l'assuré d'obtenir une indemnité que l'on n'a pas pu raisonnablement rechercher ni escompter au moment du contrat ». Selon la police, les assureurs ne se sont pas engagés à couvrir « les frais engagés pour remédier à une malfaçon », mais ils ont promis de couvrir les « dommages matériels [qui] découl[ent] » de cette « malfaçon ». On peut difficilement dire que, dans la présente affaire, une indemnisation pour les dommages causés aux fenêtres de la Tour n'aurait pas pu raisonnablement être recherchée ou escomptée lors de l'achat de la police.

[80] En outre, pareille interprétation ne transforme pas à mon sens une police d'assurance en une garantie de construction. Elle ne répartit pas le risque de façon inappropriée ni n'encourage les entrepreneurs à mal exécuter leur travail ou à le faire de manière négligente. Fait important, Bristol ne peut recevoir le paiement initial pour son travail

then receiving further additional payment to repair or replace its faulty work. See C. Brown, *Insurance Law in Canada* (loose-leaf), at p. 20-31; and *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2d) 88 (S.C.). The cost of redoing faulty or improper work is excluded from coverage. The cost can be sizeable; in the instant appeals, for example, Bristol's contract price for cleaning the windows was \$45,000.

[81] The Insurers argue that accepting the Insureds' position would tether the application of the resulting damage exception to how the work is divided among various contractors on a project, a result which they say would not make commercial sense. This argument echoes the Court of Appeal's concerns at para. 40 of its reasons:

This approach might create an incentive to artificially divide up the work as finely as possible, as then the maximum amount of damage would be covered by insurance. On the other hand, it would be dangerous for the owner to hire a single contractor to do all the work, as then nothing would be covered.

[82] With respect, I do not find this persuasive. It is premised on a theoretical concern that does not reflect the commercial reality of construction sites on the ground. In my view, it is unreasonable to expect that the owner of a property or the general contractor on a construction site will divide up work exclusively on the basis of potential coverage under their insurance policy. Many other considerations, such as costs, subcontractor expertise and the risk of delay, will likely be more relevant in deciding how to allocate work.

[83] I also note that interpreting the Exclusion Clause as precluding from coverage only the cost of redoing the faulty work breaks no new ground in the world of insurance, as it mirrors the approach courts have adopted when construing similar exclusions to comprehensive general liability insurance policies. These policies cover the risk that the insured's

mal exécuté, puis recevoir un paiement additionnel pour réparer ou remplacer ce travail. Voir C. Brown, *Insurance Law in Canada* (feuilles mobiles), p. 20-31; *Privest Properties Ltd. c. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2d) 88 (C.S.). Le coût de la nouvelle exécution du travail défectueux ou inadéquat n'est pas couvert. Ce coût peut être considérable; dans les présents pourvois, par exemple, le prix du contrat conclu par Bristol pour le nettoyage des fenêtres s'élevait à 45 000 \$.

[81] Les assureurs font valoir que si l'on retient la thèse des assurés, cela limiterait l'application de l'exception relative aux dommages découlant de la malfaçon à la manière dont le travail est réparti entre les divers entrepreneurs participant à un projet, un résultat qui n'aurait selon eux aucun sens sur le plan commercial. Cet argument fait écho aux préoccupations exprimées par la Cour d'appel au par. 40 de ses motifs :

[TRADUCTION] Cette interprétation pourrait inciter à diviser artificiellement au maximum le travail, pour que le montant maximal de dommages soit couvert par l'assurance. En revanche, il serait dangereux pour le propriétaire d'engager un seul entrepreneur pour effectuer tout le travail, parce que rien ne serait alors couvert.

[82] Avec égards, je ne trouve pas cet argument convaincant. Il a pour prémisse une préoccupation théorique qui ne correspond pas à la réalité commerciale des chantiers de construction. À mon avis, il est déraisonnable de s'attendre à ce que le propriétaire d'un bien ou l'entrepreneur général sur un chantier divisent le travail exclusivement en fonction de la garantie d'assurance éventuelle de leur police d'assurance. Bien d'autres considérations, comme les frais, l'expertise des sous-traitants et le risque de retard, sont probablement plus pertinentes pour décider de la répartition du travail.

[83] Je signale également que considérer la clause d'exclusion comme soustrayant à la garantie d'assurance uniquement le coût de la nouvelle exécution du travail défectueux n'a rien de nouveau dans le monde des assurances, puisque cela reflète l'interprétation retenue par les tribunaux à l'égard d'exclusions similaires dans des polices complètes

work might cause bodily injury or property damage. However, they generally contain a “work product” or “business risk” exception, which excludes from coverage the cost of redoing the insured’s work: “Covered for What?”, at p. 122.

(d) *Ensuring Consistent Interpretation*

[84] The purpose of builders’ risk policies and the need to prevent unrealistic results point to an interpretation of the Exclusion Clause that would exclude from coverage only the cost of redoing the cleaning work. Such an interpretation of the Exclusion Clause is also consistent with case law. Though the Court of Appeal stated, at para. 46 of its reasons, that “numerous cases . . . hold that the exclusion is not limited to the cost of re-doing the faulty work, but also extends to the cost of repairing the thing actually being worked on”, with respect, I am of the view that many of these faulty workmanship and faulty design decisions can be read as limiting the faulty workmanship exclusion to only the cost of redoing the faulty work. As these cases are highly fact-specific, the results that courts reach will be largely dictated by the particular circumstances of each case. More specifically, whether certain damage falls within the resulting damage exception to the faulty workmanship exclusion will greatly depend on the scope of the contractual obligation pursuant to which the faulty workmanship was carried out.

[85] In the appeals before us, Bristol’s obligation under its service contract with Station Lands was limited to cleaning the Tower’s windows after they had been properly installed. Redoing Bristol’s faulty work did not require Bristol to install windows in good condition. As such, the cost of the windows’ replacement represents “resulting damage” and is covered under the Policy. Conversely, if Bristol had been responsible for the windows’ installation, and the windows had been damaged in the course of the installation process, the damage done to the windows

d’assurance responsabilité civile générale. Ces polices couvrent le risque que le travail de l’assuré cause des lésions corporelles ou endommagement des biens. Toutefois, elles contiennent généralement une exception liée au [TRADUCTION] « fruit du travail » ou au « risque commercial », qui soustrait à la garantie d’assurance les frais engagés par l’assuré pour refaire son travail (« Covered for What? », p. 122).

d) *Assurer une interprétation constante*

[84] L’objectif des polices d’assurance chantier et la nécessité d’éviter les résultats irréalistes mènent à une interprétation de la clause d’exclusion qui soustrairait à la garantie uniquement le coût du nouveau nettoyage. Une telle interprétation de la clause d’exclusion est aussi conforme à la jurisprudence. Bien que la Cour d’appel ait dit, au par. 46 de ses motifs, qu’il [TRADUCTION] « a été jugé dans de nombreuses décisions que l’exclusion ne se limite pas au coût de la nouvelle exécution du travail défectueux et s’étend aussi au coût de la réparation de l’ouvrage en cours d’exécution », à mon humble avis, un grand nombre de ces décisions en matière de malfaçon et de conception défectueuse peuvent être interprétées comme limitant l’exclusion relative à la malfaçon au coût de la nouvelle exécution du travail défectueux. Comme ces décisions se fondent en grande partie sur les faits en cause, le résultat auquel parviendront les tribunaux sera largement dicté par les circonstances de chaque affaire. Plus précisément, la question de savoir si certains dommages relèvent de l’exception relative aux dommages découlant de la malfaçon dépendra fortement de la portée de l’obligation contractuelle dont l’acquiescement a débouché sur la malfaçon.

[85] Dans les pourvois dont nous sommes saisis, l’obligation imposée à Bristol par le contrat de service qu’elle a conclu avec Station Lands ne consistait qu’à nettoyer les fenêtres de la Tour après que celles-ci eurent été correctement installées. La nouvelle exécution du travail défectueux de Bristol n’obligeait pas cette dernière à installer des fenêtres en bon état. En conséquence, le coût du remplacement des fenêtres représente un « dommage [. . .] découlant » de la malfaçon qui est couvert par la police. À l’inverse, si Bristol avait été responsable

in such circumstances would not have constituted “resulting damage”. Indeed, redoing the faulty work would have required installing windows in good condition, as per Bristol’s (hypothetical) contractual obligation.

[86] I will now review some of the faulty workmanship cases cited by the Court of Appeal to illustrate how an interpretation that limits the scope of the faulty workmanship exclusion to the cost of redoing the faulty work is consistent with the jurisprudence.

[87] In *Sayers & Associates Ltd. v. Insurance Corp. of Ireland Ltd.* (1981), 126 D.L.R. (3d) 681 (Ont. C.A.), an electrical subcontractor was to install two bus ducts in connection with the construction of an office building in Toronto. Because of the subcontractor’s failure to take adequate protective measures, which constituted faulty workmanship, rain water that had come into contact with concrete penetrated the ducts, which in turn caused a malfunction. The subcontractor argued that the damage to the equipment by water was “damage resulting from . . . faulty . . . workmanship” so as to come within the exception to the exclusion. The Ontario Court of Appeal disagreed, writing as follows, at pp. 684-85:

In the present case the “fault” that underlay the “faulty workmanship” was the failure of the appellant to take protective measures; but by the terms of its contract its “work” was to install the electrical equipment and to keep it dry and clean until the contract was completed. It would be taking too narrow a view of the case to isolate one part of the work from the total contractual obligation. The damage to the equipment was the product of the failure to take protective measures, and so that fault rendered the appellant’s performance of its contractual obligations “faulty workmanship”. The damage to the ducts and the switching gear was not, therefore, “damage resulting from such faulty . . . workmanship . . .”, so as to come within the exception to the exclusion. [Emphasis added.]

de l’installation des fenêtres, et que celles-ci avaient été endommagées lors de leur installation, les dommages causés aux fenêtres dans de telles circonstances n’auraient pas constitué des « dommages [. . .] découlant » de la malfaçon. En fait, la nouvelle exécution du travail défectueux aurait nécessité l’installation de fenêtres en bon état conformément à l’obligation contractuelle (hypothétique) de Bristol.

[86] J’examinerai maintenant certaines des décisions en matière de malfaçon citées par la Cour d’appel pour illustrer comment une interprétation qui limite l’exclusion pour malfaçon au coût de la nouvelle exécution du travail défectueux est conforme à la jurisprudence.

[87] Dans *Sayers & Associates Ltd. c. Insurance Corp. of Ireland Ltd.* (1981), 126 D.L.R. (3d) 681 (C.A. Ont.), un sous-traitant électricien devait installer deux barres sous gaine lors de la construction d’un immeuble à bureaux situé à Toronto. Comme le sous-traitant n’avait pas pris de mesures de protection adéquates, ce qui constituait une malfaçon, de l’eau de pluie qui est entrée en contact avec le béton a pénétré dans les barres, ce qui a causé un mauvais fonctionnement du système. Le sous-traitant a fait valoir que les dommages causés au matériel par l’eau étaient des [TRADUCTION] « dommages découlant d’une malfaçon » et relevaient par le fait même de l’exception à l’exclusion. La Cour d’appel de l’Ontario ne partageait pas cet avis et elle s’est exprimée ainsi aux p. 684-685 :

[TRADUCTION] En l’espèce, la « faute » qui sous-tend la « malfaçon » était l’omission de la part de l’appelante de prendre des mesures de protection; or, il était stipulé dans son contrat que son « travail » consistait à installer du matériel électrique et à le garder sec et propre jusqu’à la fin du contrat. On interpréterait trop étroitement le contrat si on isolait une partie du travail de l’ensemble de l’obligation contractuelle. Les dommages causés au matériel résultaient de l’absence de mesures de protection et, de ce fait, l’exécution par l’appelante de ses obligations contractuelles constituait une « malfaçon ». Les dommages causés aux conduites et aux appareils de commutation électrique ne constituaient donc pas des « dommages découlant de cette malfaçon » visés par l’exception à l’exclusion. [Je souligne.]

The court's statement is clear: since the subcontractor was contractually required to install the electrical equipment and keep it dry, and its failure to take adequate protective measures resulted in it failing to comply with said contractual obligations, the damage to the equipment could not be considered resulting damage.

[88] In *Ontario Hydro v. Royal Insurance*, [1981] O.J. No. 215 (QL) (H.C.J.), a contractor was responsible for designing a boiler system, acquiring the material and supervising the commissioning of the boiler. After installation, as part of the testing of the boiler system, an acid wash of the superheater and reheater was carried out. But the acid wash was done improperly, ruining the reheater and resulting in extensive cracking of the tubing in the boilers. The contractor argued that the faulty workmanship exclusion served to exclude from coverage only the cost of redoing the wash, and not the cost of replacing the tubing, which it said constituted "resultant damage". The court disagreed, holding that the "cost of making good the improper workmanship is the cost of replacing the tubing which was the object of [the] procedure": para. 37. In my view, the court reached this conclusion because replacing the tubing was necessary for the contractor to fulfill its contractual obligation to design the boiler system, to acquire the material and to supervise the commissioning of the boiler. Thus, the cost of redoing the work encompassed the cost of replacing the tubing.

[89] In *Bird Construction Co. v. United States Fire Insurance Co.* (1985), 24 D.L.R. (4th) 104 (Sask. C.A.), the collapse of a truss, caused by the subcontractor's faulty workmanship in failing to properly erect it, resulted in the subcontractor failing to comply with its contractual obligation to fabricate and erect a truss in good condition. The cost of repairing the truss formed part of the cost of redoing the work, and thus did not fall within the resulting damage exception. The same reading can also be made of *Greene v. Canadian General Insurance Co.* (1995), 133 Nfld. & P.E.I.R. 151 (Nfld. C.A.).

L'énoncé de la cour est clair : comme le sous-traitant était contractuellement tenu d'installer le matériel électrique et de le garder au sec, et que son omission de prendre des mesures de protection adéquates constituait un non-respect de ces obligations contractuelles, les dommages causés au matériel ne pouvaient pas être considérés comme des dommages découlant de la malfaçon.

[88] Dans *Ontario Hydro c. Royal Insurance*, [1981] O.J. No. 215 (QL) (H.C.J.), un entrepreneur avait la responsabilité de concevoir un système de chaudières, d'acheter le matériel et de superviser le démarrage du système. Lors des essais qui ont suivi l'installation, il a procédé au lavage à l'acide du surchauffeur et du resurchauffeur, mais ce lavage a été mal effectué et a endommagé le resurchauffeur, ce qui a entraîné une fissuration importante de la tuyauterie des chaudières. L'entrepreneur a fait valoir que l'exclusion relative à la malfaçon servait à soustraire à la garantie uniquement le coût d'un nouveau lavage, et non le coût de remplacement de la tuyauterie qui, à ses dires, constituait des « dommages [. . .] découlant » de la malfaçon. La cour n'était pas du même avis, jugeant que les [TRADUCTION] « frais engagés pour remédier au travail mal exécuté sont le coût de remplacement de la tuyauterie touchée par la procédure » (par. 37). À mon avis, la cour est parvenue à cette conclusion parce que le remplacement de la tuyauterie était nécessaire pour que l'entrepreneur remplisse son obligation contractuelle de concevoir le système de chaudières, d'acheter le matériel et de superviser le démarrage du système. En conséquence, le coût de la nouvelle exécution du travail comprenait le coût de remplacement de la tuyauterie.

[89] Dans *Bird Construction Co. c. United States Fire Insurance Co.* (1985), 24 D.L.R. (4th) 104 (C.A. Sask.), vu l'effondrement d'une ferme imputable à sa mauvaise installation par le sous-traitant, ce dernier n'a pas respecté son obligation contractuelle de fabriquer et d'installer une ferme en bon état. Le coût de réparation de la ferme faisait partie du coût de la nouvelle exécution du travail et ne relevait donc pas de l'exception relative aux dommages découlant de la malfaçon. L'arrêt *Greene c. Canadian General Insurance Co.* (1995), 133 Nfld. & P.E.I.R. 151 (C.A. T.-N.), va dans le même sens.

[90] Though this interpretation of the resulting damage exception to the faulty workmanship exclusion may, at first glance, seem to run contrary to the interpretation generally given to it by courts in faulty design cases, it is actually consistent with those cases.

[91] It is true that, in faulty design cases, courts generally interpret the resulting damage exception as encompassing damage done to something other than the property which is faultily designed. Such language may thus appear to be more closely in line with the physical or systemic connectedness test established by the Court of Appeal, as exclusion from coverage may appear to depend on whether the damage has been done to the very thing being worked on or to something else. Only in the latter case would the loss qualify as “resulting damage”. For instance, in *British Columbia v. Royal Insurance Co. of Canada* (1991), 7 B.C.A.C. 172, the British Columbia Court of Appeal wrote that “[d]amage for faulty or improper design encompasses all the damage to the very thing that was designed faultily or improperly. Resultant damage is damage to some part of the insured property other than the part of the property that was faultily designed”: para. 11; see also *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada* (2003), 50 C.C.L.I. (3d) 107 (Ont. S.C.J.), at para. 204.

[92] These decisions, however, are not inconsistent with holding that the faulty workmanship exclusion precludes from coverage only the cost of redoing the faulty work. Indeed, in faulty design cases, a contractor is obligated to design a given item, with the design being integral to the whole of that item. Thus, the cost of repairing the damages caused to that item will be included within the cost of redoing the faulty work, and the resulting damage exception will necessarily apply to damages caused to items other than the item being designed. As held in *Simcoe & Erie General Insurance Co.*

[90] Bien que cette interprétation de l’exception à l’exclusion fondée sur la malfaçon qui touche les dommages en découlant puisse, de prime abord, sembler contraire à l’interprétation généralement retenue par les tribunaux dans les affaires de vice de conception, elle est en fait conforme aux conclusions tirées dans ces décisions.

[91] Il est vrai que, dans les affaires de vice de conception, les tribunaux considèrent généralement que l’exception relative aux dommages découlant de la malfaçon englobe les dommages causés à un autre bien que celui entaché d’un vice de conception, ce qui peut donc sembler cadrer davantage avec le critère de connexité matérielle ou systémique établi par la Cour d’appel. En effet, l’exclusion de la garantie d’assurance peut paraître tributaire de la question de savoir si les dommages ont été causés à l’ouvrage même sur lequel on travaillait ou à un autre. Ce n’est que dans la deuxième situation que la perte constitue un « dommage [. . .] découlant » de la malfaçon. À titre d’exemple, dans *British Columbia c. Royal Insurance Co. of Canada* (1991), 7 B.C.A.C. 172, la Cour d’appel de la Colombie-Britannique a écrit que [TRADUCTION] « [l]es dommages attribuables à une conception défective ou inadéquate comprennent tous les dommages causés à l’élément même entaché du vice de conception. Les dommages en découlant sont les dommages causés à une autre partie du bien assuré que la partie du bien dont la conception était défective » (par. 11; voir aussi *Algonquin Power (Long Sault) Partnership c. Chubb Insurance Co. of Canada* (2003), 50 C.C.L.I. (3d) 107 (C.S.J. Ont.), par. 204).

[92] Ces décisions ne sont toutefois pas incompatibles avec la conclusion selon laquelle l’exclusion relative à la malfaçon ne soustrait à la garantie que le coût de la nouvelle exécution du travail défectueux. En fait, dans les cas de vice de conception, l’entrepreneur est tenu de concevoir un article donné et la conception fait partie intégrante de l’ensemble de cet article. Ainsi, le coût de réparation de l’article endommagé sera inclus dans le coût de la nouvelle exécution du travail défectueux, et l’exception relative aux dommages en découlant s’appliquera nécessairement aux dommages causés aux autres

v. *Royal Insurance Co. of Canada* (1982), 36 A.R. 553 (Q.B.), at para. 34:

. . . the total contractual obligation of [the engineer] was to design and supervise the construction of a bridge required by the [city]. The damage to the structure that [the engineer] first designed was the product of its failure to properly design a bridge, which in turn prevented it from properly performing its contractual obligations. It follows therefore that the contract was not performed until a stable bridge was constructed. [Emphasis added.]

[93] In any event, I disagree with the Insurers' contention that the case law systematically supports one interpretation of the faulty workmanship exclusion. Though the jurisprudence addressing the resultant damage exception has generally interpreted it narrowly (S. C. Vogel, "Recent Developments in Construction Insurance Law", in *Review of Construction Law: Recent Developments* (2012), 169, at p. 184), courts have not always been consistent in construing the exception, and parties cannot therefore adequately predict what sort of damage will or will not be caught by the exclusion: L. Ricchetti and T. J. Murphy, *Construction Law in Canada* (2010); "Covered for What?", at p. 106; and Poitras, at p. 195. Even the Court of Appeal acknowledged the inconsistency in the jurisprudence at para. 47 of its reasons, citing as an example *Foundation Co. of Canada v. Aetna Casualty Co. of Canada*, [1976] I.L.R. ¶ 1-757 (Alta. S.C.).

[94] Additionally, in *Commercial union cie d'assurance du Canada v. Pentagon Construction Canada Inc.*, [1989] R.J.Q. 1399 (C.A.), the Quebec Court of Appeal broadened the resultant damage exception and, thus, narrowed the faulty workmanship exclusion, commenting that damage to the thing that the faulty contractor is responsible for building is covered. Though these comments were made in *obiter*, as the court had already concluded that

biens que celui en cours de conception. Comme il a été décidé dans *Simcoe & Erie General Insurance Co. c. Royal Insurance Co. of Canada* (1982), 36 A.R. 553 (B.R.), par. 34 :

[TRADUCTION] . . . l'intégralité de l'obligation contractuelle de [l'ingénieur] consistait à concevoir un pont commandé par la [ville] et à en superviser la construction. Les dommages causés à la structure conçue au départ par [l'ingénieur] étaient attribuables à son omission de bien concevoir le pont, dommages qui ont à leur tour empêché l'entreprise de s'acquitter comme il se doit de ses obligations contractuelles. En conséquence, le contrat n'a pas été exécuté tant qu'un pont stable n'a pas été érigé. [Je souligne.]

[93] Quoi qu'il en soit, je ne suis pas d'accord avec l'affirmation des assureurs selon laquelle la jurisprudence appuie systématiquement une seule interprétation de l'exclusion relative à la malfaçon. Bien que, dans la plupart des précédents portant sur l'exception relative aux dommages découlant d'une malfaçon, les tribunaux aient interprété cette exception de façon étroite (S. C. Vogel, « Recent Developments in Construction Insurance Law », dans *Review of Construction Law : Recent Developments* (2012), 169, p. 184), ils n'ont pas toujours interprété l'exception de la même manière, et les parties ne peuvent pas en conséquence prédire adéquatement les dommages qui relèveront ou non de l'exclusion (L. Ricchetti et T. J. Murphy, *Construction Law in Canada* (2010); « Covered for What? », p. 106; Poitras, p. 195). Même la Cour d'appel a reconnu le manque de constance de la jurisprudence au par. 47 de ses motifs, citant à titre d'exemple *Foundation Co. of Canada c. Aetna Casualty Co. of Canada*, [1976] I.L.R. ¶ 1-757 (C.S. Alb.).

[94] De plus, dans *Commercial union cie d'assurance du Canada c. Pentagon Construction Canada Inc.*, [1989] R.J.Q. 1399 (C.A.), la Cour d'appel du Québec a étendu l'exception relative aux dommages découlant d'une malfaçon et restreint de ce fait l'exclusion fondée sur la malfaçon, en faisant observer que les dommages causés à l'élément que l'entrepreneur fautif doit construire sont couverts. Même s'il s'agissait d'une remarque incidente, puisque la

the workmanship at issue was not faulty, they help demonstrate that the case law on the interpretation of the faulty workmanship exclusion and resulting damage exception is not unanimous.

(e) *Conclusion on the Interpretation of the Exclusion Clause*

[95] As outlined above, the language of the Exclusion Clause, read in light of the Policy as a whole, does not provide a clear answer to the question raised before us. That said, the parties' reasonable expectations, informed largely by the purpose of builders' risk policies, point to the faulty workmanship exclusion serving to exclude from coverage only the cost of redoing the faulty work. This interpretation aligns with commercial realities and is consistent with prior jurisprudence. In the circumstances of this case, the cost of redoing the faulty work is the cost of recleaning the windows — both parties agree that the recleaning falls under the Policy's "cost of making good faulty workmanship" exclusion. The Insureds, however, have met their onus of demonstrating that the cost of replacing the damaged windows is covered under the "resulting damage" exception to that exclusion.

[96] In any event, even if I were to determine that the general rules of contractual interpretation do not clarify the ambiguous Exclusion Clause, I would reach the same conclusion on the basis of the *contra proferentem* rule.

VI. Disposition

[97] I would allow the appeals with costs throughout.

cour avait déjà conclu que les travaux exécutés dans cette affaire ne constituaient pas une malfaçon, ces propos contribuent à démontrer que la jurisprudence sur l'interprétation de l'exclusion relative à la malfaçon ainsi que de l'exception des dommages en découlant n'est pas unanime.

e) *Conclusion sur l'interprétation de la clause d'exclusion*

[95] Comme je l'ai expliqué plus tôt, le libellé de la clause d'exclusion, lu à la lumière de l'ensemble de la police, ne fournit pas de réponse claire à la question qui nous a été soumise. Cela dit, les attentes raisonnables des parties, lesquelles reposent en grande partie sur l'objectif des polices d'assurance chantier, donnent à penser que l'exclusion fondée sur la malfaçon sert à soustraire à la garantie d'assurance uniquement le coût de la nouvelle exécution du travail déficient. Cette interprétation s'accorde avec la réalité commerciale en plus d'être compatible avec la jurisprudence. Dans les circonstances de l'espèce, le coût de la nouvelle exécution du travail défectueux est le coût d'un nouveau nettoyage des fenêtres. Toutes les parties s'entendent pour dire que le nouveau nettoyage relève de l'exclusion de la police relative aux « frais engagés pour remédier à une malfaçon ». Les assurées se sont toutefois acquittées de leur fardeau de démontrer que le coût du remplacement des fenêtres endommagées est couvert par l'exception à l'exclusion pour les « dommages [. . .] découlant » de la malfaçon.

[96] Quoi qu'il en soit, même si je devais décider que l'application des règles générales d'interprétation contractuelle ne dissipe pas l'ambiguïté sur le sens de la clause d'exclusion, je parviendrais à la même conclusion en raison de la règle *contra proferentem*.

VI. Dispositif

[97] Je suis d'avis d'accueillir les pourvois avec dépens devant toutes les cours.

The following are the reasons delivered by

Version française des motifs rendus par

CROMWELL J. —

LE JUGE CROMWELL —

I. Introduction

I. Introduction

[98] I agree with the disposition of these appeals proposed by my colleague, Justice Wagner, in his carefully crafted and comprehensive reasons. However, I respectfully do not agree with him on two points: the applicable standard of appellate review and whether the contractual clause that we must interpret is ambiguous. As I will explain, our very recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, decides that the standard of review here is palpable and overriding error, not correctness, and in my opinion the trial judge did not err in finding that the clause is ambiguous. Like my colleague, I would therefore allow the appeals with costs.

[98] Je souscris au dispositif proposé par mon collègue le juge Wagner dans ses motifs détaillés et rédigés avec soin. Je suis toutefois en désaccord avec lui sur deux points : la norme de contrôle applicable en appel et la question de l’ambiguïté de la clause contractuelle que nous devons interpréter. Comme je l’expliquerai, la norme de contrôle applicable en l’espèce est celle de l’erreur manifeste et dominante, et non celle de la décision correcte, selon notre arrêt très récent *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, et le juge de première instance n’a, à mon avis, pas commis d’erreur en concluant que la clause est ambiguë. À l’instar de mon collègue, je suis donc d’avis d’accueillir les pourvois avec dépens.

[99] The merits of the appeals turn on a straightforward question. When window cleaners destroy the windows they are supposed to clean, does the cost of replacing the windows fall within the expression the “cost of making good faulty workmanship”, in which case it is excluded from coverage provided by the insurance policy we must interpret in this case, or does that cost fall within the expression “physical damage . . . resulting” from the faulty workmanship, in which case it is covered by the policy?

[99] Le fond des pourvois se résume à une question simple. Quand un laveur de vitres endommage les fenêtres qu’il est censé nettoyer, le coût de remplacement des fenêtres est-il visé par l’expression [TRADUCTION] « frais engagés pour remédier à une malfaçon », auquel cas il est exclu de la couverture offerte par la police d’assurance que nous devons interpréter en l’espèce, ou par l’expression « dommages matériels [. . .] découlant » de la malfaçon, auquel cas il est couvert par la police?

II. The Standard of Review

II. La norme de contrôle

A. *Sattva Brought Appellate Review in Contract Cases Within the Court’s General Framework for Appellate Review in Civil Cases*

A. *Dans son arrêt Sattva, la Cour a intégré le contrôle en appel dans les affaires contractuelles à son cadre général de contrôle en appel en matière civile*

(1) The Standard of Review in Civil Appeals Turns on the Nature of the Question Under Review

(1) La norme de contrôle applicable dans les appels civils dépend de la nature de la question à l’examen

[100] The standard of review aspect of the Court’s judgment in *Sattva* must be understood in the context of the Court’s broader jurisprudence on standard

[100] L’aspect du jugement rendu par notre Cour dans *Sattva* qui a trait à la norme de contrôle doit être replacé dans le contexte plus large de sa

of review in civil appeals. At least since *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the standard of appellate review has turned on the nature of the question being reviewed. Questions of law are reviewed for correctness and questions of fact for palpable and overriding error. *Housen* also holds that applying a legal standard to the facts is a mixed question of law and fact and is generally reviewable on appeal for palpable and overriding error: paras. 26-37. So, in a negligence case such as *Housen*, that is the standard that generally governs appellate review of the trial court's application of the legal standard of negligence to the evidence.

[101] I say “generally” because *Housen* recognized that this would not always be so. In some cases, the trial court's application of a legal standard to the facts will attract correctness review on appeal. This will be the case when the basis for a finding under review can be traced to a pure legal error, such as a wrong characterization of the legal standard or the failure to consider a required element of the applicable standard. In cases of this sort, the reviewing court can “extricate” a purely legal question from the trial court's analysis and having done so, apply to that purely legal question the correctness standard of appellate review: paras. 31-33. These sorts of cases are fairly rare, however. As *Housen* cautioned, it is often difficult to extricate the legal questions from the factual and therefore appellate courts should not be quick to find extricable legal errors in the trial court's application of a legal standard to the facts: para. 36.

(2) Sattva Brought Contract Appeals Within This Framework

[102] I review these basic points of *Housen* because, as I see it, the Court's decision in *Sattva*

jurisprudence sur les normes de contrôle en matière d'appels civils. Depuis au moins l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, la norme de contrôle applicable en appel dépend de la nature de la question examinée. Les questions de droit sont examinées selon la norme de la décision correcte tandis que les questions de fait le sont en fonction de la norme de l'erreur manifeste et dominante. Il a aussi été jugé dans *Housen* que l'application d'une norme juridique à des faits constitue une question mixte de droit et de fait, qui est généralement susceptible de révision en appel selon la norme de l'erreur manifeste et dominante (par. 26-37). Ainsi, dans une affaire de négligence comme *Housen*, c'est cette norme qui régit généralement le contrôle en appel de l'application, par le tribunal de première instance, de la norme juridique de négligence à la preuve.

[101] Je dis « généralement » parce que la Cour a reconnu dans *Housen* que ce ne serait pas toujours le cas. Il arrive parfois que l'application par le tribunal de première instance d'une norme juridique aux faits commande un contrôle en appel selon la norme de la décision correcte. C'est le cas lorsque le fondement de la conclusion contrôlée est imputable à une pure erreur de droit, telle une mauvaise qualification de la norme juridique ou omission d'examiner un élément essentiel de la norme applicable. Dans les affaires de ce genre, la cour siégeant en révision peut « dégager » une pure question de droit de l'analyse du tribunal de première instance, puis appliquer à cette question la norme de la décision correcte applicable lors d'un contrôle en appel (par. 31-33). Les affaires de cette nature sont toutefois assez rares. Selon la mise en garde formulée dans *Housen*, les cours d'appel ne devraient pas conclure trop rapidement que le tribunal de première instance a commis des erreurs de droit isolables en appliquant une norme juridique aux faits, car il est souvent difficile de départager les questions de droit des questions de fait (par. 36).

(2) Dans Sattva, la Cour a intégré les appels en matière contractuelle à ce cadre

[102] J'examine ces aspects fondamentaux de *Housen* parce que, à mon sens, notre Cour a inscrit

brought appellate review in contract cases within this general standard of review framework. To put it in *Housen*'s terms, applying the text of a contract to a particular fact situation involves applying the legal standard set by the contract to the facts of the situation at hand. This interpretative process, therefore, generally gives rise to a mixed question of law and fact and should be reviewable on appeal for palpable and overriding error.

[103] *Sattva* explained that this was an appropriate development for two related reasons. First, contractual interpretation is not simply a question of ascribing an abstract legal meaning to the words, but rather of understanding those words in their full context. Second, this process of interpretation should generally be considered to be the application of a legal standard to the facts; in other words, contractual interpretation is generally a mixed question of law and fact which, under the Court's standard of review jurisprudence, is generally reviewed for palpable and overriding error. Both of these related reasons, as we shall see, apply to interpreting all types of contracts.

[104] Consider the first reason. Contract interpretation cannot be understood as a process of determining the "legal" and immutable meaning of the text. "[W]ords alone do not have an immutable or absolute meaning" and therefore contractual interpretation does not often turn on ascribing immutable legal meanings to the contractual words: *Sattva*, at para. 47. Rather, the meaning of words often turns on context, such as the purpose of the agreement and the nature of the relationship between the parties: para. 48. Taking those sorts of contextual considerations into account — sometimes called the surrounding circumstances or the factual matrix — requires the court to understand the text of the agreement in light of them, not simply to ascribe purely legal meanings to the words taken in isolation. Thus, just as the Court in *Housen* cautioned against too readily finding that applying a legal standard to the facts gives rise to a purely legal question, the Court

dans *Sattva* le contrôle en appel dans les affaires contractuelles à l'intérieur de ce cadre général de contrôle. Pour reprendre les termes de *Housen*, l'application du texte d'un contrat à une situation factuelle particulière suppose l'application de la norme juridique établie par le contrat aux faits de la situation en cause. Par conséquent, cet exercice d'interprétation soulève généralement une question mixte de droit et de fait qui devrait être contrôlée en appel selon la norme de l'erreur manifeste et dominante.

[103] D'après *Sattva*, il s'agissait d'une évolution opportune pour deux raisons connexes. Premièrement, l'interprétation contractuelle ne consiste pas simplement à attribuer un sens juridique abstrait aux mots utilisés, mais plutôt à saisir ces mots dans leur contexte global. Deuxièmement, cet exercice d'interprétation devrait généralement être considéré comme l'application d'une norme juridique aux faits; autrement dit, l'interprétation contractuelle constitue généralement une question mixte de droit et de fait qui, selon la jurisprudence de la Cour en matière de normes de contrôle, est généralement susceptible de révision selon la norme de l'erreur manifeste et dominante. Comme nous le verrons, ces deux raisons connexes valent pour l'interprétation de tous les types de contrat.

[104] Examinons la première raison. L'interprétation contractuelle ne peut être considérée comme la détermination du sens « juridique » et immuable du texte. Comme « les mots en soi n'ont pas un sens immuable ou absolu », l'interprétation contractuelle consiste rarement à attribuer un sens juridique immuable aux mots employés dans le contrat (*Sattva*, par. 47). Le sens des mots est plutôt souvent fonction du contexte, comme l'objet de l'entente et la nature de la relation entre les parties (par. 48). La prise en compte de pareilles considérations contextuelles — parfois appelées les circonstances ou le fondement factuel — exige que la cour comprenne, à la lumière de ces considérations, le texte de l'entente, et non qu'elle se contente d'attribuer des significations purement juridiques aux mots pris isolément. Par conséquent, tout comme la Cour a indiqué dans *Housen* qu'il faut s'abstenir de conclure trop rapidement que l'application d'une norme juridique aux

in *Sattva* cautioned that interpretation does not often give rise to a pure question of law. Interpretation is rarely a matter of ascribing some immutable legal meaning to the text considered apart from the surrounding circumstances.

[105] A number of appellate courts and my colleague Wagner J. are of the view that this first rationale underlying *Sattva* does not apply to cases interpreting standard form contracts: *Vallieres v. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, at paras. 11-13; *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, at paras. 28-30; *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1, at para. 273, per McDonald J.A.; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at paras. 40-41; *Monk v. Farmers' Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, at paras. 22-24; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, at para. 34 (CanLII); and *Sankar v. Bell Mobility Inc.*, 2016 ONCA 242, at para. 26 (CanLII). I respectfully disagree.

[106] I accept, of course, that standard form contracts generally do not have relevant surrounding circumstances relating to their negotiation because there was in no real sense any negotiation of their terms. However, standard form contracts, like all contracts, have many other surrounding circumstances: they have a purpose, they create a relationship of a particular nature and they frequently operate within a particular market or industry. These factors are all part of the context — of the surrounding circumstances — that must be taken into account in interpreting the text of the contract. As Lord Wilberforce put it in a passage cited with approval in *Sattva*, “In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating”: *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.), at p. 574, quoted in *Sattva*, at para. 47. This point is further developed in a short passage from *Investors Compensation Scheme Ltd. v. West*

faits pose une pure question de droit, elle a précisé dans *Sattva* que l'interprétation ne pose pas souvent une pure question de droit. L'interprétation consiste rarement à attribuer un quelconque sens juridique immuable au texte pris sans égard aux circonstances.

[105] Mon collègue le juge Wagner ainsi que plusieurs cours d'appel estiment que ce premier raisonnement qui sous-tend *Sattva* ne s'applique pas aux affaires où l'on interprète des contrats types (*Vallieres c. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, par. 11-13; *Precision Plating Ltd. c. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, par. 28-30; *Stewart Estate c. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1, par. 273, le juge McDonald; *MacDonald c. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, par. 40-41; *Monk c. Farmers' Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, par. 22-24; *True Construction Ltd. c. Kamloops (City)*, 2016 BCCA 173, par. 34 (CanLII); *Sankar c. Bell Mobility Inc.*, 2016 ONCA 242, par. 26 (CanLII)). Avec égards, je ne suis pas d'accord.

[106] J'accepte bien sûr qu'il n'existe généralement pas, dans le cas des contrats types, de circonstances pertinentes quant à leur négociation puisque leurs conditions n'ont pas été véritablement négociées. Cependant, à l'instar de tous les autres contrats, les contrats types s'inscrivent dans un contexte beaucoup plus large : ils ont un objet, créent une relation particulière et sont fréquemment utilisés dans une industrie ou un marché donné. Ces facteurs font tous partie du contexte — les circonstances — dont il faut tenir compte pour interpréter le texte du contrat. Pour reprendre les propos de lord Wilberforce, cités avec approbation dans *Sattva*, [TRADUCTION] « [I]orsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités » (*Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.), p. 574, cité dans *Sattva*, par. 47). Cette question est davantage approfondie dans le court extrait suivant tiré d'*Investors Compensation*

Bromwich Building Society, [1998] 1 All E.R. 98 (H.L.), also quoted by the Court in *Sattva*, at para. 48:

The meaning which a document . . . would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[107] All contracts, whether standard form or not, have important contextual elements — elements of their surrounding circumstances — that are generally considered in applying the contractual language to a specific set of occurrences.

[108] Unlike my colleague, I do not read this aspect of *Sattva* as holding that contractual interpretation is not generally a pure question of law simply because it involves assessing a “factual matrix” relating to negotiation. Rather, as I have discussed, *Sattva* sees contractual interpretation as not being a pure question of law because it involves understanding the words used in light of a number of contextual factors beyond negotiation, including the purpose of the agreement, the nature of the relationship, the market in which the parties are operating, and so forth. While the words have a consistent meaning, how they apply to the myriad of situations that may arise will most often turn on these sorts of contextual factors. My colleague’s interpretative analysis of the standard form contract before us in this case shows that this is so. That analysis relies on the nature of the particular work alleged to be faulty; the nature and cause of the particular damage in issue; the purpose of the contract; the market in which it operates (i.e. the construction industry); the parties’ reasonable expectations; and commercial reality.

[109] The importance of taking these contextual matters into account is the first reason the Court relied on in *Sattva* to explain why contractual interpretation is generally not a pure question of law

Scheme Ltd. c. West Bromwich Building Society, [1998] 1 All E.R. 98 (H.L.), également cité par la Cour dans *Sattva*, par. 48 :

[TRADUCTION] Le sens d’un document [. . .] qui est transmis à la personne raisonnable n’équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu’il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[107] Tous les contrats, qu’ils soient types ou non, comportent des éléments contextuels importants — les circonstances — dont il est généralement tenu compte pour appliquer le libellé du contrat à un ensemble précis de faits.

[108] Contrairement à mon collègue, je n’estime pas que la Cour indique à cet égard dans *Sattva* que l’interprétation contractuelle n’est en général pas une pure question de droit simplement parce qu’elle suppose l’évaluation du « fondement factuel » relatif à la négociation. Au contraire, comme je l’ai expliqué précédemment, la Cour considère dans *Sattva* que l’interprétation contractuelle n’est pas une pure question de droit parce qu’elle implique de comprendre les mots utilisés eu égard à plusieurs facteurs contextuels autres que la négociation, dont l’objet de l’entente, la nature de la relation, le marché dans lequel les parties exercent leurs activités, etc. Le sens des mots ne change pas, mais la façon dont ces mots s’appliquent à la multitude de situations qui peuvent survenir dépendra souvent de ces facteurs contextuels. C’est d’ailleurs ce que démontre l’analyse interprétative du contrat type en l’espèce effectuée par mon collègue. Cette analyse repose sur la nature du travail qui aurait été mal exécuté; la nature et la cause du dommage en question; l’objet du contrat; le marché dans lequel il est employé (en l’occurrence l’industrie de la construction); les attentes raisonnables des parties; la réalité commerciale.

[109] L’importance de prendre en compte ces éléments contextuels est la première raison donnée par la Cour dans *Sattva* pour expliquer pourquoi l’interprétation contractuelle n’est généralement pas une

and applies to standard form contracts as it does to others. While negotiating history will generally not be relevant to such contracts, many other contextual matters are.

[110] Turning to the second related reason given in *Sattva*, it too applies to the interpretation of standard form contracts. That second reason was that “the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and [*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748]”: para. 49. Rather, contractual interpretation should be understood as generally giving rise to mixed questions of law and fact. As Rothstein J. wrote for the Court, “Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix”: para. 50. In short, *Sattva* brought appellate review of contractual interpretation into the general framework for appellate review in civil cases set out in the Court’s standard of review jurisprudence.

[111] I see no reason to think that the interpretation of certain types of contracts should be excluded from these general principles that apply to appellate review in all civil cases. A number of appellate courts have reached the same conclusion: *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575, at paras. 40-41; *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581, at paras. 34-36; *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223, at paras. 34-35; *GCAN Insurance Co. v. Univar Canada Ltd.*, 2016 QCCA 500, at paras. 37-42 (CanLII).

[112] It is important to remember that *Housen* did not hold that all applications of a legal standard to the facts should be reviewed for palpable and overriding error. As I have discussed, *Housen* recognized that sometimes the analysis will turn on an extricable

pure question of droit et vaut tant pour les contrats types que pour les autres contrats. Bien que l’historique de la négociation ne soit généralement pas pertinent pour de tels contrats, bien d’autres éléments contextuels le sont.

[110] En ce qui concerne maintenant la deuxième raison connexe donnée dans *Sattva*, elle vaut aussi pour l’interprétation des contrats types. Cette seconde raison était que « l’approche historique de l’interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et [*Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748] » (par. 49). On devrait plutôt considérer que l’interprétation contractuelle pose généralement des questions mixtes de droit et de fait. Comme le juge Rothstein l’a écrit au nom de la Cour, « [l]’interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s’agit d’en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel » (par. 50). Bref, dans *Sattva*, la Cour a intégré le contrôle en appel de l’interprétation d’un contrat au cadre général de contrôle en appel en matière civile établi dans sa jurisprudence relative aux normes de contrôle.

[111] Je ne vois aucune raison de penser que ces principes généraux applicables au contrôle en appel dans toutes les affaires civiles ne devraient pas régir l’interprétation de certains types de contrat. Plusieurs cours d’appel sont parvenues à la même conclusion (*Industrial Alliance Insurance and Financial Services Inc. c. Brine*, 2015 NSCA 104, 392 D.L.R. (4th) 575, par. 40-41; *Ontario Society for the Prevention of Cruelty to Animals c. Sovereign General Insurance Co.*, 2015 ONCA 702, 127 O.R. (3d) 581, par. 34-36; *Acciona Infrastructure Canada Inc. c. Allianz Global Risks US Insurance Co.*, 2015 BCCA 347, 77 B.C.L.R. (5th) 223, par. 34-35; *GCAN Insurance Co. c. Univar Canada Ltd.*, 2016 QCCA 500, par. 37-42 (CanLII)).

[112] Il importe de se rappeler que la Cour n’a pas jugé, dans *Housen*, que toutes les applications d’une norme juridique aux faits devraient être contrôlées selon la norme de l’erreur manifeste et dominante. Comme je l’ai mentionné, la Cour a

pure question of law. *Sattva* adopted this holding. Rothstein J. in *Sattva* acknowledged, echoing *Housen*, that it may sometimes be possible to identify an extricable question of law such as the application of incorrect principles, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. I therefore agree with Wagner J. that “*Sattva* should not be read as holding that contractual interpretation is always a question of mixed fact and law”: para. 46. *Sattva* was explicit on this point: para. 53.

[113] However, again echoing *Housen*, Rothstein J. warned that courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation; he noted that “the circumstances in which a question of law can be extricated from the interpretation process will be rare”: *Sattva*, at para. 55.

B. The Proposed Exception Does Not Conform to the General Principles of Appellate Review in Civil Cases

[114] My colleague proposes an “exception” to *Sattva*’s holding: if an appeal involves the interpretation of a standard form contract, the interpretation itself is of precedential value and there is no meaningful factual matrix specific to the parties to assist the interpretation process, then the interpretation is a question of law and subject to correctness review (para. 46). I do not support the creation of this “exception”.

[115] As I have outlined, the general principles of appellate review in civil cases turn on characterizing the nature of the question being reviewed as one of fact, law or mixed law and fact. The distinction between questions of pure law and questions of mixed law and fact turns on where the question is located along a “spectrum of particularity”: *Housen*, at para. 28. Questions of law are concerned with general legal propositions: *Housen*, at para. 28,

reconnu dans *Housen* que l’analyse porte parfois sur une pure question de droit isolable, et a fait sienne cette conclusion dans *Sattva*. Le juge Rothstein y a reconnu, en faisant écho à *Housen*, qu’il peut parfois être possible de dégager une question de droit comme l’application d’un mauvais principe ou l’omission d’examiner un élément essentiel d’un critère juridique ou un facteur pertinent. Je souscris par conséquent à l’observation du juge Wagner selon laquelle « [l]’arrêt *Sattva* ne devrait pas être interprété comme prescrivant que l’interprétation contractuelle est toujours une question mixte de fait et de droit » (par. 46). L’arrêt *Sattva* était explicite à cet égard (par. 53).

[113] Or, faisant encore une fois écho à *Housen*, le juge Rothstein a prévenu les tribunaux qu’ils devaient faire preuve de prudence en dégageant des questions de droit isolables dans les litiges portant sur l’interprétation d’un contrat; il a fait remarquer que « rares seront les cas où il sera possible de dégager une question de droit de l’exercice d’interprétation » (*Sattva*, par. 55).

B. L’exception proposée ne respecte pas les principes généraux de contrôle en appel en matière civile

[114] Mon collègue propose une « exception » à la conclusion tirée dans *Sattva* : si un appel porte sur l’interprétation d’un contrat type, l’interprétation retenue a valeur de précédent et l’exercice d’interprétation ne repose sur aucun fondement factuel significatif qui est propre aux parties, l’interprétation constitue alors une question de droit et est assujettie à un contrôle selon la norme de la décision correcte (par. 46). Je ne suis pas en faveur de la création de cette « exception ».

[115] Comme je l’ai souligné, les principes généraux de contrôle en appel dans les affaires civiles s’attachent à la qualification de la nature de la question faisant l’objet du contrôle en tant que question de fait, question de droit ou encore question mixte de droit et de fait. La distinction entre les pures questions de droit et les questions mixtes de droit et de fait dépend de l’endroit où se situe la question sur le « spectre comportant des degrés variables de

citing *Southam*, at para. 37. As stated in *Housen* and repeated in *Sattva*, examples include applying an incorrect principle, failing to consider a required element of a legal test, or the failure to consider a relevant factor: *Sattva*, at para. 53.

[116] As I see it, the three elements of the proposed exception do not assist in deciding whether the question is sufficiently general in nature so as to attract correctness review. Whether or not a contract is a standard form does not, as I see it, tell us anything about the degree of generality of the particular interpretative principle in issue in a particular case. The absence of a “factual matrix” is not of much assistance either. All contracts have a context which is important for their interpretation. As I mentioned earlier, aspects of the transaction such as its purpose and the market or industry in which it operates are important for interpreting all contracts, and so is the nature of the allegedly faulty work and the damage allegedly resulting from it. The absence of facts about negotiations does not mean that there are no contextual matters that inform the interpretative process and therefore tend to make it a mixed question of law and fact.

[117] The third element of the proposed exception — whether the interpretation has precedential value — seems to me to simply ask the critical question, which is concerned with the level of generality of a legal principle, in a different and unhelpful way. Questions of law are reviewed on appeal for correctness because the decisions on such questions have precedential value: these sorts of decisions ensure uniformity among similar cases and serve the law-making function of appellate courts (*Housen*, at paras. 8-9). The more general the principle, the more the precedential value. To ask the question in terms of precedential value rather than the generality of the legal principle in issue seems to me to simply pose the key question in a different way and in one that simply sends the

particularité » (*Housen*, par. 28). Les questions de droit concernent des propositions juridiques générales (*Housen*, par. 28, citant *Southam*, par. 37). Comme la Cour l’a dit dans *Housen* et répété dans *Sattva*, une erreur de droit peut consister, par exemple, à appliquer le mauvais principe ou à négliger un élément essentiel d’un critère juridique ou un facteur pertinent (*Sattva*, par. 53).

[116] À mon avis, les trois éléments de l’exception proposée n’aident pas à décider si la question est de nature suffisamment générale pour appeler un contrôle selon la norme de la décision correcte. J’estime que le point de savoir si un contrat est ou non un contrat type ne nous permet de tirer aucune conclusion sur le degré de généralité du principe d’interprétation particulier en cause dans une affaire donnée. L’absence de « fondement factuel » n’est pas non plus d’un grand secours. Tous les contrats ont un contexte qui est important pour leur interprétation. Comme je l’ai mentionné précédemment, des aspects de l’opération comme son objet et l’industrie ou le marché dans lequel elle a lieu sont importants pour interpréter tous les contrats. Il en va de même de la nature du travail qui aurait été mal exécuté et du dommage qui en découlerait. L’absence de faits se rapportant aux négociations ne signifie pas qu’il n’y a aucun élément contextuel éclairant l’exercice d’interprétation, ce qui, par conséquent, tend à indiquer que cette interprétation serait une question mixte de droit et de fait.

[117] Selon moi, le troisième élément de l’exception proposée — le point de savoir si l’interprétation a valeur de précédent — pose simplement de façon différente et peu utile la question cruciale, qui a trait au niveau de généralité du principe juridique. Les questions de droit sont contrôlées en appel selon la norme de la décision correcte parce que les décisions sur ces questions ont valeur de précédent : les décisions de ce genre garantissent l’uniformité entre les affaires similaires et permettent aux cours d’appel d’accomplir leur fonction d’élaboration du droit (*Housen*, par. 8-9). Plus le principe est général, plus sa valeur comme précédent est grande. Poser la question sous l’angle de la valeur de précédent plutôt que du caractère général du principe juridique en cause équivaut, à mon sens, à poser simplement la

analysis back to the question of degree of generality.

[118] As my colleague’s interpretive analysis shows, there are important contextual elements — surrounding circumstances — that inform how the text should be applied to the facts. This is not a case where there are no such contextual factors to consider. Focusing on the question of the generality of the legal principle in issue, I do not see a good case for correctness review on that basis either.

[119] The question this case raises, boiled down to its essentials, is this: Is the cost of replacing a window that was scratched by a window cleaner while cleaning it the “cost of making good faulty workmanship” (which is excluded from insurance coverage) or the cost of repairing “physical damage [that] results” from faulty workmanship (which is covered)? The answer proposed by Wagner J. is that it is the cost of repairing the physical damage, because the exclusion applies only to the cost of redoing the faulty work, in this case, recleaning the windows: para. 5. The legal principle is that “making good faulty workmanship” means “the cost of redoing the faulty work”. However, this principle does not seem to me to operate at a very high level of generality.

[120] Applying the principle turns on two considerations: the scope of the “faulty work” and the nature of “redoing” it. We could say that the window cleaners’ faulty work did not require them to install windows in good condition: para. 81. But this seems to me to be the assertion of the conclusion rather than a reason for it. Presumably, the window cleaners’ work was to clean the windows without destroying them; if their faulty work destroyed the windows, why should we say that “redoing” their work does not involve replacing the windows? In short, I am not convinced the principle that the exclusion only relates to “the cost of redoing the faulty

question fondamentale d’une manière différente qui fait uniquement porter l’analyse sur la question du degré de généralité.

[118] Comme le démontre l’analyse interprétative de mon collègue, il existe d’importants éléments contextuels — circonstances — qui nous renseignent sur la façon dont le texte devrait être appliqué aux faits. Nous ne sommes pas en présence d’un cas où il n’existe pas de tels facteurs contextuels à prendre en considération. En axant mon examen sur le caractère général du principe juridique en cause, je n’estime pas non plus qu’il est justifié de procéder à un contrôle en fonction de la norme de la décision correcte sur cette base.

[119] Ramenée à l’essentiel, la question soulevée en l’espèce est la suivante : le coût de remplacement d’une fenêtre égratignée par un laveur de vitres pendant qu’il était en train de la nettoyer équivaut-il aux « frais engagés pour remédier à une malfaçon » (qui sont exclus de la couverture) ou au coût de la réparation des « dommages matériels [qui] découl[ent] » de la malfaçon (lesquels sont couverts)? La réponse proposée par le juge Wagner est la suivante : il s’agit du coût de la réparation des dommages matériels parce que l’exclusion ne vise que le coût de la nouvelle exécution du travail défectueux, en l’occurrence un nouveau nettoyage des fenêtres (par. 5). Selon le principe juridique, l’expression « remédier à une malfaçon » s’entend « du coût de la nouvelle exécution du travail défectueux ». Toutefois, ce principe ne me semble pas atteindre un très haut niveau de généralité.

[120] L’application du principe repose sur deux considérations : l’étendue de la « malfaçon » et la nature de sa « nouvelle exécution ». On pourrait avancer que la malfaçon des laveurs de vitres ne les obligeait pas à installer des fenêtres en bon état (par. 81). Cette affirmation me semble toutefois être l’énoncé de la conclusion plutôt que son fondement. On peut présumer que le travail des laveurs de vitres consistait à nettoyer les fenêtres sans les détruire; si, par leur malfaçon, ils ont détruit celles-ci, pourquoi devrait-on dire que la « nouvelle exécution » de leur travail n’implique pas le remplacement des fenêtres? En somme, je ne suis pas convaincu que le principe

work” can operate at a very high level of generality. Rather, its application in other cases will ultimately be decided on a case-by-case basis in light of the particular circumstances of the particular case.

[121] The extensive jurisprudence cited to us tends to confirm the view that it is difficult to define the scope of the exclusion in general terms. The line basically has to be drawn on a case-by-case basis. For example, in *Greene v. Canadian General Insurance Co.* (1995), 133 Nfld. & P.E.I.R. 151 (Nfld. C.A.), a contractor was hired by the appellants to construct the framework of a house. Shortly after the contractor completed its contract, the framework was damaged by high winds and, as a result, the house had to be substantially demolished and rebuilt: para. 2. It was uncontested that the loss was caused by the failure of the contractor to install temporary bracing.

[122] The trial judge held that the loss was caused by faulty or improper workmanship and was an excluded peril under clause 9(a) of the appellants’ insurance policy with the respondent company. He rejected the appellants’ contention that the exclusion clause should be limited to the cost of remedying the improper installation of permanent or temporary bracing: *Greene*, at para. 3.

[123] The Court of Appeal confirmed the trial decision, holding that “the defective or inadequate bracing was to stabilize the house during construction and the resulting accident caused the destruction of that house. I see no error in the decision of the trial judge that the loss suffered by the appellants was the cost of making good faulty or improper workmanship, not ‘resultant damage’, nor in his analysis of the applicable case law”: *Greene*, at para. 16. As I see it, the analysis of this case could easily have gone a different way. The court could have held, as we do in this case, that because the contractor was only responsible for constructing the framework of the house, the exclusion should only be the cost of

selon lequel l’exclusion vise uniquement le « coût de la nouvelle exécution du travail défectueux » peut atteindre un très haut niveau de généralité. Les tribunaux décideront plutôt de son application en dernière analyse au cas par cas à la lumière des circonstances propres à chaque affaire.

[121] La jurisprudence abondante qui nous a été citée tend à confirmer l’opinion selon laquelle il est difficile de cerner l’étendue de l’exclusion en termes généraux. La ligne doit essentiellement être tracée au cas par cas. Par exemple, dans *Greene c. Canadian General Insurance Co.* (1995), 133 Nfld. & P.E.I.R. 151 (C.A. T.-N.), un entrepreneur avait été engagé par les appelants pour construire la charpente d’une maison. Peu après que l’entrepreneur eut mené à terme l’exécution de son contrat, la charpente en question a été endommagée par des vents violents. La maison a donc dû être démolie et reconstruite en grande partie (par. 2). Nul ne conteste que la perte était imputable à l’omission de l’entrepreneur d’installer un contreventement temporaire.

[122] Le juge de première instance a statué que la perte résultait d’une malfaçon ou d’un travail défectueux et constituait un risque exclu aux termes de la clause 9a) de la police d’assurance à laquelle les appelants avaient souscrit auprès de la société intimée. Il a rejeté la prétention des appelants selon laquelle la clause d’exclusion devrait viser uniquement les frais engagés pour remédier à l’installation défectueuse d’un contreventement temporaire ou permanent (*Greene*, par. 3).

[123] La Cour d’appel a confirmé la décision de première instance, affirmant que [TRADUCTION] « le contreventement défectueux ou inadéquat devait stabiliser la maison pendant la construction et l’accident qui en a résulté a causé la destruction de cette maison. Je ne relève aucune erreur ni dans la conclusion du juge de première instance que la perte subie par les appelants équivalait aux frais engagés pour remédier à la malfaçon ou au travail défectueux, et non aux “dommages en découlant”, ni dans son analyse de la jurisprudence applicable » (*Greene*, par. 16). À mon avis, l’analyse de cette affaire aurait pu facilement donner un résultat différent. La cour aurait pu décider, tout comme nous

redoing the framework of the house, and not the cost of fixing damages to the whole house.

[124] Other examples include *Bird Construction Co. v. United States Fire Insurance Co.* (1985), 24 D.L.R. (4th) 104 (Sask. C.A.), where a subcontractor was hired to build and install roof trusses and partially damaged the trusses due to faulty erection procedures. Although the faulty workmanship occurred during the erection procedures, the cost of replacing the trusses themselves ended up also not being covered because the court considered it would be making good faulty workmanship. In *Ontario Hydro v. Royal Insurance*, [1981] O.J. No. 215 (QL) (H.C.J.), the contractual obligation of the contractor responsible for the damage was to install a power-generating boiler. As part of the installation, the plaintiff requested that the contractor perform an acid wash on the boiler. The acid wash ultimately damaged the tubing and the court held that the cost of making good improper workmanship was not only the cost of rewashing the tubing, but also to replace it: para. 37.

[125] I conclude that there are important surrounding circumstances that inform the interpretation of standard form contracts and that the legal principle is not of much precedential value. In short, the issue here involves applying a legal standard to a set of facts and did not give rise to any extricable question of law.

C. *The Merits of the Appeals*

[126] I agree in substance with the trial judge's analysis and conclusion: 2013 ABQB 585, [2013] I.L.R. ¶ I-5494. Clackson J. made no legal error because he properly described and applied the Court's decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245.

en l'espèce, que, comme l'entrepreneur n'était responsable que de la construction de la charpente de la maison, l'exclusion ne devrait viser que le coût de la nouvelle charpente de la maison, et non les frais engagés pour remédier aux dommages causés à l'ensemble de la maison.

[124] On peut également citer d'autres exemples telle l'affaire *Bird Construction Co. c. United States Fire Insurance Co.* (1985), 24 D.L.R. (4th) 104 (C.A. Sask.), où un sous-traitant avait été engagé pour fabriquer et installer des fermes de toit. Or, il a partiellement endommagé les fermes parce qu'il avait employé une mauvaise méthode d'installation. Bien que la malfaçon ait eu lieu à l'étape de l'installation, le coût de remplacement des fermes elles-mêmes a finalement été exclu lui aussi parce que la cour a considéré qu'un tel remplacement équivaudrait à remédier à une malfaçon. Dans *Ontario Hydro c. Royal Insurance*, [1981] O.J. No. 215 (QL) (H.C.J.), l'obligation contractuelle de l'entrepreneur responsable du dommage consistait à installer une chaudière génératrice de courant. Dans le cadre de ce contrat, le demandeur a demandé à l'entrepreneur de nettoyer la chaudière à l'acide. Ce nettoyage a endommagé la tuyauterie. La cour a statué que les frais engagés pour remédier à la malfaçon représentaient non seulement le coût d'un nouveau nettoyage de la tuyauterie, mais aussi le coût de son remplacement (par. 37).

[125] Je conclus qu'il existe des circonstances importantes qui nous éclairent sur l'interprétation des contrats types et que le principe juridique n'a pas une grande valeur comme précédent. Bref, le litige en l'espèce porte sur l'application d'une norme juridique à un ensemble de faits et il n'a posé aucune question de droit isolable.

C. *Le bien-fondé des pourvois*

[126] Je souscris pour l'essentiel à l'analyse et à la conclusion du juge de première instance (2013 ABQB 585, [2013] I.L.R. ¶ I-5494). Le juge Clackson n'a commis aucune erreur de droit parce qu'il a correctement décrit et appliqué l'arrêt *Progressive Homes Ltd. c. Cie canadienne d'assurances générales Lombard*, 2010 CSC 33, [2010] 2 R.C.S. 245.

[127] The trial judge considered the competing interpretations of the relevant policy provisions. The insureds' position was that excluding the cost of "making good" faulty cleaning simply excludes the cost of redoing the cleaning properly. The insurers' position was that "making good" faulty cleaning extends to the damage done by the faulty cleaning. The trial judge found that both of these interpretations were reasonable as the policy did not clearly suggest one alternative over the other. The judge then took into consideration the general rules of contract construction: he looked at the context, the language of the contract, as well as the nature and purpose of an all risks policy, which helped him to determine the reasonable expectations of the parties. It remains that, according to him, these rules did not produce a clear result. He therefore applied the *contra proferentem* principle, interpreted the clause against the insurers and held that the exclusion did not apply. I see no reviewable error in this analysis.

III. Disposition

[128] I would allow the appeals, set aside the order of the Court of Appeal (2015 ABCA 121, 599 A.R. 363) and restore the order of the trial judge with costs to the appellants throughout.

Appeals allowed with costs.

Solicitors for the appellant Ledcor Construction Limited: Supreme Advocacy, Ottawa; Stacey Boothman, Vancouver.

Solicitors for the appellant Station Lands Ltd.: Dentons Canada, Edmonton; Supreme Advocacy, Ottawa.

Solicitors for the respondents: Owen Bird Law Corporation, Vancouver.

[127] Le juge de première instance a examiné les interprétations opposées des dispositions pertinentes de la police. Les assurées faisaient valoir qu'en excluant les frais engagés pour « remédier » au nettoyage défectueux, on excluait simplement le coût d'un nouveau nettoyage adéquat. Les assureurs soutenaient quant à eux que le fait de « remédier » au nettoyage défectueux s'étendait aux dommages causés par ce nettoyage. Le juge de première instance a conclu que ces deux interprétations étaient raisonnables puisque la police ne privilégiait clairement aucune de ces interprétations aux dépens de l'autre. Le juge a ensuite pris en considération les règles générales d'interprétation des contrats et examiné le contexte, le libellé du contrat ainsi que la nature et l'objet d'une police d'assurance tous risques, ce qui l'a aidé à établir les attentes raisonnables des parties. Par contre, il a estimé que ces règles ne conduisaient pas à un résultat clair. Il a donc appliqué le principe *contra proferentem*, soit interprété la clause contre les assureurs, et jugé que l'exclusion ne s'appliquait pas. Je ne décèle aucune erreur susceptible de révision dans cette analyse.

III. Dispositif

[128] Je suis d'avis d'accueillir les pourvois, d'annuler l'ordonnance de la Cour d'appel (2015 ABCA 121, 599 A.R. 363) et de rétablir l'ordonnance du juge de première instance avec dépens en faveur des appelantes devant toutes les cours.

Pourvois accueillis avec dépens.

Procureurs de l'appelante Ledcor Construction Limited : Supreme Advocacy, Ottawa; Stacey Boothman, Vancouver.

Procureurs de l'appelante Station Lands Ltd. : Dentons Canada, Edmonton; Supreme Advocacy, Ottawa.

Procureurs des intimées : Owen Bird Law Corporation, Vancouver.

TAB 2

CANADA LAW BOOK

Falconbridge on Mortgages

Fifth Edition

Walter M. Traub, L.S.M., B.A., LL.B., LL.M.
Editor-in-Chief



THOMSON REUTERS®

October 2019

§1:40 Definitions

A mortgage is a conveyance of land as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation.¹⁸

A good statutory definition of wider scope is to be found in “An Act respecting the Law and Transfer of Property”, R.S.O. 1897, c. 119, s. 1, as follows:

“Mortgage” shall include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the payment of money or money’s worth, and to be reconveyed, re-assigned or released on satisfaction of the debt.

The *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, contains the following definitions:

- 1(1) In this Act,
- “conveyance” includes an assignment, appointment, lease, settlement, and other assurance, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property, and “convey” has a meaning corresponding with that of conveyance;
 - “land” includes messuages, tenements, hereditaments, whether corporeal or incorporeal, and any undivided share in land;
 - “mortgage” includes a charge on property for securing money or money’s worth;
 - “mortgage money” means money, or money’s worth secured by a mortgage;
 - “mortgagee” includes a person from time to time deriving title under the original mortgagee;
 - “mortgagor” includes a person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to the original mortgagor’s estate, interest or right in the mortgaged property;
 - “property” includes real and personal property, a debt, a thing in action, and any other right or interest;
 - “puffer” means a person appointed to bid on the part of the seller;
 - “purchaser” includes a lessee, a mortgagee, and an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for any property, and “purchase” has a meaning corresponding with that of purchaser; but “sale” means only a sale properly so called.

The *Mortgages Act*, R.S.O. 1990, c. M.40, s. 1, contains substantially the same definitions of the words “conveyance”,¹⁹ “convey”, “mortgage”,²⁰ “mortgage money”, “mortgagee” and “mortgagor”, and in addition provides as follows:

- “encumbrance” includes a mortgage in fee or for a less estate, a trust for securing money, a lien, and a charge of a portion, annuity or other capital or annual sum; and
- “encumbrancer” has a corresponding meaning and includes every person entitled to the benefit of an encumbrance, or to require payment or discharge thereof;
- “land” includes tenements and hereditaments, corporeal or incorporeal, houses and other buildings, and also an undivided share in land;

¹⁸ The definition given in 21 Halsbury, *Laws of England*, 1st ed. (1912), p. 70, adopted from the words of Lindley M.R. in *Santley v. Wilde*, [1899] 2 Ch. 474 (C.A.), and approved by Lord Halsbury in *Noakes & Co. v. Rice*, [1902] A.C. 24, at p. 28, is copied in the text with the exception that it has been modified so as to exclude a mortgage of chattels or choses in action. The definition is not wide enough to cover all forms of equitable mortgages: see Chapter 5 or §1:20.

¹⁹ Except that in the *Mortgages Act* “conveyance” includes also a “covenant to surrender”.

²⁰ Except that in the *Mortgages Act* the word “any” is inserted before the word “property”.

that, on a proper interpretation of the agreement and considering all the surrounding circumstances, the parties have abandoned the lien, do not intend to retain it, or that it would be inequitable to enforce it. The onus rests on the party claiming that there is no lien.^{41.1}

The test of waiver is an objective one, to be determined from the parties' agreement. Given the importance of the lien and its equitable nature, there should be clear evidence or a manifest inference that the parties intended to exclude or waive the lien.^{41.2} The waiver of a vendor's lien cannot be inferred simply from the fact that the vendor took back a purchase money mortgage or that payment of the purchase price is not due yet.^{41.3}

§1:50.20 Charges

Like a mortgage a charge arises by contract. With a charge, however, there is no transfer of the title or possession but the land is charged with the payment of a debt or the discharge of an obligation. A charge under the *Land Titles Act*, R.S.O. 1990, c. L.5, has certain incidents annexed to it by statute, such as the right of foreclosure, which it would not otherwise have.⁴² Although, unlike a mortgage, a land titles charge does not confer title on the chargee, the statute for all practical purposes assimilates the position of the chargee to that of a mortgagee. Similarly, the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, which provides for charges in place of mortgages, gives the parties the same rights and remedies as would have been available to them had the land been transferred by the chargor to the chargee by way of mortgage, subject to a proviso for defeasance.

§1:60 The Conveyancing and Law of Property Act

The law of mortgage is of course affected in many respects by the provisions of the *Conveyancing and Law of Property Act*.⁴³ Some of these provisions are discussed in later chapters in connection with particular topics.⁴⁴ Of the other provisions, which

R.S.O. 1990, c. C.34, s. 37; *Corporations Tax Act*, R.S.O. 1990, c. C.40, s. 99(1); *Municipal Act, 2001*, S.O. 2001, c. 25, s. 349(3); *Public Utilities Act*, R.S.O. 1990, c. P.52, s. 31; *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, s. 22; *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, s. 145; *Land Transfer Tax Act*, R.S.O. 1990, c. L.6, s. 15.

^{41.1} *Freeborn v. Goodman* (1969), 6 D.L.R. (3d) 384 (S.C.C.); *4345142 Ontario Inc. v. Access Self Storage Inc.* (2008), 72 R.P.R. (4th) 102 (Ont. S.C.J.); *Central Mortgage & Housing Corp. v. Co-operative College Residences Inc.* (1975), 71 D.L.R. (3d) 183 (Ont. C.A.); *552439 Ontario Ltd. v. Forbes Building Material Ltd.* (2015), 46 M.P.L.R. (5th) 160 (Ont. S.C.J.).

^{41.2} *4345142 Ontario Inc. v. Access Self Storage Inc.*, *ibid.*; *552439 Ontario Ltd. v. Forbes Building Material Ltd.*, *ibid.*

^{41.3} *4345142 Ontario Inc. v. Access Self Storage Inc.*, *ibid.*; *Silaschi v. 1054473 Ontario Ltd.* (2000), 186 D.L.R. (4th) 339 (Ont. C.A.); *552439 Ontario Ltd. v. Forbes Building Material Ltd.*, *ibid.*

⁴² The confusion in terminology which has arisen from time to time between equitable mortgages and equitable charges will be discussed in Chapter 5.

⁴³ For definitions contained in the statute, see §1:40.

⁴⁴ As to ss. 6 and 7, relating to the effect of a receipt in the body of a conveyance or endorsed thereon, see Chapter 11; as to s. 21, providing for a title free from encumbrance on a sale of mortgaged land, the mortgage money being paid into court pursuant to order of the court, see §14:20; as to s. 36, relating to merger, see §21:10; as to s. 53, relating to the assignment of choses in action, see Chapter 11.

*Paramount Theatres v. Brandenberger*¹⁰¹ the court suggested that the relevant time that determines the effect of notice is when the subsequent purchaser takes his interest. However, again as in *Peebles v. Hyslop*, there were not two competing registrations so the court did not need to deal specifically with s. 71.

In *Edwards v. Gilboe*,¹⁰² McGillivray J.A., in a dissenting judgment cited with approval *Peebles v. Hyslop* in considering the application of s. 71 of the *Registry Act* and pointed out that the proper time for determining whether a person had actual notice of an adverse claim was when he took his deed and not when he registered it.¹⁰³ The majority of the Court of Appeal did not specifically consider the point made by the dissenting judge but it would appear that there was no disagreement on the important period with respect to notice, for in considering s. 71, McKay J.A., in delivering judgment for the majority said that an unregistered equitable interest will prevail over a registered legal interest where the person holding the latter had notice of the equitable interest before he acquired his interest. In the present context the important words are, of course, “before he acquired his interest”, which were used, rather than “before he registered his interest”.

§8:10.50 Effect of Registration as Notice, s. 74 Registry Act

The original *Registry Act* of 1795 did not provide either that priority of registration should prevail or that the registration of an instrument should constitute notice to anyone. It was therefore held that where a mortgagee took a subsequent conveyance of the land as security for a further advance (giving a bond to reconvey on payment of the whole debt), he was entitled, by virtue of the doctrine of tacking, to priority as to the whole debt as against a registered encumbrance of which he had no notice.¹⁰⁴ The law was changed in 1850 by the enactment of a provision specifically directed against the doctrine of tacking and of a provision that the registration of an instrument should in equity constitute notice thereof to all persons claiming any interest in the land subsequent to such registration.¹⁰⁵

The *Registry Act*, s. 74, provides as follows:

74(1) The registration of an instrument under this or any former Act constitutes notice of the instrument to all persons claiming any interest in the land, subsequent to such registration, despite any defect in the proof for registration, but nevertheless it is the duty of a land registrar not to register any instrument except on such proof as is required by this Act.

(2) Subsection (1) does not apply to an instrument entered in the by-law index or to an instrument registered as a general registration under subsection 18(1) or (6) or under predecessors of those subsections,

- (a) unless an entry of the instrument appears in the abstract index;
- (b) unless an entry of a declaration under section 25 or a predecessor of that subsection referring to the instrument appears in the abstract index; or

¹⁰¹ [1928] 4 D.L.R. 573 (Ont. S.C.).

¹⁰² (1959), 17 D.L.R. (2d) 620 (Ont. C.A.).

¹⁰³ For a complete discussion of the facts of the case see §8:10.20, *supra*.

¹⁰⁴ *Street v. Commercial Bank of the Midland District* (1844), 1 Gr. 169.

¹⁰⁵ 1850 (U.C.), c. 63, ss. 4, 17, C.S.U.C. 1859, c. 89, ss. 56, 47. A provision as to tacking is now contained in s. 72, *infra*, §8:10.60. See also §9:70.

- (c) unless the instrument is mentioned in a subsequently registered instrument and an entry of the latter instrument or of a declaration referring thereto, as mentioned in clause (b), appears in the abstract index.

[The next page is 8-21]

(3) For the purposes of subsection (1), the registration of a notice under the section 113 or a statement under section 25 constitutes registration of the instrument referred to in the notice of statement.

(4) The registration of a notice under subsection 22(7) or (8) constitutes notice only of the particulars contained in the notice.

(5) After the expiry of a notice registered under subsection 22(8), the notice shall not constitute notice of the agreement, option or assignment or any particulars referred to in the notice.

Notice within the meaning of s. 74 is actual notice.¹⁰⁶ An assignment of an agreement of purchase and sale is a registrable instrument.¹⁰⁷ However, uncertainty as to the effect of such registration has led to considerable judicial examination.

In *Cope v. Crichton*,¹⁰⁸ it was held that a mere equitable interest expressed in a registered instrument, for example, in a registered assignment of the benefit of an agreement for the sale and purchase of land, will be good as against a subsequent mortgagee or grantee of the legal estate. This decision would appear to be in conflict with *Orsi v. Morning*.¹⁰⁹ There the court pointed out that while registration of an instrument is actual notice of that instrument under s. 74 of the *Registry Act*, s. 74 does not go so far as to provide that registration of an assignment of an instrument is equivalent to actual notice of an unregistered instrument referred to therein. Consequently Fraser J., held that where purchasers had registered their deed without actual notice of the registration of an assignment of a prior agreement of purchase and sale the assignment was at best only constructive notice of the original agreement of purchase and sale. On appeal the Court of Appeal did not deal with the point.

The registration of an agreement of purchase and sale itself operates as notice of the full rights of the purchaser,¹¹⁰ It has been suggested that, apart from s. 22(7) and (8) and s. 74(4), registration of an assignment of an agreement of purchase and sale to which the agreement has been attached would put on the register actual notice of the agreement under which the assignee claims.¹¹¹

A subsequent purchaser takes subject to an instrument which is in fact upon the register, notwithstanding that the proof of execution is defective.¹¹²

The principle of the statute is that a person acquiring land ought to ascertain whether there is anything registered against the land, and that he is assumed to search the registry for that purpose, and the statute does not apply to a person who is parting with an interest in land,¹¹³ or to a mortgagee who makes subsequent advances under a prior registered mortgage.¹¹⁴ As is pointed out in §8:10.80 it is

¹⁰⁶ *Edwards v. Gilboe* (1959), 17 D.L.R. (2d) 620 (Ont. C.A.) at p. 630; *Chugal Properties v. Levine* (1970), 17 D.L.R. (3d) 667 (Ont. H.C.J.) at p. 680, rev'd 22 D.L.R. (3d) 410 (C.A.), aff'd 33 D.L.R. (3d) 512n (S.C.C.).

¹⁰⁷ *Re Sutherland and Volos and Lebopal Realty Ltd.* (1967), 62 D.L.R. (2d) 11 (Ont. C.A.), *supra*, §8:10.10.

¹⁰⁸ (1899), 30 O.R. 603 (H.C.).

¹⁰⁹ (1971), 20 D.L.R. (3d) 25 (C.A.), affg *loc. cit.*, at p. 26.

¹¹⁰ *Strathy v. Stephens* (1913), 15 D.L.R. 125 (Ont. S.C.), at p. 130; *Croll v. Greenhow* (1930), 38 O.W.N. 101 (H.C.), aff'd 39 O.W.N. 105 (C.A.); see also *Stackhouse v. Morin*, [1948] O.R. 864 (H.C.J.), at p. 872.

¹¹¹ *Whitehead v. Lach General Contractors Ltd.* (1974), 46 D.L.R. (3d) 500 (Ont. C.A.), at p. 517.

¹¹² *Rooker v. Hoofstetter* (1896), 26 S.C.R. 41, affg 22 O.A.R. 175; see Words and Phrases for the judicial definition of "Equitable Mortgage or Charge" from this case; *Armstrong v. Lye* (1897), 24 O.A.R. 543, revg in part 27 O.R. 511 (Q.B.), aff'd 27 O.A.R. 287.

¹¹³ *Trust and Loan Co. v. Shaw* (1969), 16 Gr. 446; cf *Beck v. Moffatt* (1870), 17 Gr. 601.

nevertheless prudent to make a subsequent search before making a subsequent advance. In the case of a person who acquires any interest in the land subsequent to the registration of an instrument against the land, it would seem to be clear that he is affected with notice to the same extent as if he had received express notice of the instrument.¹¹⁵

Registration of a mortgage on land before the issue of the patent from the Crown does not constitute notice to a person who afterwards obtains the patent without actual notice of the mortgage.¹¹⁶

An equitable lien, charge or interest affecting land which is expressed in a written instrument falls within s. 70.¹¹⁷ If the instrument is not registered it is void as against a subsequent purchaser or mortgagee for value claiming under a registered instrument without notice of the equitable claim. In the case of an equitable claim arising by implication and not expressed in a written instrument which can be registered, special provision is made by s. 72 of the statute.¹¹⁸

Before 1893 it had been held that entry of an instrument at full length was necessary in order to constitute registration, and that the receipt of the instrument by the registrar was not sufficient,¹¹⁹ though the mere omission of the registrar to index an instrument would not deprive it of priority.¹²⁰ In that year, however, the statute was amended¹²¹ by the addition of the provision which is now contained in R.S.O. 1990, c. R.20, s. 77 as follows:

77. An instrument capable of and properly proved for registration shall be deemed to be registered when the land registrar has accepted it for registration in accordance with the regulations and no alteration may be made to it after that time.

As regards goods which have been delivered and which have been affixed to realty, the *Personal Property Security Act*,¹²² contains special provisions with regard to the priority of the security interest in the fixtures.

§8:10.60 Unregistered Equitable Interests, s. 72 Registry Act

Before 1865 the Registry Acts contained a proviso that nothing therein contained should be construed "to affect the rights of equitable mortgagees as now recognized in the Court of Chancery in this province".¹²³ It was only after the creation of the Court of Chancery in 1837¹²⁴ that equitable mortgages on land were enforceable at

¹¹⁴ See *Pierce v. Canada Permanent Loan and Savings Co.* (1894), 25 O.R. 671 (Ch. Div.), affd 23 O.A.R. 516n, in §8:10.60, *infra*; *Molgat Holdings Ltd. v. Zephyr Development Ltd.* (1979), 98 D.L.R. (3d) 104 (B.C. S.C.); *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2019 BCSC 238, at para. 72; related reasons at 2019 BCSC 1129 (CanLII).

¹¹⁵ *Bell v. Walker* (1873), 20 Gr. 558. There is, however, a dictum of Boyd C., to the contrary in *Abell v. Morrison* (1890), 19 O.R. 669 (Ch. Div.), at p. 676, which would seem to be of doubtful validity: *cf.*, observations of E.D. Armour in (1892) 11 Can. L.T. 23.

¹¹⁶ *Re Reed v. Wilson* (1893), 23 O.R. 552 (Ch. Div.).

¹¹⁷ See §8:10.30.

¹¹⁸ See §8:10.60.

¹¹⁹ *Lawrie v. Rathbun* (1876), 38 U.C.Q.B. 255.

¹²⁰ *Lawrie v. Rathbun*, *supra*; *Green v. Ponton* (1885), 8 O.R. 471 (Comm. Pl.); *Jost v. McCuish* (1893), 25 N.S.R. 519 (S.C.); *cf.*, *Siemens v. Dirks* (1913), 14 D.L.R. 149 (Man. C.A.), as to the registrar's omission to endorse a certificate of registration.

¹²¹ 1893 (Ont.), c. 31, s. 93.

¹²² R.S.O. 1990, c. P.10, s. 34.

¹²³ 1851 (U.C.), c. 63, s. 3; 1859 (C.S.U.C.), c. 89, s. 53.

TAB 3

Durrani et al. v. Augier et al.

[Indexed as: Durrani v. Augier]

50 O.R.(3d) 353

[2000] O.J. No. 2960

Court File No. 95-CU-89941

Ontario Superior Court of Justice

Epstein J.

August 4, 2000

Real property -- Registration -- Priorities -- Forgery --
Fraud -- Doctrine of actual notice -- Defendant forging
mortgage to obtain title to property -- Defendant selling
property -- Purchaser mortgaging property -- Register under
Land Titles Act being mirror of title -- Land Titles Act
overruling common law rule that fraudulent document a nullity
-- Fraudulent document capable of creating interest in land
under Land Titles Act unless person acquiring title not bona
fide purchaser or mortgagee without actual notice -- Purchaser
having actual notice and not obtaining title -- Mortgagee being
bona fide mortgagee without notice -- Transfer and sale
vitiating but mortgage remaining valid -- Land Titles Act,
R.S.O. 1990, c. L.5, ss. 155, 159, 160.

In 1992, the defendant A, who had a criminal record for fraud
and forgery, had a brief business relationship with AD, the
adult son of the plaintiffs Mr. and Mrs. D. In 1995, A
contacted the Ds' household and spoke to their daughter, and,
claiming he was owed a debt, A threatened to take action.
Subsequently, for the purpose of defrauding the Ds, A forged a
collateral loan agreement, which purported to evidence a
\$158,000 secured loan in U.S. currency. On March 23, 1995, A
arranged to have the collateral loan agreement registered under
the Land Titles Act against the title of the Ds' home in

Scarborough as instrument C940459. In May 1995, he obtained a default foreclosure judgment based on the collateral loan agreement. In June 1995, having discovered that Mrs. D had an interest in the Scarborough home, he forged another document, amended his statement of claim to add her and obtained a second default judgment. Next, A obtained title to the Scarborough property by registered instrument C961567.

Having obtained title in this way, A took steps to sell the property. About this time, as a result of a routine credit check, the Ds discovered that a judgment had been registered against their property. They retained a lawyer who put A's lawyer on notice that the Ds would be moving to set aside any judgment and that no steps should be taken to sell the property. The notice did not deter A and, after several unsuccessful efforts were made to sell the property, in August 1995, it was sold to MZ and SZ, who were the teenage daughters of J, a real estate agent who had been involved in several unsuccessful efforts to sell the property. The agreement of sale between A and the Zs included a schedule that, among other things, made the transaction conditional on the purchasers' solicitor being satisfied as to the validity of the foreclosure judgment.

With the assistance of their mother, J, the Zs obtained an \$87,000 mortgage from the Royal Bank to finance their purchase. The Bank was provided with a copy of the agreement of purchase and sale that did not include a copy of Schedule A. The Bank was also not provided with a copy of a side agreement that gave particulars of the proceedings against the property.

The sale and the mortgage transactions closed in August 1995. It was admitted that the Zs held the property in trust for their mother. The Royal Bank's mortgage was registered on the title to the Ds' property on August 17, 1995 as instrument number C97775. The transaction closed notwithstanding that there was an outstanding motion, which had been adjourned, to set aside the default judgment. J was aware of the court proceedings and aware that there was a serious dispute about A's right to sell the property. Subsequently, the Zs were enjoined from taking any steps to take possession of the

property and, in November 8, 1995, the foreclosure judgment was set aside. The Ds sued A, the Zs and the Royal Bank to resolve the competing claims to the Scarborough property. The Royal Bank, among other things, cross-claimed against the Zs for payment of the mortgage.

Held, the Ds had title and the Royal Bank had a mortgage against the property. A and the Zs had no interest in the property.

The outcome of the action depended upon the effect of the land titles legislation. The philosophy of the Land Titles Act embodied three principles: (1) the mirror principle, that the register mirror the state of the title; (2) the curtain principle, that a purchaser need not investigate behind the title depicted on the register; and (3) the insurance principle, that the state guarantees the accuracy of the register and compensates those suffering a loss as result of an inaccuracy. These doctrines form the doctrine of indefeasibility of title. The Act dealt specifically with fraud in three sections: ss. 155, 159, and 160. Section 155 modifies the common law rule that a forged instrument is a nullity and makes this rule subject to the provisions of the Act. The import of ss. 159 and 160 is that where a bona fide purchaser for value succeeds in becoming a registered owner, the fact of registration is conclusive and the court does not have jurisdiction to rectify the register. The court's ability to apply equitable doctrines is limited by the rights innocent people acquire under the Act. The burden of proving absence of notice is on the person alleging that he or she is a purchaser for valuable consideration without notice.

Applying these principles, instrument C961567 was fraudulent and did not give A an interest in the Scarborough property, although it could create a good root of title to a bona fide purchaser for value. Correspondingly, while at common law the transfer to the Zs would be void since it was based on A's fraudulent transfer of title, their title would be protected if their registered transfer was pursuant to a registered disposition for valuable consideration and they were bona fide purchasers for value without notice. Actual notice is

knowledge, not presumed knowledge as in the case of constructive notice. A person has actual notice if he or she is aware of the existence of a legal right even if he or she does not have knowledge of the precise details of that legal right. The evidence established that J had actual notice of the invalidity of A's interest in the property. She was acting as agent for her daughters and her knowledge was imputed to them. The Zs did not acquire an interest in the property. There was no evidence that the Royal Bank was aware of any irregularities with the title and it was a bona fide mortgagee without notice. Under the provisions of the Act, the Bank continued to have a valid charge. The Ds were entitled to an unencumbered title, but, under the Act, a person wronged is entitled to recover what is just from the person responsible for the wrong and, if unable to recover just compensation, the person who is prejudiced by the operation of the Act is entitled to have the compensation paid out of the Land Titles Assurance Fund established under the Act. The claim is made to the Director of Titles and the liability of the Fund for compensation and the amount of the compensation is determined by the Director subject to a right of appeal.

The Ds were entitled to a declaration that they owned the property as joint tenants and to punitive damages against A of \$25,000 for his malicious, high-handed and oppressive conduct. They were also entitled to solicitor and client costs against him fixed in the amount of \$100,000. The Bank was entitled to a declaration that it had a valid and binding mortgage, but it did not have a monetary claim against the Ds. Its enforcement proceedings against them were stayed pending the resolution of matters by the Director of Titles or further order of the court. The Bank was entitled to judgment against the Zs for the full amount owing under the mortgage and solicitor and client costs.

Cases referred to

Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd. (1996), 29 O.R. (3d) 350, 3 R.P.R. (3d) 174 (Gen. Div.), supp. reasons 29 O.R. (3d) 350 (Gen. Div.) [affd Ont. C.A., McMurtry

C.J.O., Finlayson and Moldaver J.J.A., February 13, 1998 (unreported)]; *Denise Construction Ltd. v. Shaddock* (1983), 31 R.P.R. 44 (B.C.S.C.); *Fort Garry Trust Co. v. Sutherland* (1980), 14 R.P.R. 270 (N.S.S.C.); *Frazer v. Walker*, [1967] 1 All E.R. 649, [1967] 1 A.C. 569, [1967] 2 W.L.R. 411, 110 Sol Jo. 946 (P.C.); *Irving Oil Ltd. v. S & S Realty Ltd.* (1983), 48 N.B.R. (2d) 1, 126 A.P.R. 1 (C.A.), revg (1983), 44 N.B.R. (2d) 602, 116 A.P.R. 602, 20 B.L.R. 288 (Q.B.) (sub nom. *Irving Oil Ltd. v. Slattery*); *MacDonald v. Canada Kelp Co.* (1973), 39 D.L.R. (3d) 617, [1973] 5 W.W.R. 689 (B.C.C.A.); *McDougall v. MacKay* (1922), 64 S.C.R. 1, 68 D.L.R. 245, [1922] 3 W.W.R. 191; *Mutual Trust Co. v. Creditview Estate Homes Ltd.* (1997), 34 O.R. (3d) 583, 149 D.L.R. (4th) 385, 49 C.B.R. (3d) 113, 12 R.P.R. (3d) 1 (C.A.), affg (1994), 28 C.B.R. (3d) 208, 41 R.P.R. (2d) 217 (Ont. Gen. Div.); *Pitcher v. Shoebottom*, [1971] 1 O.R. 106, 14 D.L.R. (3d) 522 (H.C.J.); *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (C.A.); *Toronto (City) v. Rudd*, [1952] O.R. 84, [1952] 2 D.L.R. 578 (H.C.J.); *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915, 71 D.L.R. (3d) 72, 11 N.R. 97, 1 R.P.R. 1; *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, [1999] I.L.R. 1-3659, 32 C.P.C. (4th) 3 (C.A.) [leave to appeal to S.C.C. granted (1999), 249 N.R. 392n]

Statutes referred to

Land Titles Act, R.S.O. 1990, c. L.5, ss. 25, 78(4), 87, 155, 159, 160

Land Transfer Act, 1875 (U.K.)

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

Authorities referred to

Di Castri, *Registration of Title to Land* (Toronto: Carswell, 1987 (looseleaf)), vol. 2, p. 17-32

Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173, p. 174

Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), p. 602

ACTION to determine the ownership of a property registered under the Land Titles Act, R.S.O. 1990, c. L.5.

A. Irvin Schein, for plaintiffs.

Gideon McGuire Augier, in person.

Richard H. Parker, Q.C., for defendants, Melanie Zettler and Sophia Zettler.

Bernard B. Gasee, for Royal Bank of Canada.

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

The Facts

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

[3] Mr. Durrani is not well. He is an insulin-dependent diabetic. In 1994, he had a stroke and then, in 1998, suffered

a heart attack. Although he was in the courtroom for much of the trial, he did not testify due to his obviously weakened condition.

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

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

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

[7] Early in 1995, three years later, Augier tried to locate Auran Durrani and contacted the Durrani household. Fawzia Durrani testified that she received a telephone call from

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

[8] The next move in Mr. Augier's attack involved the creation of a document entitled a "collateral loan agreement" bearing the date of January 3, 1992. This document was based on certain information Mr. Augier had been able to obtain as a result of his contact three years earlier with Auran Durrani. This information related to the address of the property and the names of those connected with it. The document purports to set out a loan agreement between Mr. Augier in trust as lender, and Auran Durrani and several companies, including Durrani Travel Services Inc., as borrowers of \$158,000 in U.S. currency. The collateral loan agreement is stated to grant the lender various forms of security for the loan including a charge in 1 Gilroy Drive. It is purportedly signed by Auran Durrani, as borrower and guarantor, and witnessed by Mr. Augier. On March 23, 1995, Mr. Augier arranged to have notice of the collateral loan agreement registered on title to the property as a notice of security interest identified as instrument number C940459.

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

[10] During this time Mr. Augier was actively trying to dispose of his alleged interest in the property. He listed it for two weeks with Ms. Bilar, an agent with Homelife Champion Real Estate agency. In fact, by May 15, 1995, Mr. Augier believed he had found a purchaser. While the prospective

purchaser identified at that point in time did not end up purchasing the property, the evidence demonstrates that Mr. Augier was very anxious to secure a purchaser who was prepared to close quickly.

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

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

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

[14] Mr. Augier impressed me as being very intelligent. He is also an ambitious man but one with no scruples. This combination makes him dangerous. His admitted criminal record is the best evidence of this. In May 1987, Mr. Augier was

convicted of one count of fraud and in September of that year he was again convicted of two counts of fraud. In 1991 he was convicted of a far more serious fraud involving holding himself out to be a qualified mortgage broker. Part of Mr. Augier's sentence for the 1991 conviction involved the restitution of moneys lost to the victims. It is undisputed that these moneys were never paid. In 1998, Mr. Augier pled guilty to three counts of fraud involving the falsification of mortgages. The facts behind the 1998 convictions suggest that Mr. Augier forged certain mortgages with the intention of defrauding his victims of their interest in their properties. Again, part of his sentence was a form of restitutionary payment. Again, Mr. Augier did not make the payment. On December 6, 1999, Mr. Augier was convicted of the offence of attempting to defraud Dr. Dehmoubed and of uttering a forged document, being a collateral loan agreement. At the time of the trial before me Mr. Augier was awaiting sentencing in respect of these most recent convictions.

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

[16] Mr. Augier's specific version of events flies in the face of common sense. In general, his testimony can only be

characterized as displaying an evident disregard for the truth.

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

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

[19] It is of note that the documents in the Dehmoubed matter are strikingly similar in wording to the two documents in question in this action. Evidence of similar facts is admissible when it is logically probative or relevant to a material issue in the case, and it is not unduly oppressive or unfair to the other side: J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at p. 602. When a real and substantial connection exists between the act or allegation made and the previous transaction, the previous transaction is admissible to rebut a defence such as lack of intent, or accident or to prove the fact of the act or allegation made: *MacDonald v. Canada Kelp Co.* (1973), 39 D.L.R. (3d) 617 (B.C.C.A.). In this case, it is clearly relevant and probative to know that there are other cases in which Mr. Augier has used documents and conducted transactions bearing close resemblance to the documents and transactions at issue here. A real and substantial connection clearly exists in the documents used and

strategies employed by Mr. Augier between the Dehmoubed transaction and the Durrani transaction. This connection supports my finding that the Durrani charge and related documents were fraudulent.

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

June 23, 1995

VIA FAX NO. (905) 362-4049

R. Geoffrey Newbury
Barrister & Solicitor
Suite 1002
95 Wellington Street West
Toronto, Ontario
M5J 2V4

Dear Mr. Newbury:

This is to confirm our telephone conversation of today. I have been retained by Mr. Asad Khan Durrani, Mrs. Zaib Durrani and their company Durrani Travel Services Ltd. with respect to proceedings that you are conducting against them on behalf of Gideon McGuire Augier, in trust.

I understand that you may have obtained a default judgment against my clients based on an alleged mortgage foreclosure. These proceedings only just came to my clients' attention as

a result of a routine credit check.

I have obtained some documents from the court file which my clients have reviewed, including the pleadings and affidavits of service. They inform me that they contain many serious misrepresentations and matters they have no knowledge of.

I am in the process of obtaining further information with respect to the involvement of Auran Durrani and hope to be in touch with you shortly. I can assure you that Mr. and Mrs. Durrani are business people of complete integrity, that they have operated Durrani Travel Ltd. for many years, and that their son Auran co-signed any mortgage on his behalf. If you have any other or different information, would you please convey it to me immediately. In particular, I would like to see a copy of the mortgage referred to in the statement of claim.

I hereby place you on notice that the action and judgment are ill-founded as against my clients and I will be taking steps to set aside these proceedings and any judgment you have obtained. I will also be requesting that the police investigate what is apparently a fraudulent claim or at least a claim based on fraudulent documents.

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

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

Yours truly,

David McGhee

[21] It is of considerable significance that Mr. McGhee's

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

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

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

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

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

[26] The purchase and sale agreement signed by the Zettlers and Mr. Augier and witnessed by Ms. Jones included a Schedule "A" that, among other things, made the transaction conditional on the purchasers' solicitor being satisfied as to

the validity of the foreclosure judgment and the writ of possession obtained and the removal of a caution that had been put on title by Mr. Garda relating to his earlier interest in purchasing the property. As well, the parties to the transaction entered into a "side agreement" in which the challenges having to do with obtaining vacant possession were addressed and in which the purchasers acknowledged having been provided with full particulars concerning all "proceedings" involving the property. I note that little if any evidence was adduced concerning the circumstances surrounding the preparation and execution of Schedule "A" or the side agreement.

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

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

[29] As previously indicated, all of this transpired after Mr. McGhee had advised Mr. Newbury that he had instructions to set aside the default judgment. The motion was originally returnable on July 31, 1995 and was then adjourned to August 14. Shortly before that date, the Durranis changed lawyers and Minden, Gross, Grafstein & Greenstein became solicitors of record. The return date for the motion was again adjourned as new counsel wanted to conduct cross-examinations.

[30] The evidence of Mr. Augier does not accord with that of Mr. Newbury concerning the decision to close in the face of the pending motion. Mr. Augier testified that Mr. Newbury assured

him he could proceed with the sale as long as counsel other than Mr. Newbury represented him. Mr. Newbury denied having given Mr. Augier this advice. His evidence was that he told Mr. Augier not to proceed with the sale and he had no further involvement. There was no specific evidence led that directly linked Mr. Newbury to the sale to the Zettlers.

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

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

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

[34] The evidence of Ms. Durrani is that early that morning she received a telephone call from a woman who identified herself as Ms. Jones. The caller announced that she was "buying

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

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

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

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

1. There was an initial unexplained two-week listing followed by a frenzy of activity all with the intent of securing a quick sale.
2. Ms. Jones purchased the property without ever seeing, let alone inspecting, the inside. Ms. Jones' response to the questions put to her as to why she did not simply go up to the front door of the property and ask to see it were quite improbable.
3. The price was low compared to demonstrable market value. The explanation offered by Ms. Jones concerning why she was able to purchase the property at such a low price is not credible. Ms. Jones was well aware that this was a "steal", not a "deal".
4. The documentation surrounding the sale was suspicious. As previously indicated, the copy of the agreement of purchase and sale Ms. Jones gave to the Bank, dated August 17, 1995, was not the original agreement signed by all parties. Schedule "A" that formed part of the agreement Mr. Augier and the Zettlers signed was not attached to the copy of the agreement given to the Bank. Clearly, Ms. Jones had to have known that editing the documents relating to the transaction was improper. Then there was the side agreement clearly entered into with the intent of keeping part of the deal confidential. The combination of the altered agreement of purchase and sale and the existence of the side agreement indicates not only an awareness that this sale was problematic but also a willingness to conceal the problems associated with title, at least from the Bank and perhaps others as well.

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

The Issues

[38a] These startling facts give rise to the following issues:

1. Did Mr. Augier ever have a legitimate interest in the property that formed the basis of his writ of foreclosure?
2. Did Ms. Jones and the Zettlers obtain a legitimate interest in the property and acquire an indefeasible interest under the Land Titles Act?
3. Does the Royal Bank have a valid charge on the property?
4. What relief is available under the Land Titles Act for any party found to have a valid interest in the property?

Analysis

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

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

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

[42] The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as

depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

[42a] Indefeasibility of title has been defined as:

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

(*Frazer v. Walker*, [1967] 1 A.C. 569 (P.C.) at pp. 580-81.)

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

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

[45] The part of the Act entitled "Fraud" has only three

sections. It starts with s. 155 that provides as follows.

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

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

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

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

159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.

160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of

the case, make an order for the rectification of the register.

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

[50] In *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (C.A.), the plaintiffs had a charge registered against land registered under the Act. A forged cessation of the charge was later registered. Then the Royal Bank of Canada registered a mortgage against the land. The plaintiffs sued to have their mortgage recognized in priority over that of the Bank despite the forged cessation of their charge. The Court of Appeal held that the Royal Bank had a valid mortgage, and its interest in the land prevailed over that of the plaintiffs. Goudge J.A. noted that s. 155 of the Act modifies the common law rule that a forged document is a nullity and is void, making this rule subject to the provisions of the Act, which, in keeping with the principle that the register is a mirror of the state of the title, deems an instrument, once registered, effective according to its nature and intent where registered dispositions for valuable consideration are involved. He concluded that the forged cessation of charge was effective as against the Bank. The Royal Bank retained its interest despite the forgery because it was a bona fide purchaser for value who relied on the cessation of charge on the register.

[51] As far as the court is concerned, when it comes to dealing with competing interests of innocent parties affected

by registration, the interests shown in the registrar prevail and there is no jurisdiction to rectify the title even when, as in the matter before me, the result may appear to be inequitable.

[52] This is not to say that equity has no application to claims governed by the Act. The importance of equity has been noted by the Supreme Court of Canada in *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915 at pp. 952-53, 71 D.L.R. (3d) 72 at p. 98 in rejecting the proposition that the Land Titles Act in Ontario had abrogated the equitable principle of actual notice. The Ontario Court of Appeal also recognized the continued application of equitable principles in affirming the decision of Adams J. in *Mutual Trust Co. v. Creditview Estate Homes Ltd.* (1994), 41 R.P.R. (2d) 217, 28 C.B.R. (3d) 208 (Ont. Gen. Div.), affirmed (1997), 34 O.R. (3d) 583, 12 R.P.R. (3d) 1 (C.A.) that the equitable doctrine of subrogation was not abrogated by the Land Titles Act in Ontario.

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

receive a windfall rather than the rights they acquired by registration.

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

1. Mr. Augier's Interest in the Property

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

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

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

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

[58] It is always a necessary precondition for valid title

that the purchaser or mortgagee be a bona fide or good faith purchaser for value without notice. As has already been observed, the Supreme Court in *United Trust Co.*, supra, held that the Land Titles Act in Ontario has not abrogated the principle of actual notice. Mr. Justice Spence made this clear in the following paragraph, found at p. 952 S.C.R., p. 98 D.L.R.:

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

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

(a) Actual notice

[60] The Zettlers contend they are bona fide purchasers for value without notice. Whether the Zettlers had actual notice of a competing interest in the property is a question of fact. The burden of proving the absence of notice is on the person alleging that he or she is a purchaser for valuable consideration without notice: *McDougal v. MacKay* (1922), 64 S.C.R. 1 at p. 7; *Toronto (City) v. Rudd*, [1952] O.R. 84

(H.C.J.); Pitcher v. Shoebottom, [1971] 1 O.R. 106 (H.C.J.); Fort Garry Trust Co. v. Sutherland (1980), 14 R.P.R. 270 (N.S.S.C.) at p. 284.

[61] Actual notice is knowledge, not presumed knowledge as in the case of constructive notice. The concept of actual notice has most often been discussed in the context of the Registry Act, the second form of land registration in Ontario. Recently Salhany J. in Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd. (1996), 29 O.R. (3d) 350, 3 R.P.R. (3d) 174 (Gen. Div.) reviewed the authorities on the definition of actual notice and concluded that the term "actual notice" [at p. 356]:

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

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

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

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

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

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

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

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

(b) Agency

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

[69] Ordinarily, the knowledge of the agent is attributed to the principal. The principal has constructive notice of things the agent is under a duty to make known to him or her, and the principal is estopped from denying knowledge of the matters in question. Notice to the agent constitutes notice to the principal: *Denise Construction Ltd. v. Shaddock* (1983), 31 R.P.R. 44 (B.C.S.C.); *Irving Oil Ltd. v. S & S Realty Ltd.* (1983), 44 N.B.R. (2d) 602 (Q.B.), reversed on other grounds (1983), 48 N.B.R. (2d) 1, 20 B.L.R. 288 (C.A.); CED, Volume 1, Title 4, s. 360.

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

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

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

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

3. The Royal Bank's Mortgage

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

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

4. Relief Available under the Land Titles Act

(a) Rectification

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

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

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

(b) Land Titles Assurance Fund and inability of the court to order compensation

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

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

Disposition

[80] The Durranis are entitled to a declaration that the transfer from Mr. Augier to the Zettlers registered as instrument number C961568, the application to amend the register as instrument number C961567 and the notice of security interest registered as instrument number C961569 are void and unenforceable. The transfer and the application to amend the register and the notice of security interest are hereby set aside. It follows that the Durranis are entitled to a declaration that they own the property as joint tenants.

[81] Pursuant to s. 25 of the Act I, direct the Registrar of the Land Titles Division of Metropolitan Toronto (No. 66) to rectify the register with respect to the title to the property

by expunging from the register the transfer, the application to amend and the notice of security interest.

[82] The Durranis have claimed punitive damages against Mr. Augier. In my view, if there is any conduct worthy of the most severe sanction of the court, it is the despicable conduct of Mr. Augier. Motivated by greed, he used the knowledge he gained from experience as a paralegal with his obvious intelligence to defraud two hard-working innocent elderly people. This wrong and the accompanying conduct was so malicious and oppressive and high-handed that it offends anyone's sense of decency. Accordingly, the two requirements for an award of punitive damages as stated by Laskin J.A. in *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280 (C.A.) have been met. I award punitive damages in favour of the Durranis against Mr. Augier in the amount of \$25,000. I make no comment about whether this amount is one that can properly be claimed from the Fund.

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

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

[85] The Bank has counterclaimed for a declaration that it has a valid and binding mortgage. For the reasons given, it is entitled to such a declaration. However, it has also claimed judgment against the Durranis for the balance owing under the mortgage or for leave to issue a writ of possession. The Bank's claim for judgment against the Durranis for the amount owing under the mortgage is dismissed without costs. The Bank does not, in the circumstances, have a monetary claim against the Durranis. I do not have to deal with what enforcement rights

the Bank may have under the mortgage as the Bank, to its credit, has given its counsel instructions not to enforce its rights against the Durranis until matters have been resolved with the Fund. Based on this undertaking, any enforcement proceedings under the mortgage are stayed pending the resolution of matters by the Director of Titles or further order of this court.

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

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

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

against the Zettlers for the full amount of the mortgage outstanding as of today's date, together with solicitor and client costs.

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

Judgment accordingly.

TAB 4

Most Negative Treatment: Check subsequent history and related treatments.

2003 CarswellOnt 4762
Ontario Superior Court of Justice

Cybernetic Exchange Inc. v. J.C.N. Equities Ltd.

2003 CarswellOnt 4762, [2003] O.J. No. 4947, [2003] O.T.C. 1035, 127 A.C.W.S. (3d) 764, 15 R.P.R. (4th) 74

**The Cybernetic Exchange Inc. and The Cybernetic Exchange LLC
(Plaintiffs) and J.C.N. Equities Ltd., Galwide Investments Limited, 1175585
Ontario Inc. and Home Savings and Loan Corporation (Defendants)**

Spence J.

Heard: August 14-18, 2002; April 7, 11, 14-17; September 2-3, 2003

Judgment: November 26, 2003

Docket: 00-CV-189607

Counsel: Jonathan C. Lissus, Paula Trattner for Plaintiffs

Antonio Conti for Defendant, Galwide Investments Limited

Richard Horodyski, John Callaghan for Defendant, Home Savings and Loan Corporation

Subject: Contracts; Corporate and Commercial; Torts; Property; Estates and Trusts

Related Abridgment Classifications

Debtors and creditors

[XII Fraudulent conveyances](#)

[XII.6 Exempted property](#)

Estates and trusts

[II Trusts](#)

[II.3 Constructive trust](#)

[II.3.h Miscellaneous](#)

Real property

[II Registration of real property](#)

[II.2 Registration of land](#)

[II.2.b Land titles](#)

[II.2.b.iv Fraud](#)

[II.2.b.iv.B Effect on title](#)

Real property

[VII Mortgages](#)

[VII.14 Priorities](#)

[VII.14.b Between types of creditors](#)

[VII.14.b.vi Mortgagee and execution creditor](#)

Headnote

Fraud and misrepresentation --- Fraudulent conveyances — Exempted property

In determining whether third party mortgagee has acted in good faith for purposes of Fraudulent Conveyances Act, distinction may be drawn between mortgagee's suspicions about creditworthiness of borrower and mortgagee's suspicions about validity of borrower's title — Mortgagee who has reason to suspect that there is something wrong with prospective mortgagor's title has or may have reason to suspect possibility of fraud — If mortgagee has reason only to suspect that mortgagor is credit risk and fails to make further enquiry, such failure might indicate negligence or indifference, but is not sufficient to show mortgagee's wilful disregard of possible fraud.

Mortgages --- Priorities — Between types of creditors — Mortgagee and execution creditor

In determining whether third party mortgagee has acted in good faith for purposes of Fraudulent Conveyances Act, distinction may be drawn between mortgagee's suspicions about creditworthiness of borrower and mortgagee's suspicions about validity of borrower's title — Mortgagee who has reason to suspect that there is something wrong with prospective mortgagor's title has or may have reason to suspect possibility of fraud — If mortgagee has reason only to suspect that mortgagor is credit risk and fails to make further enquiry, such failure might indicate negligence or indifference, but is not sufficient to show mortgagee's wilful disregard of possible fraud.

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

In determining whether third party mortgagee has acted in good faith for purposes of Fraudulent Conveyances Act, distinction may be drawn between mortgagee's suspicions about creditworthiness of borrower and mortgagee's suspicions about validity of borrower's title — Mortgagee who has reason to suspect that there is something wrong with prospective mortgagor's title has or may have reason to suspect possibility of fraud — If mortgagee has reason only to suspect that mortgagor is credit risk and fails to make further enquiry, such failure might indicate negligence or indifference, but is not sufficient to show mortgagee's wilful disregard of possible fraud.

Trusts and trustees --- Constructive trust — General principles

In alleging defendant's knowing receipt of trust property, for plaintiff to recover disputed property, plaintiff must prove that property was subject to trust in favour of plaintiff, that property, which defendant received, was taken from plaintiff in breach of trust, and defendant did not take property as bona fide purchaser for value without notice.

Two plaintiff corporations filed an action in Florida court against an individual, B, and B's company, GF Ltd. The plaintiffs alleged that B and GF Ltd. had committed fraud and civil theft in connection with a proposed stock financing transaction. The plaintiffs were successful in their claim for damages for civil theft, and the Florida court entered judgment against B and GF Ltd. in the amount of \$625,725.71. One month after the judgment, B arranged for GF Ltd. to purchase a property in Ontario for the sum of \$185,000. The plaintiffs successfully sued B and GF Ltd. in Ontario on the Florida judgment. By means of a trust, B subsequently caused GF Ltd. to transfer the Ontario property to an entity, J Ltd., for the sum of two dollars. The trust deed identified J Ltd. as the Trustee and the "B family trust" (the "BFT") as the beneficiary. J Ltd. did not exist as of the date the trust was settled, but was incorporated shortly afterwards by B and GF Ltd. B was the shareholder, director, and officer of J Ltd. The BFT was a bank account opened by B which he used exclusively for his own purposes, and with respect to which he presented himself as trustee.

While the plaintiffs were attempting to enforce the Florida and Ontario judgments against B, J Ltd. granted a mortgage over the Ontario property to the defendant H Co. H Co. did not disburse the mortgage funds to J Ltd., but disbursed the funds to the account in the name of the BFT. In disbursing the funds, H Co. was aware that two months prior, the property had been conveyed from GF Ltd. to J Ltd. for two dollars, and made no request for any conveyancing documents nor any inquiries about the BFT. One month after granting the mortgage to H Co., B approached the defendant GI Ltd. for the purpose of borrowing funds to be secured by way of mortgage over the Ontario property. GI Ltd. advanced the sum of \$150,000 to the BFT account and took a second mortgage on the property. After making a voluntary assignment into bankruptcy and informing GI Ltd. that he was bankrupt, B approached GI Ltd. for another advance. GI Ltd. made no further inquiries about B and advanced an additional \$50,000 to be secured by the existing second mortgage on the property.

The plaintiffs brought a claim against the Ontario property held by J Ltd. arguing that the mortgages given by J Ltd. to H Co. and GI Ltd. were not valid as against the plaintiffs.

Held: The claim was dismissed.

The plaintiffs registered and filed a writ of execution against B in accordance with the provisions of the Execution Act. Even if the Ontario property could be said to be property of B, which was doubtful, because the property was registered in a different name than B's, s. 136(6) of the Land Titles Act made the plaintiff's writ of execution ineffective to bind the property.

The acquisition by GF Ltd. of B's interest in the Ontario property at a time when B was insolvent was prima facie a fraudulent conveyance. As the transfer of property from GF Ltd. to J Ltd. in trust for the BFT was for nominal consideration, and as J Ltd. and the BFT were clearly related to B, the transfer to J Ltd. was a further prima facie fraudulent conveyance. By its terms, s. 7(2) of the Fraudulent Conveyances Act could apply to save a mortgage made upon good consideration even where there was notice or the knowledge of the intent to defraud, provided the mortgage was made in good faith and without fraud. On this basis, it could be said that the only issue was whether the defendant mortgagees acted in good faith. Section 155 of the Land

Titles Act effectively preserves the application of the Fraudulent Conveyances Act, subject to the provisions of the Land Titles Act with respect to registered dispositions for valuable consideration.

The allegations of the plaintiffs were based on the failure of H Co. and GI Ltd., the mortgagees, to make more inquiry than they did about B and specifically their failure, in the face of "suspicious circumstances", to search executions against B. The evidence from both mortgagees was that their loans on the Ontario property were equity loans, namely loans based on the value of the property that provided the security. H Co. testified that an equity loan did not place importance on the ability of the borrower to repay, on the basis that the property would be available if there was a default in regular payments. On the issue of whether H Co. and GI Ltd. were acting in good faith, a distinction may be drawn between a mortgagee's suspicions about the creditworthiness of the borrower and suspicions about the validity of the borrower's title. A mortgagee who has reason to suspect that there is something wrong with the prospective mortgagor's title has or may have reason to suspect the possibility of fraud. A mortgagee who has reason only to suspect that there is a credit risk is not in such a position and therefore if that mortgagee fails to make enquiry it might indicate negligence or indifference, but it is not sufficient to show wilful disregard of possible fraud.

While H Co. and GI Ltd. both dealt personally only with B, they each knew they were obtaining a charge from J Ltd. in trust for the BFT. The question to be asked, therefore, was whether there were suspicious circumstances surrounding J Ltd. and the trust. No reason existed to regard J Ltd. as having been, upon its incorporation, other than a duly incorporated and subsisting corporation. In particular, no reason existed to suppose that J Ltd. was simply the alter ego of B. No evidence existed to indicate that the mortgagees knew or had reason to know that B had ever had a personal interest in the property. They had no reason to believe that there was any deficiency in respect of the trust or that there had been any other dealing in respect of the title which could have the result that a judgment against B could affect the title to the property.

The plaintiffs submitted that B was a constructive trustee of the property for the benefit of the plaintiffs and that H Co. and GI Ltd. were liable for knowing receipt of trust property. Even if B could be said to have held in trust the sum of which B was found to have defrauded the plaintiffs, no evidence existed to show that any part of that amount was used to purchase the Ontario property. Therefore, the action of B and GF Ltd. in acquiring the property did not result in enriching them with property and correspondingly depriving the plaintiffs of it. Because no constructive trust of the property for the plaintiffs existed, the charges in favour of the mortgagees could not constitute knowing receipt of trust property.

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R. 1.140(a)(2) — referred to

CLAIM by execution creditors against property held by corporation on basis of judgment in favor of creditors against corporation's owner for civil fraud.

Spence J.:

1 In this case the plaintiffs claim against real property held by the defendant J.C.N. Equities Ltd. ("JCN"), as the registered owner in Land Titles, on the basis of a judgment in favour of the plaintiff against the alleged owner of JCN, the defendant Joseph Bressi, ("Bressi") for civil fraud. The plaintiffs also claim that the mortgages given by JCN to the other two defendants Home Savings and Loan Corporation ("Home") and Galwide Investments Limited ("Galwide") are not valid as against the plaintiffs. The dispute is effectively between the plaintiffs and the two mortgagees.

2 Stated briefly, the position of the plaintiffs is that the defendants were on sufficient notice of suspicious facts indicating a fraudulent conveyance that they are not entitled to the protections that would otherwise be available to them under applicable statutes and also that they are liable to the plaintiffs under the doctrine of knowing receipt of trust property. The defendants dispute these claims on various grounds. One factual issue that is key is what the defendants knew or ought to have known or enquired about concerning Bressi and the judgment against him in favour of the plaintiffs.

Background

3 The plaintiff, The Cybernetic Exchange, Inc. is a corporation organized under the laws of the State of Florida and resident in the State of Florida, one of the United States of America.

4 The plaintiff, The Cybernetic Exchange LLC., is a limited company resident in the Turks and Caicos Islands.

5 The Defendant J.C.N. Equities Ltd. ("JCN"), is a corporation incorporated under the *Ontario Business Corporations Act* with its head office in Bolton, Ontario, Canada.

6 Galwide was incorporated in Ontario on or about October 30, 1992.

7 Home is a company incorporated under the *Canada Business Corporations Act*.

8 Ontario Inc. ("Ontario") was incorporated in Ontario on or about April 17, 1996. It is owned and controlled by Joseph Bressi. As of April 6, 2000 Bressi was a bankrupt.

The Plaintiffs' Judgments against Bressi

9 In or around August 1996 the Plaintiffs filed an action, number 96-5273, in the Thirteenth Circuit Court in and for Hillsborough County, Florida against Garwood Financial Ltd., Garwood Properties III Ltd. and Joseph Bressi ("the Garwood and Bressi defendants") alleging, *inter alia*, that the Garwood and Bressi defendants had committed fraud and civil theft in connection with a proposed stock financing transaction.

10 At all material times Joseph Bressi ("Bressi") was a shareholder, director and officer of Garwood Financial Ltd. and Garwood Properties III Ltd. and JCN.

11 On or around October 8, 1996, the Garwood and Bressi Defendants filed a motion with the Florida Court to dismiss the action for lack of personal jurisdiction alleging that, as Canadians, they lacked sufficient minimum contacts with Florida to satisfy American constitutional due process requirements.

12 By Order dated June 6, 1997, the Thirteenth Circuit Court denied the Garwood and Bressi Defendants' motion to dismiss for lack of personal jurisdiction.

13 The Garwood and Bressi Defendants appealed the Thirteenth Circuit Court's Order denying the motion to dismiss to the Second District Court of Appeal. After filing the initial appeal brief, counsel for the Garwood and Bressi Defendants was granted leave to be removed as solicitor of record and withdraw from the case. The Second District Court of Appeal gave the Garwood and Bressi Defendants 30 days to obtain substitute counsel. No substitute counsel entered an appearance for any of the Garwood and Bressi Defendants.

14 The Second District Court of Appeal affirmed the Thirteenth Circuit Court's Order and filed its Opinion on March 13, 1998. This Opinion became final as of March 30, 1998.

15 Florida Rule of Civil Procedure 1.140(a)(2) requires a party to file a responsive pleading within 10 days after the court's action on a motion.

16 The Garwood and Bressi Defendants failed to respond to the action within the time required by the applicable rules and a default was therefore entered against the Garwood and Bressi defendants in the Thirteenth Circuit Court on or around June 3, 1998. On June 3, 1998, the Thirteenth Circuit Court entered an order granting Default and Partial Final Judgment in favour of the plaintiffs as to Counts VI, VII and VIII (seeking damages for civil theft) and entered judgment against the Garwood and Bressi defendants in the amount of \$625,725.71.

17 The Court reserved jurisdiction to consider the relief requested by the plaintiffs under the remaining counts of the complaint.

18 At the evidentiary hearing the plaintiffs submitted evidence in support of their damages claims. The Court found that the plaintiffs were entitled to the relief requested, \$56,917,302.00 on principal, and \$18,629,033.00 for interest, a total of \$75,546,335.00.

19 This judgment was in addition to, and not reduced by the judgment previously entered by the Court in Florida in this matter on June 3, 1998.

20 The Garwood and Bressi Defendants have not paid the judgment or any portion of it and the full amount is due, owing, and payable by the defendants to the plaintiffs.

21 The plaintiffs have demanded payment from the Garwood and Bressi Defendants and they have failed to pay the judgment amount or any portion of it.

22 By Statement of Claim dated August 6, 1998, bearing Court file no. 98-CV-152006, the plaintiffs sued the Garwood and Bressi Defendants in Ontario on the Florida Judgment.

23 On or around August 12, 1998 the Garwood and Bressi Defendants were served with the statement of claim.

24 On or around August 28, 1998 and September 11, 1998, Bressi was served with the Statement of Claim in Court file no. 98-CV-152006 in accordance with the terms of an Order for Substituted Service, as ordered by Master Garfield on August 28, 1998.

25 On or around November 2, 1998 the plaintiffs obtained default judgment in Court file no. 98-CV-152006 from the Honourable Madam Justice Lax. The judgment is for \$625,725.71 in United States currency plus interest at a rate of 10% per annum until December 31, 1998 and thereafter at the rate set by the Florida Comptroller plus costs fixed at \$1500.00.

26 On or around September 23, 1999 the plaintiffs obtained judgment in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida against the Bressi and Garwood Defendants. This judgment (the "Final Judgment") is for a total amount of \$75,546,335.00 in United States currency plus interest at a rate of 10% per annum until December 31, 1999 and thereafter at the rate set by the Florida Comptroller.

27 By Statement of Claim dated November 9, 1999 bearing Court file no. 99-CV-179761 the plaintiffs sued the Garwood and Bressi Defendants on the Final Florida Judgment in the amount of \$75,546,335.00.

28 On or around November 20, 1999 the Bressi and Garwood Defendants were served with a Notice of Examination in Aid of Execution for Court file no. 98-CV-152006 as well as the Statement of Claim in Court file no. 99-CV-179761 at the property referred to herein as the Bolton property.

Creation of Bressi Family Trust

29 In 1994 Bressi, who was insolvent and had outstanding executions against him, opened a bank account at the Royal Trust in Toronto in the name of the Bressi Family Trust (sometimes referred to below as the "BFT"). At all material times Bressi was the sole person with signing authority on the account and the only person who operated it. Bressi used the account exclusively for his own purposes. Bressi presented himself as the trustee of the BFT. The BFT has never filed a trust tax return. It has no resolutions, minutes, records or accounts and has never accounted to its purported beneficiaries.

30 The monies defrauded from the plaintiffs through the transactions referred to above were deposited by Bressi in the BFT bank account which were subsequently the subject of the plaintiffs' action in Florida.

Purchase of the Bolton Property

31 On July 9, 1998 (i.e. about one month after the first Florida Judgment) Bressi arranged for the purchase of a property in Bolton ("the Bolton property") from Ellen and Sigismund Sturm for the sum of \$185,000.

32 Bressi initially intended to take title to the Bolton property in the name of a corporation he owned, Bressi Holdings. However, at the last minute an execution was discovered against Bressi Holdings. Accordingly, Bressi took title to the Bolton property in the name of Garwood Financial Ltd..

33 On or about July 9, 1998 the Bolton property was transferred from the owners Sigismund and Ellen Strum to the purchaser Garwood Financial Ltd. Garwood Financial Ltd. became the owner of the Bolton property.

34 At the time of this purchase Bressi had a number of executions outstanding against him. He also had not and has not filed a tax return since 1995.

The Incorporation of JCN and the Transfer to it

35 On or around January 6, 1999 J.C.N. Equities Ltd. was incorporated by the Garwood and Bressi Defendants as an Ontario corporation. Joseph Bressi is the shareholder, director and officer of JCN. The head office of JCN is the Bolton property. Bressi lived on the Bolton property.

36 On or around January 13, 1999 Bressi caused Garwood Financial Ltd. to transfer the Bolton property to JCN for the sum of two dollars. JCN became the owner of the Bolton property. As of the date of the transfer, Garwood was insolvent or unable to pay its debts or was on the eve of insolvency.

37 Neither JCN nor Garwood Properties nor Garwood Financial has ever filed a tax return.

The Mortgage Transactions with the Bolton property: The Mortgage to Home

38 In May of 1999 after the plaintiffs had obtained judgment against the Garwood companies and Bressi in Florida and Ontario and while the plaintiffs were attempting to enforce the judgments, JCN granted a mortgage over the Bolton property to Home.

39 In early March 1999 two months after he caused the conveyance of the Bolton property from Garwood to JCN, Bressi approached Home for a loan. Bressi was building an estate home on the Bolton property.

40 In its internal documentation, Home identifies the mortgagors of the Bolton property as "J.C.N. Equities - Joe Bressi".

41 The appraisal report obtained by Home on April 7, 1999 for the purposes of the mortgage over the Bolton property identifies Bressi as the applicant.

42 Home's mortgage loan commitment dated April 28, 1999, requires "verification of income for the mortgagors by way of personal letter".

43 In accordance with this requirement Bressi provided Home with a personal letter dated April 30, 1999 in which he stated "through various companies that I operate, my income this year will be approximately \$100,000.00 plus expenses".

44 The last tax return Bressi filed was in 1995. It showed total income of \$14,294 and a taxable income of 0.

45 No request was made by Home for Bressi's tax returns or any other income verification.

46 Home was aware that two months before applying for the loan the Bolton property had been conveyed from Garwood to JCN for two dollars (\$2) when the property was said to have a value of \$550,000. No request was made by Home for any sale or conveyancing documents.

47 Home requested and received a copy of the trust deed.

48 The trust deed is dated January 1, 1999. It identifies JCN as the Trustee. It is signed by Bressi on behalf of both the Trustee and beneficiary. JCN did not exist on January 1, 1999. It was incorporated on January 6, 1999.

49 Home was aware that JCN did not exist as of the date the purported trust was settled. Home had JCN's articles of incorporation dated January 6, 1999. JCN's articles of incorporation are signed by Bressi.

50 The trust deed identifies the BFT as the beneficiary. Home made no inquiries about the BFT.

51 Home did not disburse the mortgage funds to JCN. It disbursed the funds to the account in the name of the BFT.

The Mortgage to Galwide

52 In June 1999 after granting the mortgage to Home, Bressi approached Galwide for the purpose of borrowing \$150,000 to be secured by way of mortgage over the Bolton property.

53 Galwide advanced the sum of \$150,000 to an account in the name of the BFT and took a second mortgage.

54 On or about July 29, 1999 after the plaintiffs had obtained judgment against the Garwood companies and Bressi in Florida and Ontario and while the plaintiffs were attempting to enforce the judgments, JCN granted a mortgage bearing registration no. LT1383287 over the Bolton property to 1175585 Ontario Inc. in the amount of \$175,000.00.

55 On April 6, 2000 Bressi made a voluntary assignment into bankruptcy. Shortly thereafter, Bressi approached Galwide for a further advance of \$50,000.00 to be secured by the existing second mortgage on the Bolton property.

56 Bressi informed Galwide that he was bankrupt and that his bankruptcy was the result of unsatisfied judgments. Notwithstanding this advice, Galwide made no further inquiries about Bressi and advanced a further \$50,000.00 on the security of the existing second mortgage on the Bolton property.

57 On or about April 28, 2000 after the plaintiffs had obtained judgment against the Garwood companies and Bressi in Florida and Ontario and while the plaintiffs were attempting to enforce said judgments, JCN granted a mortgage bearing registration no. LT1473509 over the Bolton property to Galwide in the amount of \$230,000.00. No amounts were advanced under this mortgage.

58 On or about April 28, 2000 the defendant, 1175585 Ontario Inc. granted a postponement of its mortgage to Galwide.

Other Transactions: the Schomberg Mortgage Loan From Home

59 In August 2000 Home entered into additional transactions with and advanced additional funds to Bressi. In particular, in August 2000 Bressi approached Home for a loan to finance the purchase of another estate property in Schomberg. Home advanced Bressi the sum of \$235,000.00 and took a first mortgage over the property owned and occupied by Bressi municipally known as 5705 Seventeenth Sideroad, Schomberg, Ontario.

Analysis of Facts and Law

The Relevant Statutes

The Fraudulent Conveyances Act

60 Section 2 of the *Fraudulent Conveyances Act* (R.S.O. 1990, c.F.29) provides as follows:

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c.F.29, s.2.

61 Section 3 of the *Act* provides as follows:

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c.F.29, s.3.

62 Section 7(2) of the *Act* provides as follows:

7.(2) No lawful mortgage made in good faith, and without fraud or covin, and upon good consideration shall be impeached or impaired by force of this Act, but it has the like force and effect as if this Act had not been passed. R.S.O. 1990, C.F29, s.7.

The Execution Act

63 The *Execution Act* (R.S.O. 1990, c.E.24) provides in part as follows in sections 10 and 11 of the *Act*:

10.(1) Subject to the *Land Titles Act* and to section 11, a writ of execution binds the goods and lands against which it is issued from the time it has been received for execution and recorded by the sheriff. R.S.O. 1990, c.E24, s.10(1).

10.(2) Despite subsection (1), no writ of execution against goods other than bills of sale and instruments in the nature of chattel mortgages prejudices the title to such goods acquired by a person in good faith and for valuable consideration unless such person at the time of acquiring title had notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached has been delivered to the sheriff and remains in the sheriff's hands unexecuted. R.S.O. 1990, c.E.24, s.10(2).

11.(1) Where the name of an execution debtor set out in a writ of execution is not that of a corporation or the firm name of a partnership, the writ does not bind the lands of the execution debtor unless,

(a) The name of the execution debtor set out in the writ includes at least one given name in full; or

(b) a statutory declaration of the execution creditor or execution creditor's solicitor is filed with the sheriff identifying the execution debtor by at least one given name in full. R.S.O. 1990, c.E.24, s.11(1).

11.(2) Subject to subsection (3), where a statutory declaration is filed under clause (1)(b), the name of the execution debtor set out in the writ shall be deemed to contain the given names affirmed in the declaration and the writ binds land from the time the declaration is received for execution and recorded by the sheriff. R.S.O. 1990, c.E.24, s.11(2).

11.(3) Where a statutory declaration is filed under clause (1)(b) in respect of a writ of execution of which a copy has been transmitted to the proper land registrar under section 136 of the *Land Titles Act*, the sheriff shall transmit a copy of the declaration to the proper land registrar and the writ does not bind land registered under the *Land Titles Act* until the copy of the declaration has been received by the property land registrar. R.S.O. 1990, c.E.24, s.11(3).

64 With respect to s.10, reference should be made to s.136(1) and (2) of the *Land Titles Act* as set out below.

The Land Titles Act

65 Section 44 of the *Land Titles Act* (R.S.O. 1990 c.L.5) provides in part as follows:

44.(6) The title of the registered owner for the time being of land is subject to enforceable writs of execution against the owner that have been recorded under section 136, but no writ of execution against a prior registered owner is enforceable in respect of the land unless a note of such writ has been entered in the title register. R.S.O. 1990, c.L.5, s.44(6).

66 Section 57 of the *Act* provides in part as follows:

57.(1) A person wrongfully deprived of land or of some estate or interest therein, by reason of the land being brought under this *Act* or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, is entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error. R.S.O. 1990, c.L.5, s.57(1).

(3) Subsection (1) does not render liable any purchaser or mortgagee in good faith for valuable consideration by reason of the vendor or mortgagor having been registered as owner through fraud or error or having derived title from or through a person registered as owner through fraud or error, whether the fraud or error consists in a wrong description of the property or otherwise.

67 Section 62 of the *Act* provides in part as follows:

62.(1) A notice of an express, implied or constructive trust shall not be entered on the register or received for registration. R.S.O. 1990, c.L.5, s.62(1).

62.(2) Describing the owner of freehold or leasehold land or of a charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall be deemed not to be a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise, but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted. R.S.O. 1990, c.L.5, s.62(2).

68 Section 66 of the *Act* provides as follows:

66. Every transfer or charge signed by a registered owner, or others claiming by transfer through or under a registered owner, purporting to transfer or charge freehold or leasehold land, or an interest therein, capable of being registered, or purporting to transfer a charge, shall, until cut out by a conflicting registration, confer upon the person intended to take under the transfer or charge a right to be registered as the owner of the land or charge and, where a person applies to be registered under this section, the land registrar may, either forthwith or after requiring such notices to be given as the land registrar considers expedient, register the applicant as owner, subject to such encumbrances, if any, as the condition of the title requires, although the transfer or charge has been executed or bears date prior to the entry of the transferor or chargor as the owner of the land or charge. R.S.O. 1990, c.L.5, s.66.

69 Section 72 of the *Act* provides as follows:

72.(1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the records of the office kept for the entry of instruments received or are in course of entry. R.S.O. 1990, c.L.5, s.72(1).

70 Section 93 of the *Land Titles Act* (R.S.O. 1990, c.L.5) provides in part as follows:

93.(1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale. R.S.O. 1990, c.L.5, s.93(1).

93.(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures. 1998, c.18, Sched. E, s.135(1).

93.(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. R.S.O. 1990, c.L.5, s.93(3).

71 Section 136 of the *Act* provides in part as follows:

136.(1) Despite section 3 of the *Bail Act* and subsection 18(4) of the *Legal Aid Act*, a sheriff to whom a writ of execution, a renewal of a writ of execution or a certificate of lien under either of those Acts is directed shall, upon receiving from or on behalf of the judgment creditor the required fee and instructions to do the actions described in clauses (a) and (b), forthwith,

(a) enter the writ, renewal or certificate of lien, as the case may be, in the electronic database that the sheriff maintains for writs of execution;

(b) indicate in the electronic database that the writ, renewal or certificate of lien, as the case may be, affects land governed by this Act;

(c) assign a number in the electronic database consecutively to each writ, renewal and certificate of lien in the order of receiving it;

(d) note in the electronic database the date of receiving each writ, renewal and certificate of lien; and

(e) give the land registrar of each land titles division wholly or partially within the sheriff's territorial jurisdiction access to the electronic database. 1998, c.18, Sched. E, s.152(1).

136.(2) No registered land is bound by any writ of execution, renewal or certificate of lien mentioned in subsection (1) until the sheriff has complied with that subsection. 1998, c.18, Sched. E, s.152(1).

136.(3) No sale or transfer under a writ of execution or certificate of lien mentioned in subsection (1) is valid as against a person purchasing for valuable consideration before the sheriff has complied with that subsection, although the purchaser may have had notice of the writ or certificate of lien, as the case may be. 1998, c.18, Sched. E, s.152(1).

136.(6) A writ of execution or certificate of lien mentioned in subsection (1) has no effect under this Act if it is issued against the registered owner under a different name from that under which the owner is registered. 1998, c.18, Sched. E, s.152(2).

72 It seems it is not disputed that the claims against Bressi satisfy the requirements of s.136(1). Although s.136(3) was mentioned in submissions it has no application in this case as there is no sale or transfer under a writ of execution or certificate of lien.

73 Section 139 of the *Act* provides as follows:

139. All the provisions of the Trustee Act that are not inconsistent with the provisions of this Act apply to land and charges registered under this Act, but this enactment does not prejudice the applicability to such land and charges of any provisions of that Act relating to land or choses in action. R.S.O. 1990, c.L.5, s.139.

74 Section 155 of the *Act* provides as follows:

155. Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner. R.S.O. 1990, c.L.5, s.155.

75 While s.155 is arguably ambiguous because of the comma placed after the first phrase in the section, it would seem to mean, in the case of a charge, that if the charge would be fraudulent or void if unregistered it will still be fraudulent and void even if it is registered. On this basis the *Fraudulent Conveyances Act* is applicable to charges under the *Land Titles Act* but, as s.155 provides, subject to the provisions of the *Land Titles Act*, "with respect to registered dispositions for valuable consideration."

76 The initial clause and the initial comma in s.155 require further consideration. No submissions were made on this. The use of the comma might be intended to indicate that the declaratory part of the section which then follows applies only with respect to dispositions for valuable consideration. But that raises the question why the section would not also, and even more strongly, apply to dispositions *not* for valuable consideration, since such dispositions are, as a general matter, more likely to be fraudulent than those made for consideration.

77 The alternative reading of s.155 is that the initial comma is effectively superfluous and that it is the initial qualifying clause in the section that is limited to dispositions for consideration, and not the declaratory part which then follows.

78 On this basis, the section provides in summary as follows: a fraudulent disposition is still fraudulent even if registered, but this rule is subject to the provisions of the *Act* relating to registered dispositions for valuable consideration. In view of the

obvious emphasis placed in the *Act* on registration and reliance on registration and the lower likelihood that transactions for valuable consideration are fraudulent, this reading of section 155 is to be preferred to the first one considered above.

79 Section 57(3) of the *Land Titles Act* deals with dispositions for valuable consideration by way of mortgage. It provides that a mortgagee in good faith for valuable consideration is not liable to compensate a person who is entitled by s.57(1) to be compensated for fraud.

80 Section 136(6) deals with the effect of a writ of execution issued against a registered owner in a different name from the registration. It appears that s.136(6) qualifies s.136(1) and s.136(2) so as to ensure in effect that, even though an execution is registered as provided in section 136(1), if it is registered in a name different from that of the registered owner it does not bind the land as contemplated by s.136(2).

The Execution Act Argument

81 Pursuant to s.10(1) of the *Execution Act*, the writs against Bressi bind the lands against which they are issued from the time of receipt and recording by the sheriff, subject to the *Land Titles Act* (and subject also to s.11 of the *Execution Act*, which was not said to have any application). The *Execution Act* does not specify how one is to determine the lands against which the writ is issued. In the absence of any provision, it is in order to look to the *Land Titles Act* for assistance.

82 Section 136 of the *Land Titles Act* deals with the effect of executions. Section 136(2) provides that no registered land is bound by any writ of execution until the sheriff has complied with the s.136(1) requirements relating to entry of the writ on the database for writs and providing access to the database to the land registrar in the sheriff's jurisdiction.

83 The plaintiffs say that, by reason of their registration of their execution and its filing with the sheriff of the region of York, they acquired a registered interest against the property of Bressi at a time prior to the registration of the mortgages in favour of the defendants under the *Land Titles Act* and accordingly those mortgages are subject to the plaintiffs' interest.

84 The plaintiffs rely on s.10(1) of the *Execution Act*, which is stated to be subject to the *Land Titles Act* and to s.11 of the *Execution Act*. Section 10(1) provides that a writ of execution "binds the goods and lands against which it is issued". The lands referred to must be understood to be lands of the judgment debtor named in the writ, in this case Joseph Bressi. Section 11(3) of the *Execution Act* requires that a copy of the necessary statutory declaration under s.11(1)(b) must be received by the property land registrar. It is not disputed that this requirement has been satisfied. Section 136(2) of the *Land Titles Act* provides that no registered land is bound by any writ of execution until the sheriff has complied with the requirements of s.136(1) as to the recording of the writ. It is not disputed that this requirement has been satisfied.

85 On this basis, the conclusion would be that the writ of execution filed by the plaintiff and recorded in York region against Joseph Bressi binds the real property of Joseph Bressi in York region registered under the *Land Titles Act*.

86 By reason of s.136(6) of the *Land Titles Act*, however, the writ of execution against Joseph Bressi is not effective against property belonging to him that is registered in a different name from his own. That is the case with the Bolton property. Accordingly, even if the Bolton property can be said to be property of Joseph Bressi (a matter that is considered below), s.136(6) makes the writ of execution ineffective for purposes of a claim based on the writ of execution under s.10 of the *Execution Act* and s.136(2) of the *Land Titles Act*.

87 It is doubtful that the Bolton property can be regarded as property of Bressi for purposes of these statutory provisions. It is not shown that JCN or the Bressi Family Trust are without substance such that the result would be that the holding of the property would be a holding for Bressi as the beneficial owner. Although for the reasons given elsewhere in these reasons, the transfer from Bressi of his interest in the agreement of purchase and sale to Garwood was a fraudulent conveyance and was therefore void as against his creditors, it is not clear that this status under the *Fraudulent Conveyances Act* means that the property is the property of Bressi for purposes of the statutory provisions now under consideration. This point was not addressed in submissions.

88 This conclusion does not dispose of the plaintiffs' argument about good faith relating to the defendants' not having searched executions against Bressi. It means only, as stated above, that those executions do not bind the Bolton property.

The Claim Based On The Fraudulent Conveyances Act: Preliminary Considerations

89 The plaintiffs submit that the mortgages to the defendants were fraudulent conveyances for purposes of s.2 of the *Fraudulent Conveyances Act* and therefore that they are void as against the plaintiffs unless they are saved under another provision of the *Act*.

90 Section 3 of the *Act* in effect saves a mortgage "conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent" set forth in section 2, i.e. "to defeat, hinder, delay or defraud creditors . . .".

91 Section 7(2) of the *Act* saves a mortgage "made in good faith and without fraud or covin and upon good consideration".

92 It may be noted, as discussed above, that section 7(2) could apply, by its terms, to save a mortgage made upon good consideration even where there was notice or the knowledge referred to in section 3 (i.e. of the intent to defraud) provided the mortgage was made "in good faith and without fraud or covin".

93 On this basis, it could be said that the only issue is whether the defendants acted in good faith. Of course, if a defendant was on notice of or had knowledge of the fraudulent intent there would be an issue whether that showed lack of good faith.

94 In any event, neither s. 3 nor s. 7(2) is available to a mortgagee who has acted in bad faith, which is what the plaintiffs say has occurred in the present case.

95 The *Land Titles Act* does not make inapplicable the *Fraudulent Conveyances Act*. On the contrary, s.155 of the *Land Titles Act* effectively preserves the application of the *Fraudulent Conveyances Act* but it does so subject to the provisions of the *Land Titles Act* with respect to registered dispositions for valuable consideration.

96 Neither defendant had knowledge that its mortgage transaction was a fraudulent conveyance for purposes of the *Fraudulent Conveyances Act*. In particular neither defendant knew Bressi had conveyed his interest in the original agreement of purchase and sale for the Bolton property. While each defendant knew that Bressi was directing its mortgage transaction, each knew that the registered owner and mortgagor was JCN in trust for the Bressi Family Trust.

97 Nor had either defendant been placed on notice of facts indicating a fraudulent conveyance, subject to the analysis below as to whether the circumstances of their respective transactions together with their lack of enquiry amounted to notice. These same factors also go to the question of good faith, as set out below.

98 While the *Land Titles Act* preserves the applicability of the *Fraudulent Conveyances Act*, it does so, as noted above subject to the provisions of the *Land Titles Act* in respect of registered dispositions for valuable consideration. This qualification also needs to borne in mind in assessing the proper view to take of the circumstances and the conduct of the defendants.

99 Two provisions of the *Land Titles Act* appear, at least *prima facie*, to have potential application in the present case. They are s.72(1) and s.93(3).

100 Section 72(1) provides that no person other than the parties thereto shall be deemed to have any notice of the contents of (to use a general term) unregistered documents. How this section applies to writs of execution that are binding under s.136(2) is perhaps not as clear as it could be. In view of the clear terms of s.136(2), it seems unlikely that s.72(1) is to be interpreted to an effect contrary to s. 72(1). The words in s.72(1) "or that have been duly entered [etc]" seem to cover duly entered executions. In the case of an execution that satisfies section 136(1) but is of no effect by reason of section 136(6), it would seem that s.72(1) supplements 136(6) by providing that the fact that such a writ is entered does not provide any basis for deeming there

to be notice of it. If this line of reasoning is sound, the inference would be that a writ of execution to which s.136(6) applies is irrelevant to the title under the *Land Titles Act* of a chargee that does not have actual notice of the writ.

101 In the present case neither defendant had actual notice of the writs of execution against Bressi when they took their original mortgages on the Bolton property.

102 Section 93(3) provides that the charge, when registered, confers on the chargee a charge on the interest of the chargor as appearing in the register subject to registered encumbrances and qualifications but free from any unregistered interest in the land. Read literally, s.93(3) would seem to provide the defendants with an absolute defence. Whether such a literal reading is correct in the light of s.155 bears consideration. On the literal reading, a chargee who took a charge from a chargor (for valid consideration) on notice from the chargor that the chargor was insolvent as a result of judgment debts not yet reflected in entered writs of execution would acquire a charge on the interest of the chargor free from those unregistered interests even though the transaction was *prima facie* a fraudulent conveyance. If that result would follow, it would seem that s.93(3) would render s.155 of limited applicability. However s.155, by its terms, seems intended to qualify s.93.

103 Cases were cited in support of the analysis of the effect of s.72(1) set out above. Cases were also cited to the effect that the courts will not allow a statute to be interpreted so as to shelter fraud, i.e. presumably for the purpose of countering a literal reading of section 93(3).

104 Whatever may be the best resolution of the issues raised by those two sections of the *Land Titles Act* they may be deferred to allow for a consideration of the principal issue raised by the plaintiffs and disputed by each of the defendants: the question whether the defendants, in circumstances that were suspicious, failed to make due enquiry, and were therefore not acting in good faith. The plaintiffs argue that that was so and that in consequence the defendants cannot make out a defence against the claim of a fraudulent conveyance.

105 In regard to the statutory context for this issue, s.57(3) provides that a mortgagee in good faith for valuable consideration is not liable under s.57(1) to compensate a person (such as a judgment creditor) wrongfully deprived of land or an interest therein by reason of a fraudulent registration of ownership: whether s.57(1) applies in the present case was not argued.

Whether the Defendants Ignored Suspicious Circumstances

106 It is central to the plaintiffs' case that they assert that each of the defendants was acting in connection with their respective mortgages in a way that involved their being aware of "suspicious circumstances" and willfully ignoring those circumstances.

107 What counts as a suspicious circumstance merits consideration. For the moment, it is sufficient to suggest that a circumstance is not suspicious merely because it is complicating or unusual. For example, part of the proceeds of the Home mortgage was to be used to provide a return of part of the equity value of the property. It was submitted that this was unusual for a residential mortgage. That might be so, but that does not advance matters much. To be suspicious, the circumstance must reasonably suggest that something is wrong.

108 The plaintiffs addressed the issue of suspicious circumstances in large part in terms of so-called "red flags" on the mortgage transactions. The defendants disputed these red flags and also argued that there is an absence of badges of fraud.

109 The circumstances said to be suspicious are considered below.

The Case Against Home: The Bolton Property Transaction

Mr. Hill's Evidence About Not Searching Executions

110 The plaintiffs submit that Mr. Hill's evidence as to why he did not do an execution search on Bressi shows that Mr. Hill expected the search would reveal problems and he wished to avoid that discovery. This is a key element of the plaintiffs' case against Home. It is dealt with separately below.

The Conveyance from Garwood to JCN

111 Each of Garwood and JCN were described as holding the property in trust for the Bressi Family Trust. The plaintiffs submit that "a trust is the cover of fraud". The trust aspect is dealt with below.

112 The plaintiffs say that there is a deficiency of conveyancing documents from Garwood to JCN. There is a transfer registered on title. The Land Titles rules do not require the chargee to search in respect of a prior owner in trust: *Land Titles Act* s. 44(6). This also deals with the objection that Garwood was insolvent when it transferred and that the transfer consisted all of its assets. Moreover, the transfer purported to be of a trust asset to a new trustee for the asset.

Departure from Lending Criteria

113 The evidence was that Home accepted CDIC lending standards and had its own lending criteria as well. These standards and criteria emphasized the importance of "knowing your borrower". Home obtained in respect of Mr. Bressi only an unsupported income statement. Home got no guarantee from Mr. Bressi. Home did no executions search. There was evidence that the lack of attention to Mr. Bressi's credit constituted a material departure from the standards and criteria.

114 Home's evidence was that the loan on the Bolton property was an "equity loan", i.e. a loan that was based on the value of the property that provided the security and did not place importance on the ability of the "borrower" to repay, on the basis that the property would be available if there was a default in regular payments. It was mentioned that since Mr. Bressi was living in the residence he would presumably ensure that the payments were made to the extent he could so.

115 There was evidence that equity lending is acceptable under the CDIC standards but is still to be accompanied by borrower information that was not obtained in this case. Mr. Hill testified that in the case of the Bolton property he relied exclusively on the equity in the property and paid no attention to the standards and criteria.

116 The purpose of these standards and criteria is to present to lenders the best practices for the management of credit risk, presumably to maximize the benefit to the lenders their investors, depositors and insurers. Mr. Johnson, an expert called by the plaintiffs, accepted that for three recent years the impaired loan rate for Home that was quoted to him was low and was acceptable. Mr. Johnson also accepted that the Bolton property loan appeared to be adequately secured by the property.

117 There was a conflict in the evidence as to whether Home's making of equity loans constituted a failure of compliance with Home's own criteria. Home's evidence was that it had an "unwritten" policy of making equity loans on an "exceptions" basis in acceptable cases authorized by senior management. There was a conflict in the evidence of the experts as to whether it was proper to engage in equity lending as an unwritten policy or whether the policy ought instead to have been set out in writing, which was done in 2001.

118 Based on the evidence, it seems that if someone had asked, in respect of the proposed loan, whether it might be wrong to do the loan on an equity basis without more information on Mr. Bressi an answer could have been given to the effect that the loan would be in keeping with company practice and while it would not fully comply with the standards and criteria it would be fully secured, so the objective of the standards and criteria would be served.

119 Where a borrower seeks a mortgage loan on an equity basis there could be various possible reasons for that request. One could be that the borrower, as in the case of Mr. Bressi, was not creditworthy. Another (although there is no evidence on the point) could be that the borrower is seeking not to employ his credit in the particular transaction, in order to keep it available for other transactions. Home had been told that Mr. Bressi was a builder. There was a notation on the application form that he was considering a major project in Aurora.

120 In these circumstances Home could reasonably have proceeded with doing the loan on the Bolton property on an equity basis without considering that, having regard to the standards and the criteria, there was something wrong in not getting more information on Bressi.

How the Home Transaction was Done

Evidence of Mr. Bressi

121 On March 2, 1999 Mr. Bressi applied to Home for the Bolton property mortgage loan via a broker, Mr. Mongreau. The property had earlier been transferred from Garwood to JCN. Mr. Bressi said he did not speak to Mr. Hill of Home until a later time, in respect of the proposed Schomberg property mortgage. With respect to Bolton, the conversation Bressi had with Laurie at Home, and Mr. Mongreau dealt with Home on behalf of Mr. Bressi.

122 Mr. Bressi told Mongreau that the property was in a corporate name and Bressi lived there.

123 At Home, Bressi told Laurie that he was interested in a project to build 36 units in Aurora, which he would bring to Home for discussion, involving of a financing potentially for \$2.8 million. Mr. Bressi signed a mortgage loan commitment, as borrower. The mortgagor was to be JCN. JCN had the title and later, in 2000, it entered into a construction agreement with respect to the house on the property.

124 Home asked how the mortgage payments were going to be made and Bressi referred to the Family Trust, to which the mortgage funds were disbursed.

125 In cross, Bressi said that on the closing of the mortgage \$400,000.00, the full amount of the mortgage, was advanced and was used for the balance of the construction work on the home and the stable.

Evidence of Mr. Soloway

126 In chief, Mr. Soloway said Mr. Hill brought the application to him and Soloway said that Home would be interested. Soloway required an appraisal, which was provided. He approved a loan of \$365,000.00 with a \$50,000.00 hold back for completion of work. He noted the reference to the Aurora prospect but it was not a factor in the decision to lend; he said each loan must stand on its own. As to the note that there was no guarantor, that matter would be for Mr. Nusam, the credit officer of Home. Mr. Soloway said he saw the loan as an equity deal, with a low value ratio which provided adequate risk protection.

127 In cross, Mr. Soloway said that, while he knew JCN itself had no equity, there was equity in the property and so JCN would pay on the mortgage. He said Ms. Laurie Chalabardo did the loan interview with Mr. Bressi, he understood it was by telephone. At the time of the transaction, Home had an unwritten policy about making exceptions to the general principle about being satisfied as to the character and integrity and financial reliability of the borrower. He disagreed that Home had not done a credit search on Bressi because it suspected the search would reveal information adverse to approving the loan. The credit office and he had considered it alright to waive the requirement for a record of Bressi's income for the file.

Failure to Enquire

128 The plaintiff relies on Home's failure to do an executions search on Bressi in view of the circumstances of the transaction which they say should have caused Home to make such a search.

129 The mortgagor of the property was JCN in trust. According to the relevant documents JCN was acting as trustee for the Bressi Family Trust. According to the trust agreement constituting the family trust, it is a trust for the members of the family of Joseph Bressi. Bressi was the authorized signing officer for JCN and the trustee of the trust. There was no indication of anyone else having a position of authority in JCN or in the trust.

130 There is evidence that Home and Galwide each regarded JCN and the trust and Bressi as in some way the same but in what sense and for what purposes is a matter for further consideration. For example, it might well have been believed that JCN and the trust were entities established and employed for the benefit of Bressi. That would not necessarily imply an impression that JCN and the trust had no separate existence. JCN was known to be incorporated. A trust agreement was known to exist. And since the trust was stated to be for the Bressi family, it could well be an arrangement for the benefit of Bressi by benefiting his

family. Home and Galwide were dealing with Bressi himself and no one else on behalf of JCN on the trust. So, at that level, it would be natural for Home and Galwide to think of JCN and the trust as being identical with Bressi. There was no evidence from Home or Galwide as to what, if anything, they meant, about JCN and the trust by referring to Bressi himself as the borrower.

131 JCN was a valid and subsisting corporation. It acquired the title to the property in trust. There was no reason based on the documents to suppose that, in respect of the property, JCN was other than the trustee for the Family Trust. In particular there was no reason to suppose that it was simply the alter ego of Bressi.

132 Home's solicitor, Mr. Kasdan, examined the Trust Agreement for the holding of the property for the family trust. He had no reason from the Trust Agreement to suppose that the trust was not validly constituted. To find otherwise, it would be necessary to have evidence that, in dealing with a purported trust in the circumstances of a transaction such as the present one, it is diligent practice for a solicitor to make further enquiry than was made here, either as a general matter or as a result of some aspect of the information that Home and its solicitor had. There is no evidence to that effect.

133 On this basis, Home was not on notice that Bressi had or might have an interest in the property in his personal capacity. Not being on notice, there is no evident basis for the contention that Home ought to have made further enquiry about Bressi personally.

134 Mr. Hill said that he probably knew that if searches were made they would turn up a "history" on Bressi. Mr. Hill's evidence in this regard is considered further below. As a preliminary comment it can be said that Mr. Hill's awareness might be considered a kind of suspicion but it is not clear how that suspicion would be enough to put Home on notice of a need to enquire unless Home also had reason to suspect that there was some irregularity in respect of JCN and the Family Trust and the actions being taken by them in the transaction.

135 The evidence is that all the information Home had about JCN and the Trust came from the enquiries made by the solicitor for Home and Home knew that Bressi acted for JCN and the trust and that the property to be mortgaged was his residence. None of this information disclosed any irregularity that would give Home reason to suppose that the arrangements involving JCN and the Trust might be a sham for Mr. Bressi himself. So there is a question as to how to understand the evidence as to Home's view about the identity of the three.

136 There is nothing in the evidence to indicate that this meant anything more than that they were dealing with Bressi himself in making the mortgage arrangements and they recognized that ultimately the making of the regular payments on the mortgage would as a practical matter depend on Bressi's willingness to have them made by the Trust.

The Nature of the Interest Asserted By the Plaintiffs

137 To put the consideration of the alleged suspicious circumstances in context, it is important to identify the nature of the interest that the plaintiffs are asserting.

138 The plaintiffs are judgment creditors of Bressi and two of his companies including the Garwood company that held title to the Bolton property prior to JCN. The plaintiffs' judgments are not against JCN or against the Bressi Family Trust.

139 As judgment creditors of Bressi, the plaintiffs assert a claim against the Bolton property and against the defendants' interest in the property on the basis of the *Fraudulent Conveyances Act* and knowing receipt of trust property.

140 Bressi entered into the Agreement of Purchase and Sale for the Bolton property on June 3, 1998, the same day the Florida Court granted judgment in favour of the plaintiffs for US\$625,725.71. The transaction closed on July 9, 1998 with the transfer of the property to Garwood Financial Ltd. as trustee. By facilitating the transfer to Garwood of the property for which he held an agreement to purchase, Bressi effectively disposed of his equitable interest in the property under the agreement to Garwood. So that disposition can be analyzed in terms of the *Fraudulent Conveyances Act*.

141 The disposition to Garwood was to a related company. Bressi signed for Garwood. There is nothing to show that anyone other than Bressi was interested in Garwood. There was no consideration for the disposition from Bressi to Garwood of his

interest. A transfer of the property to Garwood, unless subsequently voided so as to vest title in Bressi, would defeat the creditors of Bressi. There is nothing to suggest that the intent of Bressi was other than this. So the acquisition by Garwood of Bressi's interest in the property at a time when Bressi was insolvent was *prima facie* a fraudulent conveyance and therefore subject to being rendered void as against the creditors of Bressi.

142 The purchase by Garwood of the property on the closing would also be a *prima facie* fraudulent conveyance *vis-à-vis* Bressi.

143 The transfer of the property from Garwood to JCN in trust for the Bressi Family Trust was for nominal consideration. JCN was controlled by Bressi. Bressi signed for the trust. JCN and the trust were clearly related to Bressi. So the transfer to JCN was a further *prima facie* fraudulent conveyance and accordingly subject to being rendered void as against the creditors of Bressi, for the same reasons as set out above.

144 The charges by JCN in favour of the successive lenders, Fenfam Holdings Inc. and Blossom Tobe (July 9, 1998) and Comfort Capital (March 10, 1999) and the two defendants involve different considerations. No issue is taken with the charges of the first two lenders, which are now discharged.

145 Each of Home and Galwide is unrelated to Bressi. Each of Home and Galwide gave valuable consideration for the respective charges they acquired. Because the charges were given for valuable consideration they would not be fraudulent conveyances if they were conveyed "in good faith to a person not having . . . notice or knowledge of the intent" (see s.3 of the *Fraudulent Conveyances Act*) or were "made in good faith, without fraud or covin" (see s.7.2 of the *Fraudulent Conveyances Act*). Alternatively they would not be fraudulent conveyances if their effect would not be to hinder the creditors of Bressi.

146 It is important to keep in mind in this analysis that the allegations of the plaintiffs are based on the failure of the defendants to make more enquiry than they did about Bressi and specifically their failure to search executions against Bressi. No issue is taken in respect of enquiring about Garwood. It does not appear that a writ was even filed against Garwood in York Region.

147 The position of the defendants is that the charge they were taking was from JCN in trust for the Bressi Family Trust, and not from Bressi.

148 The plaintiffs say that Bressi is involved in the transactions because, firstly, Bressi acquired the original Agreement of Purchase and Sale which he then disposed of to Garwood. But there is no evidence that either of the defendants knew this. Moreover, by reason of s. 44(6) of the *Land Titles Act* there was no reason for them to make enquiry about Garwood's title, because it was simply a registered predecessor on title. So the fact that the interest in the property originated with Bressi does not assist the plaintiffs, as judgment creditors of Bressi, against the defendants.

149 The plaintiffs say that enquiry should have been made about Bressi because of certain features relating to JCN and the Bressi Family Trust.

150 The sole signatory for JCN and the Trust was Bressi, the only person that the defendants dealt with. Home recorded Bressi as the borrower.

151 While each defendant dealt personally only with Bressi they each knew they were obtaining a charge from JCN in trust for the family trust. So the question to be asked is whether there were suspicious circumstances surrounding JCN and the trust.

152 The Trust Agreement made by JCN is stated to be made on January 1, 1999 but JCN was not incorporated until January 6, 1999. This latter fact was known to Home.

153 Section 21(2) of *Business Corporations Act of Ontario*, R.S.O. 1990, c. B 16 ("OBCA") provides as follows:

A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,

(a) the corporation is bound by the contract and is entitled to be benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and

(b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

154 By taking title to the property on the closing of the transfer from Garwood on January 13, 1999, JCN effectively affirmed the pre-incorporation trust agreement made on January 1, 1999, pursuant to s. 21(2) of the OBCA. So the trust agreement is not irregular by reason only of the date that it was made.

155 There is no reason to regard JCN as having been, upon its incorporation, other than a duly incorporated and subsisting corporation.

156 The trust agreement contains provisions relating to the financing and development of the Bolton property. It was submitted that these provisions were exceptional in respect of a residential property and should have prompted enquiry. But Bressi was known to be a builder and it is not shown that there is something untoward in the notion that a builder might, through and for his family trust, contemplate and make provision relating to the possible development of the property for other purposes.

157 On this analysis, there was no reason, in respect of the matters considered above, for either defendant to regard its transaction as other than the taking of a charge from JCN in trust for the Bressi Family Trust on the basis of a deal negotiated with Bressi on behalf of the chargor.

The Evidence of Mr. Hill: Analysis

158 The parties referred to evidence given by Mr. Hill on discovery. The evidence is recorded in the transcript read-ins at p.23 at l. 26 to p.25 at l. 25.

159 The questions first put to Mr. Hill elicited the following evidence from Mr. Hill.

1. no execution search or credit search was done on Bressi, which Hill said was because Bressi was not guaranteeing;
2. he knew the property was in a company name and had recently been transferred, which was "another red flag" in terms of risk;
3. the existence of a trustee was another red flag in terms of risk which he would have left to his lawyer;
4. he knew what the search indicated as to Bressi signing for the two companies that conveyed the property;
5. he knew payments were to come from the Bressi Family Trust.

160 There then followed the two questions which call for careful consideration. The questions are at p.25 at l.14 and 20 respectively.

161 The first question at p. 25, at l.14, suggests that Mr. Hill did not make "any enquiry, any execution search on Bressi" because "you suspected you would find problems". Mr. Hill answered, "No".

162 It is to be noted that in the preceding questions put to Mr. Hill about "enquiring" or "search" in respect of Mr. Bressi Mr. Hill said was, as set out in item 1 above, that he did no execution search or credit search on Bressi because Bressi was not guaranteeing. Mr. Hill's answer to the question at p.25, at l.14 is not evidently inconsistent with his answer to the earlier question as to searches.

163 The second question, put at p.25, at l.20, suggests to Mr. Hill that "if you followed up those red flags and made a search, you would see a history on Bressi because that is what the picture looked like", to which Mr. Hill said "probably".

164 In view of all of the preceding questions, the reference to "a search" in this question would reasonably be taken to be a reference to an execution search or a credit search on Bressi.

165 One way to understand the three questions on searches is as follows. Mr. Hill knew that if he made searches in Bressi he would probably find a "history" on Bressi, but that did not cause him to suspect he would find "problems" and therefore not to make enquiry, because Mr. Bressi was not guaranteeing and there was therefore no need to make enquiry about him. On this reading of the three questions, Mr. Hill's evidence is apparently consistent throughout.

166 A different reading is that Mr. Hill's answer to the last question is a concession or admission by him, contrary to his answers to the earlier questions. But such a reading would disregard the difference between the questions. The first of the three questions, as answered, and the second question address the question why Mr. Hill did not make enquiry. The last question does not directly do so. It suggests Mr. Hill would have found a history if he had made enquiry and Mr. Hill said, probably. On its face value, Mr. Hill was merely acknowledging that a history would likely have turned up. That does not amount to saying that his reason for not making enquiry was to avoid learning of that history. Such a reading of his answer is not an interpretation of his answer; it is an inference from the answer he gave. And it is inconsistent with the answers he had already given dealing directly with his reason for not making enquiry, namely that it was because Mr. Bressi was not guaranteeing, and it was not because he suspected he would find problems.

167 On this analysis, there is no good reason to construe Mr. Hill's answer in the latter fashion as opposed to the former.

The Evidence of Mr. Hill: Further Analysis

168 Mr. Hill said "No" to the suggestion that he made no inquiry because he knew he would find problems. To the next question, that he knew that if he made enquiry he would find a "history" he answered, "probably".

169 If he thought he would uncover a history, and his answer to the previous question was honest, then it would seem that even though he thought he would uncover a history, he did not think that history would be a problem. Why would a history relating to Mr. Bressi not be a problem? Because (one might reasonably infer), while it would relate to the creditworthiness of Bressi, it would not affect the security of the mortgage from JCN. On this basis, the proper view of this evidence may be that while Mr. Hill was "suspicious" that a history would be uncovered, and was deliberately "blind" to this suspicious circumstance, this was because he did not consider the suspicion to be relevant to the transaction, which was an equity mortgage.

170 Another possible interpretation of the answers, and particularly the answer to the first question is that even though he would find problems he decided to make no enquiry for some other reason.

171 Why would he avoid finding problems? The plaintiffs' submission implies a reason: to avoid being put on notice of the problems and thereby becoming subject to them.

172 Whether Mr. Hill understood or believed that if he avoided being put on notice he would avoid becoming subject is not in evidence. He is experienced in the mortgage lending business so it would not be surprising if he had a view about such matters. However it would also not be surprising if he had a view that once a lender was aware of suspicious circumstances, the lender could not blindly ignore them with impunity. If he held such a view then he would likely have appreciated that failure to make enquiry would jeopardize Home's investment in the mortgage.

173 In the absence of evidence as to his understanding and belief in this regard, it seems more likely that the reason he did not search against Bressi personally is that he did not think such a search was relevant to the security of the mortgage, because Bressi was not the mortgagor and not the guarantor.

New Evidence of Mr. Hill

174 Home seeks to have allowed into evidence the question put to Mr. Hill and the answer given by him on a *voir dire* held during the trial. The question put to Mr. Hill was: when he said he would probably find a history about Bressi, what did

he mean by the words "a history on Bressi". Mr. Hill gave his answer. The plaintiffs dispute the admissibility of the question and answer at this late stage

175 Campbell J. in *Burke v. Gauthier*, [1987] O.J. No. 1086 (Ont. H.C.) (Action No. 57/85) said "the basic rule of fairness [is] that a party should have reasonable knowledge of the case he must meet."

176 The defendants have known since at least the motion for summary judgment in this case that the plaintiffs were relying on the answer as given and they have not sought to correct or complete that answer until now and they have offered no explanation as to why they have not done so. So it must be inferred that, if they are right to consider this new evidence important, their failure to bring it forward earlier has prejudiced the ability of the plaintiffs to have reasonable knowledge of the defence that they would have to meet. At this late stage, it is not evident that a prejudice of this sort can be overcome. Counsel submits that the fact this matter comes forward now is because they take a different view of the original evidence from the plaintiffs and this decision on the part of counsel should not be visited upon their client. Whatever merit there may be in that position, the problem with it is that there is a presumptive prejudice to the plaintiffs which R.53.08 requires the court to address as a prospective reason for denying leave.

177 Whether this presumptive prejudice is real is another matter. Mr. Hill's answer purported to state the kind of debts Mr. Hill expected would be disclosed on a search. But as is shown in the analysis set out below, the relevant question is why Mr. Hill did not consider Mr. Bressi's debts to be relevant to the mortgage loan. The disputed answer does not seem to shed light on that question and it does not affect the analysis given above, so it is arguably in fact not prejudicial.

178 Nevertheless, in view of the importance the defendants apparently attach to the evidence and the consequent appearance of prejudice, the more cautious approach is not to admit it. On the above basis, leave to admit is denied.

The Schomberg Transaction

179 The plaintiffs submit that Home's lack of good faith is demonstrated by Home's continued dealings with Bressi in August of 2000 after Home was on explicit notice of Bressi's fraudulent conduct. The August 2000 transaction was a mortgage loan by Home in connection with an acquisition of property in Schomberg. Title to the property was taken in the name of JCN in trust for the Bressi Family Trust and the mortgage was given by JCN in that capacity to Home. Mr. Hill said in his evidence that he approached the Schomberg loan approval in exactly the same way as the Bolton transaction.

180 On July 26, 2000 the plaintiffs added Home and Galwide as defendants to their claim against JCN for fraudulent conveyance of the Bolton property. On July 31, 2000 Home and Galwide were served with the Statement of Claim.

181 Mr. Soloway testified that a Motion Record seeking to add Home Savings & Loan Corporation as a party was received in July of 2000 and forwarded to litigation counsel. Based on counsel's response to him that he did not think that the claim had any merit and would not proceed, Soloway was not unduly concerned about completing the Schomberg Mortgage.

182 Mr. Kazdan testified that he received a copy of the Motion Record sometime in July 2000. At this point in time the Bolton Mortgage had been closed for more than a year and he had done at least 45 to 50 transactions for Home Trust during that time. He did not know what was being alleged and forwarded the material to senior counsel Ronald Birken who has been in practice for over 30 years. Mr. Kazdan testified in cross-examination that although it was unusual to be served with a Motion Record, after he reviewed the matter with Mr. Birken, he was left with the impression that the litigation was without merit.

183 By late July arrangements were underway between Bressi and Home for a mortgage on the Schomberg property. The Appraisal Report dated July 28, 2000 commissioned by Home identifies the applicant as "Bressi, Joe". The loan application dated August 10, 2000 bears Bressi's signature.

184 It was unclear at the outset exactly who the purchaser and borrower was going to be. The Loan Application is by Nordicraft Homes Ltd.. The original Mortgage Loan Commitment dated August 10th, 2000 is in favour of Nordicraft Homes Ltd.. The Transaction Summary originally named Nordicraft Homes Limited but was changed to 1434406 Ontario Ltd.. The

Agreement of Purchase and Sale indicates Nordicraft Homes Ltd. although there is some writing crossed out and unreadable beside the purchaser's name. The income letter is from Bruno Bressi.

185 Numerous other documents for the transaction were prepared in the names of or with reference to 1434406 Ontario Inc. and Bruno Bressi. There were also some documents in the name of Nordicraft Homes.

186 There is a Statement of Adjustments showing JCN Equities Ltd. As purchaser. Kazdan testified that he received this document after closing.

187 The Solicitor's Direction re Funds shows "JCN Equities/Nordicraft Homes (Brezzi)" as purchasers. Kazdan testified that he did not receive this document until at least the day after closing. He also testified that the Solicitor's Direction that he received before closing shows 1434406 Ontario Inc. as purchaser.

188 The pre-authorized chequing form and void cheque received on the Schomberg Mortgage was from the Bressi Family Trust. Kazdan testified that this was received by his conveyancing clerk on closing and forwarded to his office afterwards.

189 These documents were received by Home or its solicitors at or after the closing. The documentation up to that time had referred to Nordicraft Homes, 1434406 Ontario Inc. and Bruno Bressi.

190 Mr. Kazdan noted the involvement of JCN and Bressi in the transaction. Mr. Kazdan said in the course of his evidence on this point and in answer to a question that he was taking his instructions from Home. It was submitted that this answer reveals Home's determination to proceed with the transaction despite having knowledge of the involvement of JCN and Bressi. The answer, taken in context, does not support that interpretation: it was a simple acknowledgement that Home was the instructing client.

191 Mr. Hill's evidence that he approached the Schomberg mortgage the same way he approached the Bolton property requires consideration. The plaintiffs submit that this evidence shows that Home's approach with Bressi was to disregard potential (in the case of Bolton) and actual adverse information (in the case of Schomberg) about Bressi because Home wished to accommodate Bressi in order to further its prospects of obtaining the financing work on his prospective development of 24 housing units in Aurora. Based on the evidence, including the discussions of Home with Bressi and the involvement of Mr. Perry, the officer of Home responsible for the development lending in approving the Schomberg loan, Home was clearly interested in the prospect of obtaining the Aurora development financing work and this gave Home a reason to assist Bressi. But that does not lead to the conclusion that Home for that reason was willfully blind to suspicious circumstances. Whether the circumstances were suspicious is independent of Home's motives for dealing with Bressi.

192 Based on Mr. Kazdan's evidence, he concluded from his discussion with Mr. Birken that the litigation with Bressi was not significant and was not a problem for the Schomberg transaction. He would have had a basis for coming to that conclusion in the fact that Bressi was not on the title.

193 Mr. Hill's evidence about the Bolton property transaction was that he did not avoid searching against Bressi because he thought problems would emerge but because Bressi was not a guarantor, while he acknowledged that if he had searched he probably would have found a history. He said that Home was looking to the trust for payment. As analyzed above, Mr. Hill's evidence is best understood as saying that, while an executions search against Bressi might well have revealed executions against him, that was not a problem for the transaction because Home was relying, not on Bressi's creditworthiness, but on the title to the property and the title was not in Bressi but in JCN in trust for the Bressi Family Trust. This view of the matter is consistent with the view Mr. Kazdan said he formed.

194 For these reasons the fact that Home was prepared to do the Schomberg loan after receiving notice of the claim of the plaintiffs against Home in respect of the Bolton property does not support the continuation that Home's manner of dealing with these loans involved willful disregard for suspicious circumstances.

A Note on Suspicious Circumstances

195 The much cited principle is that "suspicious circumstances followed by willful blindness" constitutes bad faith and/or amounts to notice. To understand and apply this principle properly it is necessary to consider the kind of context in which it is relevant. In an equity loan for good consideration on a property in Land Titles, where the lender relies only on the title of the mortgagor, the lender would be subject to a claim not registered on title if the lender has notice or knowledge of that claim. So, if there had been a direction that the title to the Bolton property was to be taken in the name of "Joseph Bressi", it would be apparent to a knowledgeable person in the mortgage lending industry that the title which Bressi could deliver to the lender would not be subject to unregistered charges against Bressi of which the lender had no actual notice or knowledge: see the *Land Titles Act* s. 72(1). Thus, if the lender wished to accommodate Bressi by lending to him and did not wish to be subject to prior charges by Bressi, the lender would wish not to have actual notice or knowledge of them. To the extent that the lender could avoid such notice by not making enquiry, the lender would have a reason not to do so. If the lender's normal practice were to make such enquiry, it would be at least curious if the lender failed to do so.

196 So, if the lenders' normal practice was to do a credit search and the lender failed to do one on Bressi in such circumstances, it is understandable that the case law would say that the lender cannot ignore its usual practice of searching in order to avoid dealing with its suspicion of a prior charge and thereby shelter on the basis that it had no notice.

197 The facts in the present case are different in one very important respect. Bressi was not the registered owner. Moreover, there is nothing to indicate that the lenders, i.e. the defendants, knew or had reason to know that Bressi had ever had an interest in the property by way of the original agreement of purchase and sale with the Sturms. So far as the lenders knew, the mortgagor was to be JCN in trust for the Bressi Family Trust. They had no reason to believe that there was any deficiency in respect either JCN or the Trust or that there had been any other dealing in respect of the title which could have the result that a judgment against Bressi could affect the title to the property.

198 Mr. Hill for Home was suspicious about Bressi in the particular sense that he expected that if he searched executions against Bressi he would find a history. He said he did not consider that it would be a problem if there were such executions. There would have been a problem if Hill or Home knew or had reason to suspect that Bressi had an equity interest in the property but the information given to them was to the contrary and they had no reason to doubt it.

The Galwide Loans

199 The borrower on the Galwide loans on the Bolton property was the registered owner, JCN in trust for the Bressi Family Trust. The plaintiffs submit that Mr. Galati, the principal of Galwide, always understood JCN to be Joseph Bressi. Galwide was certainly aware it was dealing with Bressi personally in making the loan arrangements. Galwide understood that the registered owner was JCN in trust for the Bressi Family Trust. There is nothing to suggest that Galwide believed JCN and/or the Bressi Family Trust to be mere alter egos for Bressi. Galwide had the same title information and the same information about JCN and the Trust as Home had except that Galwide did not ask for a copy of the trust instrument. There was nothing in the information Galwide had about the title, JCN or the Trust that should have caused Galwide to consider that JCN and/or the Trust were mere alter egos for Bressi or that Bressi had or had held an interest in the equity in the property. Bressi told Galati that the trust belonged to his children.

200 The evidence for Galwide, was that, in lending on the Bolton property, it was making an equity loan, i.e. a loan based on the equity value in the property. There was a guarantee from Bressi on the first Galwide mortgage loan. This feature is dealt with below.

201 The plaintiffs say that the same "red flags" applied to the transactions with Galwide as to the Bolton property loan from Home. These red flags are dealt with above in connection with the Home loan.

202 It should be noted that Galwide was a privately owned company and did not have any relation to CDIC and its standards and did not have lending criteria of its own of the kind Home had.

203 The plaintiffs make a point of saying that Galwide was lending to Bressi at a 12% interest rate which they say was 80% higher than the market rate. Even assuming that the rate was comparatively higher as alleged (which is not clearly shown, at least in respect of second mortgage rates), it is hard to see how this fact supports any adverse inference. Presumably Galwide was motivated to lend at this rate. Accordingly it would want to satisfy itself that there was sufficient equity in the property to permit enforcement of its loan. So, there is nothing to show that Galwide's willingness to lend on an equity basis and to do only those searches necessary for that purpose was a suspicious circumstance.

204 The plaintiffs say that Mr. Galati's subsequent lack of candour about his knowledge about the business of JCN reflects a consciousness of guilt and a desire to shield the extent to which, in order to make an investment at a highly preferential rate, he had disregarded Bressi's fraudulent past. However, Galati's interest was simply to make an equity loan based on the title of JCN in trust for the Bressi Family Trust. There is nothing to show that, at least at the time of the first Galwide loan, Galati had any reason to consider Bressi had or might have a fraudulent past.

205 In April 2000 when Bressi sought to arrange a loan of a further \$50,000.00 on the Bolton property, Bressi informed Galati that he was bankrupt and that his bankruptcy was a result of his failure to pay judgments against him from the United States. The plaintiffs correctly submit that it was therefore absolutely clear to Galwide that it was dealing with an individual who had unpaid judgments outstanding. The plaintiffs submit that Galwide disregarded this information because Galwide wanted a preferential rate of interest and believed it could enforce its security. The evidence of Mr. Russo, Galwide's solicitor was that there was no obligation from a conveyancing perspective to make any enquiry into the borrower (i.e. JCN in trust for the Trust) beyond the conduct of an execution search against the borrower and a title search.

The Bressi Guarantee of The Galwide Mortgages

206 Mr. Russo said there was a guarantee from Bressi on the first loan. Mr. Russo said that he often required a guarantee, in order to show the guarantor's belief in the value of the property. Mr. Russo said he did not search executions against Bressi. He said that in many cases he has not searched executions against guarantors. The point was not pursued. In principle it is credible that a lender who was lending on the equity in the property could decide to take a guarantee as additional security for whatever it might be worth.

207 Mr. Galati said he wanted a guarantee from Bressi on the \$50,000.00 increase but Bressi revealed he was bankrupt. When they came to advance they could not get the guarantee so they advanced on the equity, which he said was ample.

208 With respect to the guarantee at the time of the April 2000 lending, when Galwide knew Bressi was bankrupt, Mr. Russo said that he believed that Bressi, despite his bankruptcy, could give a guarantee but the guarantee could not be enforced against him while he was still bankrupt. He said he was not relying on the guarantee so he did not research the matter.

The April 2000 loan by Galwide

209 The loan amount originally sought in early April was \$50,000.00. Later, Galwide agreed to advance a further \$30,000.00, for a total of \$80,000.00 if an up-to-date appraisal indicated that the value had increased up to at least \$800,000.00 and to advance only the \$50,000.00 otherwise. The appraisal was never produced and the amount advanced was kept to \$50,000.00. This was in addition to the \$150,000.00 previously advanced in 1999.

Fraudulent Intent of Transferor

210 For a conveyance to be impugned as fraudulent, it must be proven that it was made with intent to defeat, hinder, delay or defraud creditors. The onus to prove this intent is on the plaintiffs.

211 JCN has not defended and the allegations against it are deemed to be true as against it. As against the defendant lenders the fraudulent intent of the transferor is a question of fact to be decided on the facts of the case. In this regard, the plaintiffs

cite the following passage from Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd ed (rev'd) (Toronto: Carswell, 1998) at F§82, with emphasis as in the plaintiffs' written submissions:

The question of whether there was an intent to defraud creditors is one of fact, which must be decided on the merits of the particular case, taking into account all the circumstances surrounding the making of the conveyance: *Holbrook v. Cedpar Properties Inc.* (1986), 62 C.B.R. (N.S.) 18 (Ont. H.C.); *Meeker Cedar Products Ltd. v. Edge* (1968), 12 C.B.R. (N.S.) 49 [(B.C.C.A.)]; affirmed (1968), 12 C.B.R. (N.S.) 60 (S.C.C.); *Havel v. Galemar Holdings Ltd. and Fabbro* (1982), . . . 36 O.R. (2d) 348 (H.C.); *Katzschke v. Walter* (1995), 32 C.B.R. (3d) 153 (B.C.S.C.); *Ocean Construction Supplies Ltd. v. Creative Capital Prosperity Corp.* (1995), 34 C.B.R. (3d) 241 (B.C.S.C.). If the necessary effect of a voluntary conveyance [*i.e.*, a conveyance without adequate consideration] is to defeat, hinder or delay creditors, then that effect will justify an inference that, in making the conveyance, there was such an intention. However, that inference is not conclusive and can be rebutted by cogent evidence that there was no such intention, but that the conveyance was, in fact, made for an honest purpose . . . If a deed is given for valuable consideration, then no presumption of fraudulent intent arises from the fact that creditors are in fact defeated by it: *Commerce Capital Mtge. Corp. v. Jemmett* (1981), 37 C.B.R. (N.S.) 59 (Ont. S.C.).

212 The transfer to each of the defendants was given for valuable consideration. So, on the basis of the above text cited by plaintiffs, no presumption of fraudulent intent arises from the fact that creditors are in fact defeated by the mortgages.

213 On this basis, it is necessary to consider the effect of the conveyance for valuable consideration upon the creditors of the transferor in order to assess what intent must reasonably be attributed to the transferor. The enquiry must ask two questions: (1) did the conveyances have the effect of defeating creditors, and (2) if so, in the circumstances, was there fraudulent intent?

214 The Home mortgage provided funds which were used in part to pay off outstanding mortgages, in part for work on the premises and in part for payment out to the Trust as a "return of equity".

215 The Galwide mortgage loans were used to meet construction costs on the property.

216 In one sense, the mortgages did not defeat creditors. The mortgage proceeds, except for the portion of the Home proceeds which went to the Trust as a return of equity, went into the property by paying down preexisting mortgages and construction costs. These payments were not shown to be related to Bressi and the amounts were not challenged, so it might be said value was obtained for the property by reason of the amounts and therefore, even though the new mortgages ranked ahead of the plaintiffs in respect of the claims against the property, the property had been increased in value by the amounts advanced and so the plaintiffs were not "defeated". This argument would not assist Home in respect of the portion of the mortgage advance that was a return of equity.

217 While it is arguable that, on the contrary, the mortgages necessarily "defeat, hinder, or delay" the creditors by putting the mortgagees in a position of priority on the property ahead of the creditors and thereby leaving the creditors in a different and more vulnerable position, it will be apparent that the arguments advanced on this issue suggest that applying the concept of fraudulent conveyance to a mortgage for valuable consideration from an unrelated party is an exercise that requires great care.

Proof of the Intent of the Mortgagees

218 Where there is valuable consideration, the plaintiff must show the fraudulent intent of both parties. The burden of proving the necessary state of mind is on the plaintiff: *Solomon v. Solomon* (1977), 16 O.R. (2d) 769 (Ont. S.C.) at p. 774.

219 The deemed admissions of Bressi and JCN do not have the effect of proof, as against the defendants, either that JCN conveyed the property with fraudulent intent or that either defendant was privy to JCN's fraudulent intent if there was one: *Solomon*, *supra* at p. 774.

220 Where a transaction actually occurs and there is valuable consideration, the plaintiff cannot succeed without proving an intention on the part of both the grantor and grantee to defraud the creditors of the grantor. This "must be based on something far beyond mere suspicion": *Solomon*, *supra* at p. 775, quoting *Shephard v. Shephard* (1925), 56 O.L.R. 555 (Ont. C.A.) at p. 558.

221 In *Solomon*, the transferee made no search of title to land nor any search of executions. The deed was dated, executed and registered on the same day. Only one lawyer acted on the transaction. The Court found that knowledge by the grantee of the grantor's insolvency or indebtedness does not cause a grantee to cease to be an innocent purchaser for value without notice of the grantor's fraudulent intent. The Court at p. 779 quoted Orde, J. in *Kvasnedsky v. Birnbaum* (1923), 25 O.W.N. 29, as follows:

It does not necessarily follow, however, that knowledge on the part of the intending purchaser of the vendor's insolvency imputes to the purchaser knowledge of the vendor's intent to defraud his creditors, and it is incumbent upon the plaintiff to bring home to the purchaser knowledge of that intent in order to impeach, under the Statute of Elizebeth, a conveyance made upon a valuable consideration . . . There is no law to prevent one who is insolvent from disposing of his property. He may be doing so in good faith and for the purpose of realizing the monies with which to pay his creditors. So that a purchaser for value is not, merely because of his knowledge of the vendor's insolvency, to be presumed to have knowledge of a fraudulent intent which may not in fact exist.

Badges of Fraud

222 The plaintiffs rely on the principle that inferences as to fraudulent intent may be drawn from the existence of badges of fraud, as set out in the following excerpt from Dunlop, *Creditor-Debtor Law in Canada*, 2nd edition (Toronto, Carswell, 1995) at p. 613, 614-615:

. . . [T]he plaintiff may raise on inference of fraud sufficient to shift the evidentiary burden to the defendant if the plaintiff can establish that the transaction has characteristics which are typically associated with fraudulent intent. No doubt proof of one or several badges of fraud will not compel a finding for the plaintiff, but it does raise a *prima facie* case which it would be prudent for the defendant to attempt to rebut.

223 Similarly, Houlden & Morawetz, *Bankruptcy and Insolvency Law in Canada*, 3rd edition rev'd (Toronto, Carswell, 1998) states at F. §82:

The existence of one or more of the traditional "badges of fraud" may give rise to an inference of an intent to defraud, defeat or delay creditors in the absence of an explanation from the defendant: *Re Fancy* (1984), . . . 46 O.R.(2d) 153 . . . (S.C.); *Nuove Ceramiche Ricchette S.p.A. v. Mastrogiovanni* (1988), 76 C.B.R. (N.S.) 310 (Ont. H.C.); *Katzschke v. Walter* (1995), 32 C.B.R. (3d) 153 (B.C.S.C.). It is unnecessary to prove numerous badges of fraud; a single badge may be sufficient: *Turfquip Inc. v. 033478 N.B. Ltd.* (1997), 50 C.B.R. (3d) 65 . . . [(N.B.Q.B.)]; affirmed (1998), 4 C.B.R. (4th) 147 [(N.B.C.A.)].

224 Krever J. in *Solomon* addressed the matter of badges of fraud as follows at p.778:

There is, as I have indicated, no direct evidence that the defendant Krawec was privy to the defendant Solomon's intent to defraud the plaintiff. Any finding to that effect that is to be made must rest, therefore, on circumstantial evidence. Circumstances that are merely suspicious are not sufficient. But all the circumstances surrounding the conveyance of the property must be examined to determine if there are among them some which have been termed "badges of fraud".

In *Bank of Montreal v. Vandine et al.*, [1953] 1 D.L.R. 456, 33 M.P.R. 368, the Appeal Division of the Supreme Court of New Brunswick affirmed the judgment of Harrison J., who listed the following features of transactions alleged to be made with fraudulent intent as badges of fraud:

- (1) Secrecy
- (2) Generality of Conveyances, by which is meant the inclusion of all or substantially all of the debtor's assets
- (3) Continuance in possession by debtor
- (4) Some benefit retained under the settlement to the settlor

He included as minor badges of fraud:

- (5) Gross excess of value of property over price paid and
- (6) Cash taken in payment instead of a cheque.

In *Ferguson v. Lastewka et al.*, [1946] O.R. 577, [1946] 4 D.L.R. 531, LeBel, J., looked upon the following circumstances as supporting an inference of fraud on the part of the grantee:

- (1) Knowledge of the likelihood of a successful action by the plaintiff against the grantor
- (2) Unusual haste in closing
- (3) No immediate or early change of possession following the conveyance, adding that "joint possession raised a presumption of fraud,"
- (4) The relationship between the parties to the conveyance.

225 Other badges of fraud include, as set out in *Prodigy Graphics Group Inc. v. Fitz-Andrews*, [2000] O.J. No. 1203 (Ont. S.C.J.) at para. 152:

- (1) Transfer to a non-arms length person.
- (2) Grossly inadequate consideration.
- (3) The transferor remains in possession on occupation of the property for his own use after the transfer.
- (4) The transferee is holding the property in trust for the transferor.
- (5) There are actual or potential liabilities facing the transferor or he is about to enter upon a risky undertaking.
- (6) The transferor has few remaining assets after the transfer.
- (7) The transfer was effected with unusual haste.
- (8) The transaction was secret.
- (9) The absence of a sound business or tax reason for the transaction.
- (10) Destruction or loss of relevant papers or inaccurate documents supporting the transaction.
- (11) Cash is taken in payment instead of a cheque.
- (12) The deed contains false statements as to the consideration.
- (13) The deed gives the grantor a general power to revoke the conveyance.
- (14) The deed contains the self-serving and unusual provision "that the gift was made honestly, truly and bona fide".

226 Of these various badges of fraud, the only one that could be said to have been present relates not the mortgagees but to Bressi. It is that Bressi had judgment debts outstanding. That he was insolvent was not known to Home on its loan on the Bolton property or to Galwide on its first loan. Home thought Bressi would have a "history" if an executions search were done but it did not search and it did not know what executions were registered. Neither did Galwide. So it cannot be said that there

were any badges of fraud as regard to the mortgagees. Unless there is other evidence of fraudulent intent on the part of the mortgagees, the claim against them under s.2 of the *Fraudulent Conveyances Act* would therefore fail.

Good Faith

227 All parties made submissions on the issue of good faith. The implicit premise to be inferred is that the *Land Titles Act* does not make the *Fraudulent Conveyances Act* inapplicable where there is an absence of good faith on the part of the lender. Section 155 of the *Land Titles Act* supports that position.

228 Whether the issue of good faith ought to be regarded as going to the question of intent for purposes of section 2 of the *Fraudulent Conveyances Act* or to the elements of the defence afforded by section 3 and s. 7(2) is not clear from the submissions, but it may not matter in the circumstances of this case. This is also the situation with respect to the related question as to which party has the onus in respect of the good faith issue.

229 There is an aspect of the good faith argument based on alleged culpable failure to enquire which arises in the particular context of the *Land Titles Act*. This aspect was not addressed in submissions but it deserves to be noted, if only to record that it is not decided in these reasons.

230 This aspect relates to the provision in s.72 of the *Land Titles Act* that no person is deemed to have notice of unregistered or unentered instruments. The principle that a party who disregards suspicious circumstances by failing to make due enquiry is acting in bad faith seems to be close to saying that a person who fails to make enquiry in such circumstances is to be regarded as if that person were on notice as to the facts that would be disclosed by the enquiry. To the extent that these principles are in substance the same, it might be argued that the position they reflect is in conflict with s.72 of the *Land Titles Act* and that s.72 governs. By reason of the view expressed below about the applicability of the good faith principle in this case, it is not necessary to try to resolve this question.

231 The plaintiffs submit that the failure of the defendants to make more enquiries than they did about Mr. Bressi and in particular their failure to obtain a search of executions against him in view of Bressi's involvement in the transactions constituted and manifested a lack of good faith on their part in the transactions. The plaintiffs say that there was a lack of good faith because the defendants were in a situation that had suspicious circumstances to which they were willfully blind in response, rather than making the enquiry that the suspicious circumstances warranted.

232 The plaintiffs submit that their position is consistent with the interpretation of good faith adapted by Lederman J. in *Bank Leu AG v. Gaming Lottery Corp.*, [2001] O.J. No. 4715 (Ont. S.C.J. [Commercial List]). At paragraphs 75 and 76, Lederman J. stated as follow:

75. The term "good faith purchaser" has been recognized in the common law for centuries. While mere negligence, commercial stupidity or unreasonableness will not be sufficient to negative good faith on the part of a plaintiff, wilful blindness amounting to dishonesty and refusal to ask obvious questions will suffice. In *Jones v. Gordon* (1877), 2 App. Cas. 616 (H.L.), Lord Blackburn stated at pages 628-9:

But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover - I think that is dishonesty. I think, my Lords, that that is established not only by good sense and reason, but by the authority of the cases themselves.

76. In *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 (H.L.) at page 221, Lord Herschell stated:

One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

233 At paragraph 77, Lederman J. continued as follows with respect to the position of GLC, the party which alleged lack of good faith.

77. GLC acknowledges that mere negligence in the conduct of the transaction concerned on the part of the purchaser of the instrument will not deprive such purchaser of good faith status. But if there is anything which excites the suspicion that there is something wrong (and it is not necessary to have notice of what the particular wrong may be) in the transaction, the taker of the instrument is not acting in good faith if the taker shuts his or her eyes to the facts presented and puts the suspicions aside without further enquiry.

234 Lederman J's formulation as to the test for bad faith in such circumstances was expressly adopted by the Court of Appeal in *Assaad v. Economical Insurance Group* (2002), 59 O.R. (3d) 648 (fr.) (Ont. C.A.) at paragraph 19: "suspicion combined with blindness adds up to an absence of good faith" and is consistent too with its judgment delivered in *Patry v. General Motors Acceptance Corp. of Canada* (2000), 48 O.R. (3d) 370 (Ont. C.A.) ff.

235 In the latter case the meaning of good faith within the Factors Act R.S.O. 1990, c.F.1, s.2 was considered and Laskin JA commented at paragraph 18 that:

Even if a more expansive meaning of good faith is warranted, bad faith should only be found if the court can infer from the surrounding circumstances that the buyer or mortgagee suspected something was wrong and refrained from asking questions because it thought any inquiries would reveal a defective title. Benjamin's Sale of Goods, 5th ed. (1997), at p. 346 considers this broader meaning in discussing "good faith" under the similarly worded English Factors Act of 1889:

The expression "in good faith" is not defined in the Act of 1889 but would appear to mean "honestly," that is to say, not fraudulently or dishonestly. It is submitted that negligence or carelessness is not in itself sufficient evidence of bad faith and the fact that the person dealing with the agent did not behave with the prudence to be expected of a reasonable man does not mean that he acted in bad faith. On the other hand, negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of bad faith. But the facts and circumstances should then be such as to lead to the inference that the disponent must have had a suspicion that there was something wrong, and that he refrained from asking questions because he thought that further enquiry would reveal an irregularity. [Footnotes omitted.]

236 The appeal of Lederman J's decision was dismissed by the Court of Appeal in *Bank Leu AG v. Gaming Lottery Corp.* Docket C37623, August 14, 2003 [2003 CarswellOnt 3103 (Ont. C.A.)].

237 In the Court of Appeal decision, at paragraph 39, Weiler J.A. listed the findings that GLC asserted showed that the trial judge had misapplied the test of good faith. These findings relate to the conduct of an officer of Bank Leu, a Mr. Keller, and they include in particular:

(5) Keller closed his eyes, as the learned trial judge found, to many warning signals about the credit worthiness of Bensberg, and the value and liquidity of the stock portfolio.

238 The Court of Appeal considered the GLC assertion at paragraph 40 as follows:

Again, at paragraph 85 of his reasons the trial judge stated, "there were many warning signs about the creditworthiness of Bensberg, the value and liquidity of the stock portfolio. The closing of one's eyes to these signs and the failure to adhere to the bank's own internal guidelines might amount to negligence or even gross negligence or recklessness or perhaps even a breach of Swiss banking laws in not seeing that Bensberg was a significant credit risk." After carefully considering GLC's submission that Bank Leu had reason to suspect that the share certificate was invalid or that Bensberg was a dishonest person, the trial judge ultimately rejected that submission. He concluded at paras. 86 and 87:

[86] [T]here is no evidence that there was any obvious indication or suspicion that the shares were invalid or that Bensberg was a dishonest man. The evidence demonstrates that Fischer [Keller's subordinate] was concerned, but his concerns did not relate to the validity of the shares. Even Fischer's comment about Bensberg's motives being unclear is more consistent with his concern that Bensberg was a credit risk rather than any concern about possible fraud . . . It makes no sense whatsoever that Keller . . . deliberately shut his eyes to a fact that was obvious to him but he was afraid to inquire into, namely, that Bensberg was perpetrating fraud on Bank Leu by using share certificates of no value that he had obtained in various stock programs.

[87] . . . The fact that Keller or others in the bank may have had a broad suspicion that Bensberg was a credit risk, cannot be interpreted so widely as to constitute suspicion about the validity of the share certificates. In these circumstances, Bank Leu was a good faith purchaser in taking the pledge of certificate 12093.

239 The court addressed the GLC submission further as follows at paragraphs 43 and 44:

[43] GLC submits that the trial judge applied the test for a good faith purchaser too narrowly. He erred in focussing on whether Bank Leu suspected a particular wrong, namely, that Share Certificate 12093 represented shares that had not been fully paid for and were invalid. GLC submits that as a result of narrowing the test, the trial judge in effect required that Bank Leu have actual knowledge of a particular wrong.

[44] I disagree that in applying the test for a good faith purchaser the trial judge narrowed it so as to require actual knowledge of a particular wrong. Although the representation on the share certificate that the shares were fully paid for, was rightly an important factor in the trial judge's analysis, the trial judge did not just consider the share certificate. He considered the unusual nature of the loan. He also considered whether there was any basis for suspecting that Bensberg was dishonest and found there was not. The trial judge's "findings" on which GLC relies are indicative that Bank Leu had concerns over the volatility of the security package and Bensberg's creditworthiness. The trial judge found that when Keller ignored these concerns, Keller may have been negligent. Negligence is, however, not sufficient. The trial judge specifically rejected the submission that the Bank was suspicious that a fraud was being committed. In relation to its submission that the Bank was wilfully blind, GLC has not met the onus as articulated in *Housen*, *supra*, [*Housen v. Nikolaisen (2002) 211 D.L.R. (4th) 577 (S.C.C.)*] with respect to the trial judge's characterization of the facts. I would also reject GLC's submission that the trial judge misapplied the test for a good faith purchaser.

240 In the paragraphs quoted the court makes a clear distinction between suspicions about the creditworthiness of the borrower and suspicions about the validity of the borrower's title. On reflection, it can be seen that this distinction is exactly relevant to the question of fraudulent intent in the present case. A mortgagee who has reason to suspect that there is something wrong with the prospective mortgagor's title has or may have reason to suspect the possibility of fraud. A mortgagee who has reason only to suspect that there is a credit risk is not in such a position and therefore if that mortgagee fails to make enquiry it might indicate negligence or indifference but it is not sufficient to show willful disregard of possible fraud.

241 The defendants assert that their situation come within the innocent side of the distinction made in the trial decision in the *Bank Leu AG* case and upheld on appeal.

242 Each defendant says in effect (although in different ways) that it was lending only on the equity in the property and its concern was therefore only to be assured that the title of the mortgagor was valid. Home did not take a guarantee from Bressi. Galwide took a guarantee from Bressi; Mr. Russo said the purpose was to have evidence of Bressi's confidence in the value of the property.

243 The plaintiffs say that each of the defendants considered that JCN was Bressi and that there were suspicious circumstances relating to JCN and the Bressi Family Trust which meant that, even if the defendants were lending only on the strength of the title, they had reason not to be satisfied without making further enquiry about Bressi. This argument is addressed earlier in these reasons.

244 It is also relevant as to intent that there is no evidence that anyone at Home or Galwide ever gave any instructions to their lawyers not to search executions against Bressi or that anyone at Home or Galwide had any expectation as to whether the lawyers would do so.

245 The information that the defendants had about JCN and the Bressi Family Trust was not such as to suggest the registered title was unsatisfactory for purposes of a valid grant of mortgage security. So the awareness of the defendants that their dealings were being carried out with Bressi as the individual involved and that Bressi was representing JCN and the Trust was not sufficient to give them reason to suspect that there could be problems relating to Bressi that would potentially affect the title of the mortgagor. Accordingly, they had no reason to make further enquiry about Bressi.

246 For these reasons, it is not shown that the defendants' failure to make further enquiry about Bressi was a manifestation of bad faith.

247 Each defendant acted consistently on the subsequent occasion, (i.e., the Schomberg property loan in the case of Home and the subsequent \$50,000.00 advance in the case of Galwide) when they were in possession of adverse information about Bressi. They sought legal advice as to whether they could proceed on the strength of the title to the property and they received favourable advice and proceeded accordingly. This conduct was not in bad faith.

Knowing Receipt of Trust Property

248 Stated in a summary way, the plaintiffs submit that Bressi and Garwood were and Bressi is a constructive trustee of the Bolton property for the benefit of the plaintiffs and that Home and Galwide are liable for knowing receipt of trust property because they each took a charge upon the property without making the enquiry which the circumstances indicated ought to have been made.

249 The plaintiffs submit that this case is a proper one for a finding of a constructive trust on the basis set out below.

1. Constructive trusts arise where there has been fraudulent or disloyal conduct. They are also imposed to remedy unjust enrichment and corresponding deprivation: *Soulos v. Korkontzilas* (1997), 212 N.R. 1 (S.C.C.) at paras. 23 and 24, at pp. 14 and 15

2. Constructive trusts will also be imposed where there is an unjust enrichment in the absence of a wrongful act or a wrongful act but no unjust enrichment: *Soulos, supra* at para. 36, p. 22. [Para. 36 in fact does not seem to go this far, in my view]

3. A constructive trust will be imposed not only to remedy unjust enrichment but to hold persons to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain: *Soulos, supra* at paras. 16-17, pp. 10-11

4. Although Bressi and Garwood, according to the facts the Florida Complaint were fiduciaries of and owed a duty of loyalty to the plaintiffs, the absence of a classic fiduciary relationship will not preclude a finding of constructive

trust. The wrongful nature of the act may be sufficient to constitute breach of a trust like duty. A constructive trust will be imposed to remedy unjust enrichment: *Soulos*, *supra* at para. 20, p. 13

5. A constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty where three elements are present:

- (i) the enrichment of the defendant;
- (ii) the corresponding deprivation of the plaintiff; and
- (iii) the absence of a juristic reason for the enrichment; *Soulos*, *supra* at para. 20, p. 13.

6. The Supreme Court of Canada in *Soulos* cited a learned article for the proposition that:

The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall; *Soulos*, *supra* at para. 22, p. 14.

7. In summary, a constructive trust is the formula through which the conscience of equity finds expression when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

250 The plaintiffs submit that this case is a proper one for a finding of knowing receipt by the defendants of trust property held for the plaintiffs on the basis set out below.

1. In a case of knowing receipt, the plaintiff sues to recover its property that has come into possession of the defendant as a result of breach of trust. The defendant has received and become chargeable with some part of the trust property: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) at pp.810-811 and *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 (S.C.C.) at p. 784.

2. A mortgage is a proprietary interest and will support a claim for knowing receipt. The courts have imposed a duty to make inquiries where mortgages are being given: *Gold*, *supra* at pp. 790-791 and 793 per Iacobucci, J. and 803 per Gonthier, J..

3. As put by Lord Denning in *Nelson v. Larholt* (1947), [1948] 1 K.B. 339 (Eng. K.B.), at p.343, as quoted in *Gold*, *supra* at pp. 786-787:

[I]f the circumstances were such as to put a reasonable man on inquiry, or if he was put off by an answer that would not have satisfied a reasonable man . . . then he is taken to have notice . . .

4. To recover disputed property, based on *Gold*, *supra* at p. 790, the plaintiff must prove:

- (a) property was subject to a trust in favour of the plaintiff;
- (b) that the proeprty, which the defendant received, was taken from the plaintiff in breach of trust; and
- (c) the defendant did not take the property as a *bona fide* purchaser for value without notice. As discussed more fully below, the defendant will be taken to have notice if the circumstances were such as to put a reasonable person on inquiry, and the defendant made none, or if the defendant was put off by an answer which would not have satisfied a reasonable person.

251 Consideration needs to be given to the doctrine of constructive trust in the circumstances of this case which relate to the fraudulent conveyance analysis. So far, with respect to fraudulent conveyance the analysis is that the disposition by Bressi to Garwood of Bressi's interest in the property was a fraudulent conveyance because it would defeat the claims which the judgment creditors of Bressi could otherwise assert against the property of Bressi. But now the question is whether the property interest

which Bressi acquired in the Bolton property ought to be regarded as an interest which he acquired and held in trust for the plaintiffs.

252 Ordinarily the fact that a plaintiff is a creditor, even a judgment creditor, of another party would not be enough to constitute that other party a trustee for the creditor of property acquired by the party. In the present case the judgment against Bressi is for fraud against the plaintiffs. But even if Bressi could be said to have held in trust the \$150,000.00 U.S. of which Bressi was found to have defrauded the plaintiffs there is, nothing to show that any part of that amount was used to purchase the Bolton property. Mr. Bressi's evidence was that the amount had already been spent in the efforts connected with the abortive public offering. So the action of Bressi and Garwood in acquiring the Bolton property did not result in enriching them with property and correspondingly depriving the plaintiffs of it. Specifically, the acquisition by Bressi of the agreement of purchase and sale for the Bolton property did not deprive the plaintiffs of property, so there cannot have been any basis for a constructive trust at that stage. The assignment of the agreement to Garwood had the effect, as concluded above, of defeating creditors. But it did so by removing from their reach property which otherwise was Bressi's property, not by transferring to another person property which Bressi held in trust for the plaintiffs. Accordingly there is no basis for a finding that Bressi and Garwood held the Bolton property in a constructive trust for the plaintiffs.

253 Because there was no constructive trust of the property for the plaintiffs, the charges in favour of the defendants could not constitute knowing receipt of trust property. There was no trust property to be received.

254 In any event, even if the Bolton property could properly be regarded as trust property held in a constructive trust for the plaintiffs, the plaintiffs would have to show, in order to make out their claim of knowing receipt, that the defendants did not take the property as *bona fide* transferees for value without notice: cf. *Gold supra* at p. 790.

255 The plaintiffs rely on the *Gold* decision at p. 794 for the proposition that failure to make enquiry where there are suspicious circumstances is sufficient to fix a defendant with notice of a breach of trust and therefore liability for knowing receipt.

256 The problem for the plaintiffs is to identify the "suspicious circumstances or unusual facts or circumstances" in the present case that can properly be said to have fixed the defendants with notice of a breach of trust. The plaintiffs have raised the various circumstances which are discussed above in these reasons. The conclusion above is that the circumstances do not show lack of good faith on the part of the defendants. The plaintiffs would have to show why those circumstances, even though they do not amount to bad faith, nevertheless should be construed as fixing the defendants with notice. The plaintiffs say that it is possible to fail to make proper enquiry and thereby be fixed with notice even though that failure does not amount to bad faith. No reason is advanced to dispute that statement as a general principle. A person might fail to make the enquiry that was necessitated by the circumstances merely out of inattentiveness or neglect. But on the analysis set out above there was no good reason why the mortgagees ought to have to make the enquiries which they did not make; i.e. the executions search against Bressi. So there is no basis to say that their failure to do so was neglect or inattentiveness any more than it was bad faith.

257 The parties refer to the view expressed by Iacobucci J. in *Gold* at p. 785 that the premise of knowing receipt was unjust enrichment. In particular, Iacobucci J. stated that "unjust enrichment is the essence of a claim in knowing receipt". In the present case, where the defendants have given value and it is not shown that they acted in bad faith or with actual or constructive notice, there is no basis for a finding that they have unjustly enriched themselves.

Conclusion

258 For the above reasons the claim of the plaintiffs is dismissed.

259 Counsel may consult me about costs.

Claim dismissed.

TAB 5

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Romspen Investment Corp. v. 2126921 Ontario Inc.](#) | 2010 ONSC 317, 2010 CarswellOnt 863, [2010] O.J. No. 639, 185 A.C.W.S. (3d) 650 | (Ont. S.C.J., Feb 17, 2010)

2008 CarswellOnt 6914
Ontario Superior Court of Justice

Holborn Property Investments Inc. v. Romspen Investment Corp.

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

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

Wilton-Siegel J.

Heard: July 14-18, 23, 24, 2008

Judgment: August 8, 2008

Docket: CV-08-00007545-00CL

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

Subject: Property; Corporate and Commercial; Contracts; Torts

Related Abridgment Classifications

Estoppel

II Estoppel in pais

II.1 Elements

II.1.b Representation of existing fact not future intention

Real property

II Registration of real property

II.2 Registration of land

II.2.b Land titles

II.2.b.ix Priorities

II.2.b.ix.A Effect of unregistered interest

Real property

VII Mortgages

VII.4 Payment and discharge of mortgage

VII.4.i Determining amount due

VII.4.i.iii Miscellaneous

Real property

VII Mortgages

VII.4 Payment and discharge of mortgage

VII.4.m Statutory discharge

VII.4.m.iv Partial release or discharge

Real property

VII Mortgages

VII.14 Priorities

VII.14.a General principles

VII.14.a.i Notice

Real property

VII Mortgages

VII.14 Priorities

VII.14.b Between types of creditors

VII.14.b.iv Registered mortgagee and equitable interest holder

Torts

XV Negligence

XV.1 Duty and standard of care

XV.1.a Duty of care

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 preempt 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.

TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor
Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent
Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty (“GOR”) be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (“CJA”) govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (“First Reasons”). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. (“the Receiver”) as receiver of the assets, undertakings and properties of Dianor Resources Inc. (“Dianor”), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor’s secured lender, the respondent Third Eye Capital Corporation (“Third Eye”) who was owed approximately \$5.5 million.

[5] Dianor’s main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. (“381 Co.”) to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor’s properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. (“235 Co.”), another company controlled by John Leadbetter.¹ The

¹ The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least \$32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.²

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a \$2 million credit bid, the assumption of certain liabilities, and \$400,000 payable in cash, \$250,000 of which was to be distributed to 235 Co. for its GORs and the remaining \$150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

² The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic ... why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land”: at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of \$250,000 and \$150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of \$250,000 was based on an expert valuation report and 235 Co.’s acknowledgement that this represented fair market value.³

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge’s decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

³ Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye’s counsel confirmed that this was the position taken by 235 Co.’s counsel before the motion judge, and 235 Co.’s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the \$250,000 and \$150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The \$250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

- (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

- (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
- (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order “effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction” (emphasis in original): David Bish & Lee Cassey, “Vesting Orders Part 1: The Origins and Development” (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 (“Vesting Orders Part 1”). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in “Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights” in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in “Vesting Orders Part 1”, at pp. 41-42:

Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement ...

Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern “restructuring” age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, “Vesting Orders Part 2: The Scope of Vesting Orders” (2015) 32:5 Nat’l Insolv. Rev. 53, at p. 56 (“Vesting Orders Part 2”). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)⁴ which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: “a more transparent and conscientious

⁴ To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants.”

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.’s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court’s inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency

Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that “statutory interpretation cannot be founded on the wording of the legislation alone”: *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.⁵ In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

⁵ Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA “does not provide a free standing right to property simply because the court considers that result equitable”: at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article “Vesting Orders Part 1”, Bish and Cassey write at p. 49:

Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is “just or convenient” to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. “Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver”: *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,

(c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, **receiver** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a

regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor's property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
- (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh, Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver ... to ... take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)⁶.

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

⁶ This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").⁷

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007* which came into force on September 18, 2009.⁸ The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

⁷ This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

⁸ *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act 2005*"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act 2007*").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,

(c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording “take such other action that the court considers advisable” in s. 47(2)(c) as permitting the court to do what “justice dictates” and “practicality demands”. As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: “It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law”. Thus, Parliament’s deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion “[l]ike the other presumptions relied on in textual analysis ... is merely a presumption and can be rebutted.” The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* “no doubt ... has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context.” In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

However, the implied exclusion argument is misplaced where it relies exclusively on the text of the ... provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance “regarding minimum requirements to be met during the sale process”: Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide “the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse”: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what “justice dictates” but also what “practicality demands”. Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to “enhance and facilitate the preservation and realization of the assets for the benefit of creditors”: *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor’s assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, “the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc.*, 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in “Vesting Orders Part 2”, at p. 58, “[a] vesting order is a vital legal ‘bridge’ that facilitates the receiver’s giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective.” As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List’s Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property “free and clear of any liens or encumbrances”: see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court’s advertence to the authority for such a term. As Bish and Cassey note in “Vesting Orders Part 1”, at p. 42, the vesting order is the “holy grail” sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is “a near daily occurrence on the Commercial List”: at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor’s assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word “encumbrance” is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed., *Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

The word “encumbrance” is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as “every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee”.

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of “jurisdiction” but rather one of “appropriateness” as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.⁹

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

⁹ This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: “Vesting Orders Part 2”, at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian, Romspen, and Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

... [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

- (1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;
- (2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and
- (3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are “invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by” the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value \$10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed \$5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed “within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.”

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of “order or decision” (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.¹⁰ Accordingly, the “[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered”: *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the *BIA* appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, “where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal.” Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

¹⁰ *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of \$1 million to \$2 million, with 235 Co.'s GORs having a value of between \$150,000 and \$300,000, and Algoma's royalties having a value of \$70,000 to \$140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of \$150,000 but 235 Co. wanted more than the \$250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of \$250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic ... why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that “[t]hese matters ought not to be determined on the basis that ‘the race is to the swiftest’”. However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge’s decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver’s conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver’s report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the \$150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time ...

In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

- (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
- (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
- (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
- (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed...;
- (5) The respondent will not be prejudiced by extending the time;
- (6) There is an arguable ground or grounds of appeal;
- (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted.
[Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.
2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.
3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between \$150,000 and \$300,000. Before the motion judge, 235 Co. acknowledged that the payment of \$250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the \$250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of \$30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: "SEP" JUN 19, 2019

"S.E. Pepall J.A."
"I agree. P. Lauwers J.A."
"I agree. Grant Huscroft J.A."

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*,
2018 BCSC 527

Date: 20180404
Docket: H170498
Registry: Vancouver

Between:

Forjay Management Ltd.

Petitioner

And

0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijar, Mohan Vilkh, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd. and 1083516 B.C. Ltd.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Frances Hansen, Allison Richardson, Elyse
Vroom, Vitalii Lavrinovitch and Suk Da Kim,
Kelly and Brigitte Burke, Gary and Linda
Newton, Lisa McGhee, Warren Kindellan,
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Counsel for Zuheir Abrahams Inc.:

Ronald Argue

Counsel for Morris Kadylo:

Travis Brine

Place and Date of Hearing:

Vancouver, B.C.
March 12-16, 2018

Place and Date of Judgment:

Vancouver, B.C.
April 4, 2018

INTRODUCTION

[1] This receivership proceeding concerns a 92-unit strata condominium project, known as “Murrayville House”, located in Langley, B.C. (the “Development”).

[2] In October 2017, I appointed The Bowra Group Inc. as receiver manager of the Development (the “Receiver”). At that time, the respondent developer 0981478 B.C. Ltd. (“098”) and various purchasers were parties to a number of pre-sale contracts. However, despite the Development being ready for occupancy in August 2017, by the time of the receivership, none of the sales had completed. The Development remains vacant at this time.

[3] The Receiver undertook an extensive review of the pre-sale contracts toward determining the status of those contracts. In addition, the Receiver has taken steps such that it is in a position to move forward toward monetizing the Development for the benefit of all stakeholders.

[4] The Receiver now seeks directions from this Court as to how to proceed.

[5] The crux of the application before me is whether the Receiver should complete 40 of the pre-sale contracts executed by 098, being ones that it describes as “without issues”. Alternatively, the Receiver recommends that the strata units, which are the subject of those 40 pre-sale contracts, be marketed and sold as soon as possible.

[6] A substantial number of pre-sale purchasers (even some who are not within the 40 that are the subject of this application) and the Superintendent of Real Estate (the “Superintendent”) support the Receiver’s recommendation to complete these sales. Conversely, the major secured creditors, 098 and 098’s principal, the respondent Mark Chandler, oppose the completion of the sales. They argue that these contracts are not valid and enforceable and, alternatively, even if they are, the Receiver should disclaim the contracts to allow a market sale of the units.

THE RECEIVER AND ITS RECOMMENDATIONS

[7] On August 25, 2017, Forjay Management Ltd. (“Forjay”) and Canadian Western Trust Company in trust and HMF Home Mortgage Fund Corporation (“CWT/HMF”) commenced these foreclosure proceedings seeking to enforce their mortgage security against 098, the Development and Mr. Chandler, a guarantor of the indebtedness. Forjay and CWT/HMF’s security ranks second in priority as against the Development.

[8] When Forjay’s foreclosure was filed, there were significant issues already affecting the Development. These included legal proceedings and certificates of pending litigation (“CPLs”) which had been registered against the lands. In addition, regulatory action had been taken, as I will discuss in more detail below, arising in part from the suggestion that 098 had sold some of the units multiple times. The house of cards quickly disintegrated from there. The insurer under the new home warranty program then took steps toward terminating coverage.

[9] Further complicating matters were that significant issues arose as between the stakeholders after Forjay’s foreclosure was filed. For example, 098 disputed the amounts owing under various mortgages, including that of Forjay and CWT/HMF; and, various secured creditors disputed the priority, validity and/or amounts claimed under other security.

[10] Some order was brought to this chaos by the appointment of the Receiver on October 4, 2017 (the “Receivership Order”). On October 12, 2017, that Order was amended to clarify that the appointment was not only over the lands, but also all of 098’s assets, undertaking and property relating to the Development.

[11] Relevant to this application, paragraph 3 of the Receivership Order grants broad powers to the Receiver in relation to the Development and in relation to various contracts entered into by 098, including the pre-sale contracts:

- c) to manage, operate and carry on the business of the Debtor [098], including the powers to enter into agreements, incur any obligations in the ordinary course of business...., or cease to perform any contracts of the Debtor;

...

h) to execute, assign, issue and endorse documents of whatever nature in respect of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

...

k) to market any or all of the Property, including advertising and soliciting in offers in respect of the Property or any parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court;

[12] After its appointment, the Receiver began immediate efforts to put itself in a position to begin marketing and selling the units in the Development, all with substantial borrowings provided by Forjay. Those efforts included: filing a new disclosure statement, in accordance with the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"); obtaining coverage under the statutory new home warranty program; confirming that Langley was permitting occupancy of the Development (later confirmed to have been effective on August 8, 2017); completing the outstanding construction; and otherwise ensuring that all other matters relating to the Development were moving toward completion.

[13] While these efforts were underway, the Receiver's other major task was to review the substantial number of pre-sale contracts that 098 had entered into prior to the receivership. The Receiver's efforts were discussed in its First Report to the Court dated November 16, 2017. That Report, updated to today's information, revealed various anomalies or issues:

a) 098 had entered into 151 pre-sale contracts for 91 units, meaning a number of the units had been sold more than once. A chart prepared by the Receiver indicates some units had been sold two or three times and one had been sold four times;

b) in 56 of the pre-sale agreements, 098 had been paid the full purchase price and the purchaser had received a promissory note;

- c) a substantial majority of the contracts (79) provided for a credit or discount of between 10 and 100% of the purchase price from that indicated in a price list issued by 098's sales centre which was operational from March 2015 to May 2016 (the "Price List");
- d) many pre-sale contracts had been signed after the closure of the sales centre in May 2016 and after market values had substantially increased beyond those indicated in the Price List; and
- e) some pre-sale contracts had been signed prior to the issuance of 098's disclosure statement, contrary to *REDMA* requirements.

[14] From this analysis, which led to its recommendations, the Receiver identified various "standard" pre-sale contracts dated from April 2015 to May 2016 that were "without issues" and which it considered "valid". In summary, those contracts are described as having the following characteristics:

- a) they were entered into after 098's issuance of a disclosure statement;
- b) a deposit of between 3 and 10% of the purchase price had been paid and was held in trust by a law firm;
- c) the purchaser has yet to pay the balance of the purchase price;
- d) the purchase price was within 90% of the Price List; and
- e) the Receiver "believed" that the pre-sale contract prices were at fair market value at the time of signing.

[15] In its First Report, the Receiver recommended that it be authorized to complete these "without issues" pre-sale contracts, after it had filed a new disclosure statement and obtained new home warranty coverage. These include the 40 pre-sale contracts that are the subject of this application. It should be noted that a number of the 40 units were sold twice, but the Receiver's intention is to disclaim these later contracts in favour of these 40 "first in time" contracts.

[16] The Receiver's analysis and recommendations were not well received by the secured creditors. In particular, there was considerable disagreement that the prices in the pre-sale contracts were at the then fair market value. In addition, the secured creditors hotly contested the Receiver's contention that they were aware of the Price List and had agreed to provide partial discharges of their security for those prices. In addition, Forjay and one of the first mortgagees, Reliable Mortgages Investment Corp. ("RMIC"), vigorously disputed that they had agreed with the Receiver to discharge their mortgages on these pre-sales.

[17] In January 2018, the Receiver brought this application for directions. The issues for which directions are sought are:

- a) the validity and enforceability of the 40 pre-sale contracts that are "without issues"; and
- b) whether the 40 pre-sale contracts should be allowed to complete (or, as I would frame it, whether the Receiver should be directed to disclaim them).

There is no dispute that, if the contracts are disclaimed, the Receiver should take immediate steps to market and sell the 40 strata units at current market value, subject to further court order.

[18] Later events disclosed that there are substantial financial consequences to various stakeholders depending on whether or not the contracts are disclaimed. An appraisal obtained by the Receiver in late January 2018 indicates that the units' value is now collectively 46% higher than the contract prices, translating into a total increase in value of \$5,461,005. In large part, the arguments advanced on this application are directed to a determination as to who should "reap the benefit" of this increase.

[19] The Receiver's analysis and arguments are largely contained in its notice of application, the First Report and the affidavit of Mario Mainella #6 sworn January 26, 2018. The Receiver continues to advance the recommendations contained in its First Report. The Receiver's materials indicate that it has embarked upon some

analysis as to validity and enforceability of these pre-sale contracts. For example, the Receiver points to the fact that on their face, these contracts have expired, yet the Receiver argues that they are still enforceable and not “void” because of the subsequent conduct of the parties to those contracts. In addition, in support of its recommendations, the Receiver refers to *REDMA* requirements and, also arguments of “good faith”.

[20] As best I can determine, there is no particular analysis by the Receiver of the disclaimer issue, beyond identifying the substantial increase in the value of the units that could maximize the recovery on the assets of 098, but “at the expense of the interest of the holders of the 40 pre-sale contracts”. The Receiver also notes that there is an “urgent need to monetize the units in the Development and to provide certainty and closure for the holders of pre-sale contracts for units in the Development”.

[21] It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment. A receiver owes fiduciary duties to all parties, including the debtor, and to all classes of creditors: *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.* (2002), 59 O.R. (3d) 376 at para. 15 (Ont. S.C.J.); *Philip’s Manufacturing Ltd., Re* (1992), 69 B.C.L.R. (2d) 44 at para. 17 (C.A.).

[22] The role of a court-appointed receiver was discussed in Frank Bennett, *Bennett on Receiverships*, 2nd Ed. (Toronto: Carswell, 1999) at 180:

... As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver’s primary duty is to account for the assets under the receiver’s control and in the receiver’s possession. This duty is owed to the court and to all persons having an interest in the debtor’s assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not

only facts favourable to pending applications, but also facts that are unfavourable.

[23] The secured creditors take issue with both the Receiver's position and its recommendations, taking the view that the Receiver has improperly entered the fray in taking an active position on the issues where there are competing interests and in doing so, has preferred the interests of the pre-sale purchasers over theirs.

[24] It is also trite law that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all interested parties. Its role is to be even handed, and not prefer one party over the other: *Bank of Montreal v. Probe Exploration Inc.* (2000), 33 C.B.R. (4th) 182 at para. 2 (C.A.) (WL). See also *Bennett* at 272.

[25] In my view, there is some basis for that criticism here. I appreciate that in its materials, the Receiver has discussed the two positions and the effect on the various stakeholders of closing (or not closing) these 40 pre-sale contracts. In addition, the factual background outlined by the Receiver has been valuable in considering the issues, as acknowledged by many counsel. However, the Receiver's position here goes far beyond that.

[26] The Receiver places great reliance on comments of the court in *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.) (WL):

[40] ... Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others.... The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision...

[27] Many counsel referred to the deference normally accorded to the views of a receiver, such as in considering the formulation of a sales process and any results of a sales process, citing *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R.

(3d) 1 (Ont. C.A.) at 5–6. However, these types of sale issues typically involve the court relying on a receiver’s expertise in such matters and in that event, deference is usually well justified. I see little relevance in that scenario to what is before me.

[28] It is clear enough that some of the issues before the Court do not involve a consideration of “business choices” made by a receiver where some deference to the knowledge and experience of a receiver would likely be accorded. The issue as to the validity and enforceability of these pre-sale contracts is a legal issue and a complex one at that. The Receiver has no particular expertise in that regard and was not tasked by the Court with a determination of that issue. I have heard substantial argument and have been taken to a large body of evidence on that issue, as noted by the volume of materials before me and numerous counsel advocating their positions. In those circumstances, where other parties are in the fray, I think it would have been best for the Receiver to have provided facts as known to it and thought to be relevant to a determination, but otherwise to have remained neutral as to the result.

[29] My comments equally apply to the Receiver’s position in respect of the issue as to completing the pre-sale contracts or disclaiming them. Given the level of conflict on the issue, neutrality would have been a better course of action, after providing all necessary facts to the parties and the Court that inform that analysis and setting forth considerations on the issue. In any event, I unfortunately agree with many of the secured creditors that the Receiver’s analysis is not particularly helpful in the determination of that issue. In some instances, the factual assertions in the First Report are unsupported (i.e. that the 40 sale prices were at fair market value); in another case, the assertion of fact (i.e. that Forjay and RMIC had agreed to discharge their security on these units) was simply wrong.

[30] I appreciate that the Receiver’s intention was to bring the matter forward as soon as possible, given the need to liquidate the units as soon as possible for the benefit of all stakeholders. In that respect, I do not question the Receiver’s good faith motives. If nothing else, the Receiver’s actions have galvanized the warring camps

to their positions and hastened this hearing so that the matter can move forward to some extent.

[31] Accordingly, I intend to rely on the unchallenged factual assertions in the Receiver's materials, including the First Report, and the circumstances that the Receiver suggests are germane to the issues. Unfortunately, I have come to the conclusion that beyond that, the Receiver's recommendations should not be afforded any deference (*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at 111 (Ont. H.C.J.)); rather, I will consider the detailed submissions put forth by the respective camps, since both were well represented on this application and all made extensive submissions on the facts and the law.

THE ISSUES

[32] Many of the arguments addressed the first issue raised by the Receiver, namely, whether the 40 pre-sale contracts were valid and enforceable at this time. In addition, other purchasers asserted that 098 was estopped from asserting that the pre-sale contracts had expired by their terms.

[33] Some arguments were based, not only on the facts as known to the Receiver and the parties, but also as to what other evidence *might* be available through ordinary litigation and the usual pre-trial discovery mechanisms. For obvious reasons, no one wishes to embark on what might be expensive and lengthy litigation to delay the matter further; however, in the absence of a full evidentiary record on at least some of the issues, it raises the definite prospect that this Court is being asked to decide legal issues in a vacuum. This also raises the unattractive prospect of an individual analysis of each of the 40 pre-sale contracts.

[34] Having considered the matter, I am satisfied that the issue can be resolved by consideration of the disclaimer issue alone, premised on the assumption that the contracts remain valid and enforceable as against 098 at this time. Within that issue, many of the factual circumstances relating to the contract issues remain relevant. By that approach, the contract validity issue only becomes relevant if I decide that the

contracts should *not* be disclaimed. For reasons set out below, I have concluded that disclaimer is appropriate here and there is no need to consider the first issue.

DISCLAIMER – GENERAL LEGAL PRINCIPLES

[35] As noted in *Bennett* above at 180, one of the primary goals of a receiver is to maximize the recovery of the assets under its charge. See also *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONSC 199 at para. 103, leave to appeal ref'd 2016 ONCA 485.

[36] Having said that, and as I will discuss in detail below, it is common ground that this is not the only consideration a receiver must take into account in the performance of its duties. The receiver is required to assess all equitable interests or “equities” in the disclaimer exercise: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818 at para. 22, aff'd 2005 BCCA 154.

[37] One of the tools by which a receiver maximizes the value of the assets for the benefit of the stakeholders is by considering whether it is beneficial to continue to abide by contracts between the debtor and other parties, or to disclaim them. For example, in the context of pre-sale contracts, although a better realization might be obtained by a disclaimer, the extra cost and delay of remarketing and selling the units might outweigh that benefit. I would add at this point that no one has argued that this is the case here.

[38] In *Bennett* at 341-42, the author discusses that a disclaimer is considered within the context of this maximization exercise:

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach...

...

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages...

[Emphasis added.]

[39] Disclaimer principles as found in numerous case authorities were summarized by Justice Burnyeat in *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 at paras. 53-57. Burnyeat J. summarized the relevant considerations found in those authorities as follows:

[58] I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

[40] As stated above, paragraph 3(c) of the Receivership Order specifically empowered the Receiver to “cease to perform any contracts of [098]”. This would include the power to not complete the sales contemplated by the 40 pre-sale contracts before me: *bcIMC* at para. 60. I agree that the Receiver has properly sought directions from the Court on that issue, given the level of conflict between the stakeholder groups.

[41] It is in the context of maximizing realizations that many of the case authorities discuss the balancing of interests—or consideration of the equities as between the

parties. This will include a consideration of the relative pre-filing positions of the parties and implicitly recognize that any failure to disclaim might result in an unjustified preference in favour of one stakeholder. For example, in *bcIMC*, Burnyeat J., at para. 96, stated that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not otherwise available to other unsecured creditors. See also *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848 at para. 27 (Ont. S.C.J.).

[42] Such an approach is evident from the court's reasoning in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816. In that case, where similar facts were in issue, Justice Morawetz (as he then was) determined the legal priority as between the pre-sale purchasers and the lenders, and then considered whether there were any "equities" in favour of the purchasers so as to displace those prior legal rights: paras. 27, 32.

[43] In *Romspen Investment Corporation v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 [*Romspen/Horseshoe*], Justice Wilton-Siegel stated:

[31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96."

[32] In accordance with this standard, a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[Emphasis added.]

[44] Mr. Nied, co-counsel for the third mortgagee, 625536 B.C. Ltd. ("625"), advances an analytical framework for consideration of the disclaimer issue. I

substantially agree with those submissions and would, therefore, frame the issues as follows:

- a) Firstly, what are the respective legal priority positions as between the competing interests?
- b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
- c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

DISCLAIMER – DISCUSSION

1) Respective Legal Priorities

[45] I will now address the respective legal positions and interests of firstly, the mortgagees or lenders and secondly, the pre-sale purchasers.

(i) The Mortgagees' Interests

[46] The first three mortgages came into existence in advance of the 40 pre-sale contracts.

[47] In May 2014, 625's mortgage, a take back mortgage, was granted around the time of 098's purchase of the lands. The face amount of the mortgage is \$1.8 million. In May 2014, RMIC and CWT registered their mortgage against the lands in the face amount of \$4.2 million. In December 2014, Forjay and CWT/HMF registered their mortgage against the lands in the face amount of \$10 million. There is a fourth mortgage registered against the Development by James Mercier, the principal of Forjay and RMIC. Mr. Mercier contends that the loans advanced by RMIC and Forjay were intended to be short-term construction loans, to be repaid by further construction financing.

[48] As a result of priority agreements, the relative position of the mortgages is: (1) RMIC and CWT; (2) Forjay and CWT/HMF; (3) 625; and (4) Mr. Mercier.

[49] There is nothing particularly unusual about any of the first three mortgages. They agreed to advance significant monies and in return, they expected to be repaid the full amount advanced, with interest and costs. In addition, on the subject of partial discharges upon sales of units, the mortgages all provided that partial discharges against strata units were entirely within the discretion of each of the lenders. The mortgages all provided in the standard terms:

13.(1) If the land is subdivided:

(a) this mortgage will charge each subdivided lot as security for payment of all the mortgage money, and

(b) the lender is not to discharge this mortgage as a charge on any of the subdivided lots unless all the mortgage money is paid.

(2) Even though the lender is not required to discharge any subdivided lot from this mortgage, the lender may agree to do so in return for payment of all or a part of the mortgage money. ...

[50] The 40 pre-sale contracts were executed during the existence of 098's sales centre, which was open from March 2015 until it closed in May 2016, and accordingly, well after all three mortgages were registered against title. Section 4.3 of the March 2015 disclosure statement that 098 provided to all of the purchasers under the 40 pre-sale contracts makes express reference to the existing legal rights of the three mortgagees.

[51] 098's slide into insolvency, at least from the lenders' point of view, did not commence just prior to the appointment of the Receiver. Highlights from the course of events include:

a) in September 2014, RMIC and CWT commenced a foreclosure proceeding under their first mortgage and they presumably filed a CPL against the lands. For reasons not clear to me, this proceeding was held in abeyance;

- b) the short-term nature of Forjay/RMIC's mortgages never materialized. The take out financing was never arranged by 098;
- c) in May 2016, Mr. Mercier was advised by 098 that it did not have funds and sources of financing to complete the Development. Either Forjay or RMIC went on to advance a further \$14.2 million to 098 under their mortgages;
- d) in early July 2017, CWT/HMF filed a foreclosure action and registered a CPL against the lands. By this time, the amounts owing under the second mortgage (Forjay and CWT/HMF) were said to be just shy of \$19 million;
- e) after the filing of CWT/HMF's foreclosure and CPL, things quickly went downhill;
- f) the Kaur Group of purchasers are largely identified as those having pre-sale contracts where the full price was paid and a promissory note was executed by 098 (they are not part of the 40 pre-sale purchasers here). In early August 2017, the Kaur Group lodged a complaint with the Superintendent to the effect that some units had been sold to more than one purchaser. On August 4, 2017, the Kaur Group filed an action against 098 and others and registered a CPL against certain units, claiming in part that 098 had used the funds paid by them for improper purposes;
- g) at least in part as a result of the filing of the CWT/HMF and Kaur actions and registrations of the CPLs, the Superintendent issued a cease marketing order pursuant to *REDMA*. Under s. 1 of *REDMA*, "market" includes engaging in any transaction that will or is likely to lead to a sale. Accordingly, this order prohibited 098 from completing any sale, save with the Superintendent's concurrence. This order also gave notice to 098 that it was required to file a new disclosure statement; and
- h) Forjay's foreclosure commenced August 25, 2017 and, as stated above, led fairly quickly to the appointment of the Receiver.

[52] As I have referenced above, one of the major planks of the Receiver's position found in the First Report was the contention that Forjay and RMIC had agreed with it to partially discharge their security if these 40 pre-sale contracts were completed. However, during the course of this hearing, it became quite evident that there was considerably more complexity to Forjay and RMIC's discussions with the Receiver. The agreement to discharge was premised on the discharges being granted in "normal circumstances". Further, Forjay and RMIC required that: there were valid pre-sale contracts (which remains in dispute); the closing would occur shortly after the Receiver's appointment; and, the net sale funds would be paid to the first mortgage. None of the latter events occurred.

[53] Many of the purchasers, including the Kaur Group, suggested that Forjay agreed to partially discharge their mortgages if the units were sold for at least 90% of the Price List.

[54] The broader allegations were that all the mortgagees implicitly agreed to partially discharge their security to allow the 40 pre-sales to close. The Kaur Group argued that it was a requirement under s. 11(3) of *REDMA* that the mortgagee pre-approve such partial discharges or alternatively, that the developer make other arrangements satisfactory to the Superintendent to transfer title to a purchaser. Assuming, for present purposes, that 098 was in breach of this requirement, I fail to see that any breach *ipso facto* means that such an agreement existed on the part of the lenders.

[55] By the conclusion of this hearing, there was either evidence or concessions by the various purchasers that no such agreement existed on the part of RMIC, Forjay or CWT/HMF.

[56] Accordingly, there is no evidence of any agreement on the part of the first three mortgagees to discharge their security against the 40 units and some have expressly stated that they did not agree. There are examples where such lenders' agreements were before the court: see *bcIMC* at para. 10; *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 at para. 18; *Romspen Investment*

Corporation v. Woods Property Development Inc., 2011 ONSC 3648 at para. 36, rev'd on other grounds 2011 ONCA 817. Such facts simply do not exist here. Nor is there any evidence that the lenders have conducted themselves in a manner to suggest that they would provide such partial discharges in certain circumstances, upon which 098 or any purchaser might rely.

(ii) The Purchasers' Interests

[57] As I described above, all of the 40 pre-sale purchasers executed what the Receiver described as a "standard" contract, presumably prepared by 098. All contracts included an Addendum "A", which includes relevant provisions for this hearing's purposes.

[58] The first provision is clause 1, titled "**Completion Date**":

- a) ... The Completion Date will be that date set out in a notice to the Purchaser (the "**Completion Date**") from the Vendor and will be no less than 21 days after the Vendor ... notifies the Purchaser... that the Strata Lot is ready to be occupied. ... The notice of the Completion Date (the "**Completion Notice**") delivered from the Vendor ... to the Purchaser ... may be based on the Vendor's estimate as to when the Strata Lot will be ready to be occupied. If the Strata Lot is not ready to be occupied on the Completion Date so established, then the Vendor may delay the Completion Date from time to time as required, by notice of such delay to the Purchaser ... If the Completion Date has not occurred by July 31, 2016 (the "**Outside Date**"), then this Agreement will be terminated, the Deposit and interest thereon will be returned to the Purchaser and the parties will be released from all of their obligations hereunder, provided that:
 - i) [a *force majeure* clause which is not relevant here]; and
 - ii) the Vendor may, at its option, exercisable by notice to the Purchaser, in addition to any extension pursuant to Section 1 (a) and whether or not any delay described in Section 1(a) has occurred, elect to extend the Outside Date for up to 120 days.

[59] The second relevant provision is clause 11, titled "**Entire Agreement/Representations**". In part, that clause provides that "No modification or waiver of this Agreement or any portion of this Agreement will be effective unless it is in writing and signed by the Vendor and Purchaser."

[60] The third and final relevant provision is clause 19 and clearly sets out the rights acquired by a purchaser upon execution of a contract:

Contractual Rights. This offer and the Agreement which results from its acceptance create contractual rights only and not any interest in land. The Purchaser will acquire an interest in land upon completion of the purchase and sale contemplated herein.

[61] 098 issued its first disclosure statement in March 2015, by which time completion of construction was anticipated to be from January to April 2016. It is common ground that 098 never issued a “Completion Notice” setting the “Completion Date”. Needless to say, the Completion Date did not occur by the Outside Date of July 31, 2016 (clause 1(a)).

[62] As the Receiver notes, based on a reading of the contracts themselves, all 40 pre-sale contracts were terminated by their terms on November 28, 2016, which marked the end of the only 120-day extension period permitted under clause 1(a)(ii). In that regard, the Receiver suggests that it be allowed to “amend” the existing contracts to permit them to complete, presumably meaning that the contracts could be resurrected and a new “Completion Date” set.

[63] On the contract validity issue, both the Receiver and the purchasers rely on the fact that 098 continued to communicate with the 40 purchasers and purported to unilaterally “amend” the Outside Date on several more occasions, as follows:

- a) in April 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between May and August 2016;
- b) an undated first notice of extension was delivered to 39 of the 40 purchasers under cover of a letter dated July 29, 2016, by which 098 exercised its right under clause 1(a)(ii) of the contract to unilaterally extend the Outside Date by 120 days, i.e. to November 28, 2016. As noted by 625’s counsel, it is not clear when the first notice of extension was sent out; in at least one case (SL 11), a notation on the July 29 covering letter indicates that it was mailed August 2, 2016, after the

original Outside Date. In one case, the July 29, 2016 covering letter relied on clause 1(a)(i) – being the *force majeure* clause – to extend the Outside Date to November 28, 2016;

- c) in September 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between November 2016 and February 2017;
- d) in November 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between January and May 2017;
- e) an undated second notice of extension was delivered to all 40 purchasers by which 098 purported to again unilaterally extend the Outside Date to March 31, 2017 under clause 1(a) of Addendum “A”. Purchasers were asked to “acknowledge” the new Outside Date;
- f) around March/April 2017, 098 sent out an addendum to all 40 purchasers that purported to amend the contracts by changing the Outside Date to May 31, 2017. In most cases, this addendum was not fully executed by both the purchasers and 098 until after March 31, 2017;
- g) for the vast majority of the 40 purchasers, the May 31, 2017 Outside Date addendum was the last attempt by 098 to extend the Outside Date and there were no further formal extension notices received from 098;
- h) a few purchasers received a third notice of extension from 098 dated May 31, 2017 extending the Outside Date to July 15, 2017 under clause 1(a)(ii) of Addendum “A”; and
- i) a few purchasers received a fourth notice of extension from 098 dated July 14, 2017 extending the Outside Date to August 31, 2017, under clause 1(a)(ii) of Addendum “A”.

[64] The spotty manner in which these last extensions took place is evident from the evidence of Jaspreet Dhaliwal, 098’s chief financial officer, who states that 098

“attempted” to deliver these notices of extension through various means. In any event, Mr. Dhaliwal confirms that 098 did not deliver any further notices of extension purporting to extend the Outside Date beyond August 31, 2017.

[65] In light of all these extensions, a number of purchasers actually inspected their units in the summer of 2017. In addition, some of them received notice from 098 that “occupancy had been received” just after Langley’s notice was issued on August 8, 2017. They were also advised that 098 would “begin the closing process”. When that did not happen, a number of purchasers even got to the point of filing an action in this Court for specific performance and registering a CPL against their units, all before the receivership.

[66] What, then, is the nature of the purchasers’ interests under their contracts?

[67] Again, the pre-sale contracts clearly provide that they create “contractual rights only and not any interest in land”, and that the purchasers will only acquire an interest in land “upon completion of the purchase and sale”. There is no suggestion by the purchasers to the effect that this contractual provision is not applicable due to waiver or estoppel; certainly, no evidence has been filed in support of any such contention.

[68] The law is clear that contracting parties may contract away their equitable interests, subject to the doctrines of undue influence and unconscionability (which none of the purchasers have argued): *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113 at paras. 45, 50; *Bernum Petroleum Ltd. v. Birch Lake Energy Inc.*, 2014 ABQB 652 at para. 97.

[69] Accordingly, there is no reason to disregard the clear intent of the parties as to the nature of the interest to be held by the purchasers upon execution of the pre-sale contracts. Numerous case authorities arrived at that same result in the context of pre-sale contracts of a development.

[70] In *bcIMC*, the Court was addressing the nature of certain pre-sale contracts, which contained similar wording to that found in clause 19. Burnyeat J. discussed

this issue at paras. 63-65 and concluded that he should give effect to that clause by confirming that no equitable interest arose.

[71] In *Pan Canadian*, the court held that certain purchasers could not have purchaser's liens (an equitable remedy) in respect of land because their contracts expressly stated that only contractual rights were created. The court discussed that the "protective" clauses in the agreements negated any intention on the part of the contracting parties to create an interest in land: paras. 36, 43-51, 58.

[72] Finally, the court in *Firm Capital* held that the lender had legal priority over the interests of purchasers where, at least in part, the pre-sale purchasers, by agreement, acquired a "... personal right only and not any interest in the Unit or property": paras. 26-27.

[73] In the alternative, I have also considered the position of the pre-sale purchasers that they have an equitable interest even in the face of clause 19. Unfortunately, this also does not assist them in seeking what is essentially an order for specific performance against the Receiver.

[74] The Court in *bcIMC* cited substantial authority at paras. 70-72 that an equitable interest cannot be specifically enforced in circumstances that are present here. Further, Burnyeat J. citing *CareVest*, stated:

[73] The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In *CareVest*, *supra*, Pitfield J. stated in this regard:

It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.

As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.

(at paras. 13-4)

[Emphasis added]

[75] In *1565397 Ontario Inc. (Re)* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.) (WL), Justice Wilton-Siegel stated:

[33] I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. ...

[76] In *Pope & Talbot Ltd. (re)*, 2008 BCSC 1000, Justice Brenner, as he then was, was dealing with cross applications: the Receiver sought to disclaim an asset purchase agreement, which was in progress at the date of the receivership; and the purchaser sought an order compelling the receiver to complete the sale. Somewhat similar to the facts here, even after the agreed closing date, the parties continued making efforts to close. Then the receivership happened. At para. 25, Brenner J. noted that the purchaser asserted an equitable interest in the assets. However, the Court, as it did in *bcIMC*, considered at para. 26 that the purchaser's status was contingent upon the contract being specifically enforceable. That remedy was not available in *Pope & Talbot* since the parties were not *ad idem* on outstanding matters at the time of the receivership and the receiver did not affirm the contract: para. 29.

[77] The statements of this Court in *bcIMC* at para. 73, citing *CareVest* at paras. 13-14, ring true here in the sense of assessing whether the pre-sale purchasers could have asserted specific performance claims against 098. The circumstances would indicate otherwise:

- a) 098 did not have permission for occupancy for the units until Langley issued its notice on August 8, 2017;
- b) there were indications even before August 8, 2017 that 098's fortunes were fading, given:
 - (1) the petering out of the extension notices after May 31, 2017 are indicative of 098 seeming to have "withdrawn from the field" (see *Pope & Talbot* at para. 31);
 - (2) in July 2017, 098 was subject to a foreclosure by CWT/HMF and their CPL had been registered against title. At that time, there was no agreement on the part of CWT/HMF to provide any partial discharges that would have allowed the completion of the sales of these units. No court order could have been enforceable as against CWT/HMF if no agreement was forthcoming;
- c) by September 8, 2017, the Superintendent had shut down any sales of units by its cease marketing order. This order in part required that 098 file a new disclosure statement under *REDMA* before any further "marketing" could proceed. Again, I appreciate that 098 was making efforts to have the Superintendent's order lifted so that these sales could proceed, but it would be speculation to assume that this would have been forthcoming. In those circumstances, no order of specific performance could have required 098 to act in breach of that order;
- d) on August 25, 2017, Forjay filed its foreclosure action and registered its CPL, adding to the barriers to any closing that might have been sought by any of the purchasers. Again, Forjay did not agree to any partial discharges at any time. It goes without saying that the purchasers would not have taken title to the units with 098's mortgages still registered against them; and

e) on September 30, 2017, 098 lost its new home warranty coverage.

[78] In short, I see no basis upon which an order of specific performance could have compelled 098 to close these sales and provide clear title after occupancy had been confirmed on August 8, 2017. Certainly, there is no basis for any such remedy before that date.

[79] The appointment of the Receiver on October 4, 2017, does not improve any argument on the part of the purchasers. The Receivership Order had no effect on the relative positions as between the mortgagees and the pre-sale purchasers: *Romspen/Horseshoe* at paras. 29, 33-35.

[80] Further, the purchasers could not have sought specific performance as of or after the date of the Receivership Order. The Receiver never affirmed the contract through its conduct or otherwise: *Pope & Talbot* at paras. 31-32. As the Receiver has acknowledged, further efforts were required to complete the Development, including completing exterior work, common areas deficiencies (including landscaping) and in-suite deficiency work.

[81] In addition, the Receiver has acknowledged that upon its appointment, it was not in a position to market, sell or complete the sale of any of the units because, among other things, it had to file a new disclosure statement and obtain new home warranty coverage. The Receiver sought and obtained substantial borrowing powers in order to complete the Development, which included this extra work.

[82] In late January 2018, the Receiver described the Development as “substantially complete”. Even as of February 19, 2018, the Receiver had still not obtained the new home warranty and was seeking funds from Forjay to complete that matter and others.

[83] In *Firm Capital*, Morawetz J. stated:

[28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an

unregistered condominium project) should not be ordered where it would amount to “a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence”. (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.

[29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[84] I agree. The Receiver could not have been forced to complete the Development so as to enable the purchasers to close their sales.

[85] The other major obstacle in the path of the pre-sale purchasers lies in the requirement that specific performance is only available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available.

[86] Uniqueness is a question of fact that must be assessed in light of the specific circumstances of the particular property in issue: *bcIMC* at paras. 95-96. A person asserting specific performance must show that the property has distinctive features that make an award of damages inadequate: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 45.

[87] Many of the purchasers have stated that they were drawn to Murrayville by its close proximity to the Langley hospital, shopping and the municipal recreational facilities. However, there is no indication that other units in the same vicinity are not available. In fact, there is evidence from some of the purchasers to the effect that there are other similar units available in the marketplace. For example, Nicola Quinn in respect of SL 19 (one of the 40 pre-sales) states that there currently exist “apartments similar to our Murrayville unit”.

[88] I do note that at least two of the purchasers paid for improvements to their units, which could stand as some basis upon which to assert that those were unique.

[89] When considering the purchasers’ evidence as a whole, it is clear that the defining “uniqueness” is the *price* at which they can acquire the units under the

existing contracts. Ms. Quinn states that these other apartments “cost much more”. Even so, no authority has been cited to me that would support that these units are unique in character for that reason. Indeed, such a reason more supports that a damage award would be an adequate remedy.

[90] In summary, the purchasers’ interests are grounded in contract and no equitable interests have arisen in any of the units. Those purchasers’ contractual rights have no legal priority over those held by the mortgagees. Even if the purchasers hold equitable interests in the lands, those interests are not enforceable in the circumstances.

(2) Realizations/Preferences

[91] Turning to the second question in the analysis, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?

[92] In light of the recent appraisal obtained by the Receiver, there can be no doubt that remarketing and selling these 40 units would enhance the value of the assets to be distributed to the stakeholders. The Receiver described the increase in value as “material”. That fact clearly points to disclaimer as being appropriate.

[93] I also have no difficulty concluding that a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security. In order to permit the pre-sale contracts to complete, the Court would need to order the discharge of the mortgages in circumstances where the mortgagees would not receive payment of the amounts they bargained to accept in exchange for a discharge. This would be an exceptional result and I know of no authority to order it in these circumstances. I agree with the mortgagees that it would have the effect of elevating the claims of the purchasers above the legal priority and security of the mortgagees: *bcIMC* at para. 96; *Penex* at para. 27.

(3) The Equities

[94] Turning to the third consideration, have the pre-sale purchasers established that the equities support overriding the mortgagees' legal priority in their favour, as opposed to allowing a disclaimer?

[95] The circumstances set out above in relation to the respective interests and priorities of the mortgagees and the pre-sale purchasers remain relevant within this part of the disclaimer exercise, but I will not repeat them again.

[96] The pre-sale purchasers, both those represented by counsel and those appearing in person, presented a wide range of arguments in support of completing the sales. I will attempt to distill their arguments, and those of the Receiver, into various categories. They are set out below, in no particular ranking of importance.

[97] Actions/Inactions of 098. The Receiver states that the 40 pre-sale contracts "did not complete because of the actions of 098". The Receiver then argues that the purchasers took all steps required of them to buy their units, but that they were denied the ability to complete the purchase due to the actions of 098. Finally, the Receiver points to the fact that the purchasers remain ready, willing and able to complete, despite having received a further disclosure statement which would have afforded them rescission rights under *REDMA*. This leads to the Receiver's view that "fairness and equity" favour completing the pre-sale contracts.

[98] With respect, this argument is simplistic and, in any event, unpersuasive.

[99] I would venture to say that most, if not all, insolvency landscapes are littered with the broken promises of the debtor. Secured creditors are not paid; suppliers and trades are not paid; employees are not paid; and the list goes on. Such is the nature of insolvency. The insolvency regimes available to stakeholders (such as bankruptcy, receivership or restructuring) are intended to stabilize matters and allow an orderly realization of assets for the benefit of stakeholders generally. To suggest that a stakeholder's claim is elevated by the debtor having broken its promise to that stakeholder does little to distinguish that claim from all others.

[100] Further, such general notions of fairness or equity, as cited by the Receiver, are not meant to *ex post facto* elevate the claims of a party so as to relieve that party of the consequences of a harsh result: *Bank of Montreal v. Awards-West Ventures Inc.* (1990), 50 B.C.L.R. (2d) 363 at para. 39 (C.A.). If that were the case, claimants would be lined up to do so.

[101] Again, I do not intend to wade into the details of the contract validity/estoppel/misrepresentation/waiver issues, all in aid of the purchasers avoiding the argument that their pre-sale contracts were not even afoot at the time of the receivership such that no disclaimer is needed. However, I acknowledge the Receiver's and many purchasers' points that 098 did not provide any notice of default or termination, and that the purchasers have been waiting patiently for months, if not years now, based on 098's ongoing assurances that it was nearing completion. Some have been particularly patient, relying on temporary accommodations and moving items into storage. Many are seniors. Many question their ability to re-enter the market (even for lesser units) if they are required to go shopping for condominiums again. Certainly, the current state of the Lower Mainland real estate market is not for the faint of heart.

[102] There is no doubt that some sympathy is in order for the purchasers in these circumstances, even assuming that the contracts remained valid and enforceable to the end. However, those circumstances are not unusual in the sense of pre-sale purchasers not getting their promised unit when a developer fails and the creditors are required to step in to finish the development and sell it and thereafter, distribute the proceeds.

[103] I also consider that the purchasers are no doubt correct when they say that the mortgagees would likely be seeking to complete the pre-sale agreements if the market had gone down. The Kaur Group argues that, if the market had fallen, the mortgagees would have been supporting these sales, to the detriment of the purchasers. However, if a receiver is appointed, s. 16 of *REDMA* dictates that a new

disclosure statement must be filed, in which case any purchaser would have the option of rescinding the contract to avoid completion.

[104] The Purchasers Knew the Risks. It is obvious that the mortgagees took risks in advancing the funds to 098. Of course, the taking of security against the Development was meant to ameliorate those risks.

[105] However, there was also some risk inherent in the pre-sale contracts. The disclosure statements alerted the purchasers to the fact that financing had been arranged and was secured against title to the Development. Further, the pre-sale contracts expressly provided that the purchasers were only obtaining contractual rights and not any interest in lands until the time of completion.

[106] In addition, the purchasers were told in section 7.2(f) of the disclosure statement that, “if [098] fails to complete the sale”, they would be paid their deposit monies together with accrued interest.

[107] Accordingly, while the pre-sale purchasers enjoyed a potential upside in the event of an increase in real estate values between the date of the purchase agreement and completion, they also bore the risk that the developer would be unable to complete the contract. In this case, section 1.5(2) of the amended March 2015 disclosure statement expressly disclosed that Mr. Chandler had been issued cease marketing orders by the Superintendent in 2006 and 2007, a fact that would have highlighted the potential risk in this case.

[108] Purchasers Will Recover Deposits. All of the purchasers under the pre-sale contracts have a deposit currently held in trust. There is no dispute that the purchasers are entitled to the return of their deposits with interest and no dispute that they will be paid those amounts. As stated in *Firm Capital* at para. 34, the purchasers will not suffer any financial loss in that respect.

[109] As mentioned above, two of the purchasers have expended their own funds in making certain improvements to their proposed units. I do not consider this to be of great significance. These funds were paid to 098 before the closing and in doing so,

the purchasers took the risk that the contracts might not close: *Firm Capital* at paras. 37-38.

[110] Purchasers' Claims against 098. If the pre-sale contracts are valid and enforceable, the purchasers may have a damage claim against 098 for any losses suffered as a result of sales not completing. As in similar cases, the purchasers are free to bring a claim for damages against 098 if such a claim exists: *Re Urbancorp*, 2017 ONSC 2356 at para. 6; *Royal Bank of Canada v. Melvax Properties Inc.*, 2011 ABQB 167 at para. 6.

[111] I note that section 7.2(f) of the disclosure statement provides that, if 098 fails to complete and the deposit is repaid, “the Purchaser shall have no further claims against [098]”. This section may affect any such claim but I would hasten to add that I am not making any determination as to the enforceability of the above restriction.

[112] I appreciate that, if such a claim exists, this is likely only a hollow remedy, given the status of the receivership; however, this is the remedy the purchasers bargained for under their contracts. Even assuming they had equitable rights against the land, the purchasers were fully aware, or should have been aware through the disclosure statements provided to them, that prior legal rights against the Development may trump that interest. The fact that damages, if awarded, may not be recovered from an insolvent developer cannot affect that result.

[113] Good Faith. The Receiver and many purchasers also argue that the “organizing principle” of good faith applies, as discussed in *Bhasin v. Hrynew*, 2014 SCC 71. They argue that 098 owed the pre-sale purchasers a duty of good faith in the performance of its contractual obligations.

[114] The Receiver states that there are many indications that 098 did not have an intention to treat the 40 pre-sale contracts as being at an end. Contrary indications are said to be that 098 “re-sold” some of the units and that 098 allowed the completion date to pass while electing not to complete.

[115] The Receiver concludes that, since 098 failed to complete the sale of the 40 pre-sale contracts, while continuing to hold onto those deposits, and then sold some of the very same units to other purchasers without advising the first purchasers, 098's actions "cannot be described as acting in good faith".

[116] Many of the participants on this application have levelled accusations against 098 concerning the conduct of its business over the course of this development. One purchaser alleged that they had been "strung along" by 098 as to why delays in closing were happening. Both the Kaur Group and the secured creditors have alleged that 098 improperly diverted funds advanced to 098 that were meant to be used to complete the Development. 098 denies all of these allegations. As for the Receiver's point above, 098 offers up explanations as to why the units were sold more than once; in addition, Mr. Dhaliwal's evidence is that 098 was making serious efforts right until the receivership to complete the sales.

[117] None of these issues are before me for determination. I would hasten to add that, even if 098 was acting otherwise than in good faith under the pre-sale contracts, that does not mean that the secured creditors who wish to benefit from their security were similarly acting in bad faith. It remains the case that the competing equities here are as between the pre-sale purchasers and the mortgagees; not the pre-sale purchasers and 098.

[118] Finally, in *CareVest*, Justice Pitfield affirmed that insolvency, the reasons for it, and the financial results flowing from it are independent of any concerns affecting the specific performance of land: para. 15. Further, as the court stated in *Romspen/Horseshoe*:

[30] ... as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.

...

[32] ... The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[119] Accordingly, “good faith” issues such as have been raised by many of the purchasers are irrelevant to the exercise before this Court.

[120] Public Policy. Some of the pre-sale purchasers argued that the Court’s consideration of the equities should include public policy factors.

[121] These arguments are grounded in *REDMA*, which unquestionably is consumer protection legislation: *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para. 17. However, there is nothing in *REDMA* that addresses either of the issues before me (the disclaimer issue or the contract validity issue). As was stated a number of times on this application, the protection afforded to the pre-sale purchasers under *REDMA* was to allow them to rescind the pre-sale contracts in certain circumstances; otherwise, no other legislative protection is afforded to the purchasers.

[122] In this case, the Court must consider the equities as between private parties. The fact that the purchasers have not availed themselves of their *REDMA* remedy does not mean that they enjoy any consideration here based on public policy. Any further protections for this cohort of purchasers must come from the Legislature, rather than this Court. I do not see that public policy arguments apply here in what is essentially a priority contest between these two camps.

[123] Winner and Losers. First, let me state the obvious – there are no winners in these circumstances. The failure of the Development will affect most, if not all, of the stakeholders. I acknowledge here that, while there are principally financial consequences, other perhaps more ephemeral consequences will be felt by others, particularly the pre-sale purchasers.

[124] Many counsel referred to the concept of “reaping the benefit” of the increase in value of the units, and more particularly, who should do the “reaping”.

[125] However, both camps rely on contractual obligations of 098. The purchasers were promised their units. The mortgagees were promised to be repaid with interest and that, if default occurred, payment would be secured against the Development. In

those circumstances, the focus is simply on recovery of the asset or the value of the asset – not obtaining any “benefit”. In that event, I reject the argument of the purchasers that allowing a disclaimer would result in a “windfall” to the mortgagees. They seek exactly what they are entitled to under their mortgages and nothing more.

[126] As of February 2018, the amounts owing to the first and second mortgagees was approximately \$44 million and accruing at approximately \$450,000 per month. The amount owed to 625, the third mortgagee, is in excess of \$7 million. Even assuming a sale of all units at the increased price confirmed in the appraisal, there will be a shortfall to the secured creditors. As noted by 625, its position is particularly vulnerable given its ranking.

[127] Some of the purchasers submit that the mortgagees were able to do due diligence and negotiate their contracts to better protect themselves. The lenders are said to be in a better position to “bear the loss”. That might be the case, but there is nothing unusual about the mortgages or the pre-sale contracts. Any failure to repay the lenders will be a real monetary loss, unlike the purchasers’ “loss” of their ability to obtain the units, which is a loss of opportunity rather than a monetary loss. The purchasers will recover their deposit monies with interest so they will not be “out of pocket” any monies under the pre-sale contract.

[128] It is also important to note that the Development’s continued progression toward completion has been due solely to Forjay’s funding of the Receiver’s borrowings. Those are estimated to be \$1.3 million at the end of the day. As of the hearing, approximately \$683,000 had been advanced. Mr. Mercier understandably objects to the pre-sale purchasers compelling sales at less than fair market value when the Receiver has been able to complete those units only after the advance of further monies by Forjay. It bears noting that these further advances have only served to increase the risk of recovery under RMIC and Forjay’s mortgages.

[129] One purchaser also suggested that the mortgagees have other means of recovery at their disposal to shore up any shortfall, unlike the purchasers. He referred to Mr. Chandler’s guarantee. He also referred to possible tracing remedies

arising from allegations that 098 improperly diverted monies from the Development to other entities. Forjay has recently filed such an action, which is being vigorously defended.

[130] In my view, it is not appropriate for the Court to rely on such a speculative matter, particularly where it is virtually impossible to assess the likelihood of success. It may be that the mortgagees recover nothing in that further litigation.

[131] Summary. Having balanced all of the above considerations, I am satisfied that the equities in favour of the pre-sale purchasers do not justify overriding the mortgagees' legal priority and giving the purchasers a preference that they would not otherwise enjoy.

SUMMARY AND CONCLUSION

[132] The Receiver is directed to disclaim the 40 pre-sale contracts that are the subject of this application. Further, the Receiver is directed to take immediate steps to remarket and sell these 40 units as soon as possible, subject to legal requirements, and subject to court order.

[133] I have great sympathy for the position of the pre-sale purchasers who have become embroiled in this litigation and who have now potentially lost the ability to obtain what they hoped would be their homes. Mr. Nied, 625's counsel, has suggested that one way to somewhat ameliorate the position of the pre-sale purchasers is for the Receiver to allow them a right of first refusal in respect of their units. This seems a reasonable proposal and one I would adopt.

[134] Accordingly, the Receiver is directed to fashion a process that would allow the 40 pre-sale purchasers a right of first refusal within the future marketing plan, provided that such right is exercised within a reasonable time so as not to unduly delay matters any further.

"Fitzpatrick J."

TAB 8

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. Peeverconn Properties Inc.*,
2018 BCCA 251

Date: 20180612
Docket: CA45234

Between:

Forjay Management Ltd.

Respondent
(Petitioner)

And

**0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust,
HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier,
Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi
Investments Ltd., Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijjar,
Mohan Vilku, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal,
Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal,
Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel,
1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd.,
Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill,
Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp.,
0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd.,
1086286 B.C. Ltd., 1085537 B.C. Ltd., and 1083516 B.C. Ltd.,
Reliable Mortgages Investment Corp., Joseph and Maria Tomica**

Respondents
(Respondents)

And

**Peeverconn Properties Inc., Gopal Naidu, David Brummitt,
Laurie Brummitt, Gary Janzen, Karen Janzen, Walter Bisschop,
and Elsje Bisschop, Brigitte Osborn, Dave and Heather Ray, Alexandra
Schoenit/Hyde, Laurie and Doug Lakusta, Tim Lamb, Andreas and Shannon
Pfenniger, Gerry and Nicky Quinn, Shannon Smyth, Drew and Kailey St. Cyr,
Fred and Terri West, Jennifer Vanpypen, Margaret Cook,
Gary and Linda Newton, Marian Mahony**

Appellants

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated April 4, 2018 (*Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, Vancouver Docket H170498).

Oral Reasons for Judgment

Counsel for all of the Appellants, except M. Mahony: D.A. Solimano and A. Boulton

Appellant M. Mahony appearing in person: M. Mahony

Counsel for the Respondents Forjay Management Ltd. and Reliable Mortgages Investment Corp.: K. Jackson and L. Hellrung

Counsel for the Respondent 625536 B.C. Ltd.: J.E. Shragge and M. Nied

Counsel for the Respondents 0981478 B.C. Ltd. and Mark Chandler: N. Hooge

Counsel for the Respondents HMF Home Mortgage Fund Corporation and Canadian Western Trust Company in trust: C. Dayan

Counsel for Superintendent of Real Estate for British Columbia: A. Welch

Counsel for the Respondents J. Tomica and M. Tomica: S. Roxborough

Place and Date of Hearing: Vancouver, British Columbia
June 12, 2018

Place and Date of Judgment: Vancouver, British Columbia
June 12, 2018

Summary:

The appellants entered pre-purchase agreements to buy units in a strata development which subsequently went into receivership. They now appeal an order directing the receiver to disclaim the contracts. Held: appeal dismissed. The judge's discretionary decision is entitled to deference; no errors in principle were made, nor was the evidence misconceived.

[1] **FENLON J.A.:** The appellants in this case all entered into pre-purchase agreements for homes in a strata development. The developer, it appears, mismanaged the funds advanced to him, failed to complete the project, and was put into receivership. That has caused significant and real hardship to the appellants, which we acknowledge. But, as stated during the hearing, we are a court of error. Our task is to look at the judge's decision and her reasons for exercising her discretion to order the receiver to disclaim the contracts, and to ask whether she erred in principle or fundamentally misconceived the evidence, or made any palpable and overriding errors in relation to the facts or reasons that would justify appellate intervention.

[2] I have considered all of the written and oral submissions but I find no such error. To the contrary, the judge's reasons were careful and thorough, addressing all of the issues raised before her. With respect to the appellants' fresh evidence applications, in my view they do not meet the test for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. I consider that even if the evidence were to be admitted it would not have affected the outcome in any event.

[3] Finally, I turn to the application to strike portions of the Tomicas' factum. I would decline to make that order. Nor would I find it necessary to add the Tomicas to the appeal as appellants in circumstances in which the order does not apply to them. We have, however, considered the Tomicas' arguments as they were effectively made in support of the appellants' position on appeal.

[4] I would, accordingly, dismiss the appeal.

[5] **HARRIS J.A.:** I agree.

[6] **FISHER J.A.:** I agree.

[7] **HARRIS J.A.:** The appeal is dismissed. The motions to adduce fresh evidence are dismissed. The order with respect to the status of the Tomicas is as set out in the reasons of Madam Justice Fenlon.

“The Honourable Madam Justice Fenlon”

TAB 9

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***bcIMC Construction Fund Corporation v.
Chandler Homer Street Ventures Ltd.,***
2008 BCSC 897

Date: 20080709
Docket: H070700
Registry: Vancouver

Between:

bcIMC Construction Fund Corporation

Petitioner

And

**Chandler Homer Street Ventures Ltd.,
Chandler Development Group Inc.,
Mark Chandler,
Cooper Pacific II Mortgage Investment Corporation,
P3 Holdings Inc.,
636455 B.C. Ltd.,
Lower Mainland Steel (1998) Ltd.,
Susan Richards Investments Ltd.
Susan Freeman, and
Theodore Freeman a.k.a. Ted Freeman**

Respondents

- and -

Docket: H070699
Registry: Vancouver

Between:

bcIMC Specialty Fund Corporation

Petitioner

And

**Cook and Katsura Homes Inc.,
Chandler Katsura Developments Inc.,
Mark Chandler,
Chandler Development Group Inc.,
636455 B.C. Ltd.,
BCMP Mortgage Investment Corporation,
Susan Richards Investments Ltd.,
Theodore Freeman a.k.a. Ted Freeman, and
Susan Freeman**

Respondents

Before: The Honourable Mr. Justice Burnyeat

**Reasons for Judgment
(in Chambers)**

Counsel for Petitioner in both actions:	D.D. Nugent
Counsel for The Bowra Group Inc., Receiver and Manager of Chandler Homer Street Ventures Ltd. and Cook and Katsura Homes Inc.:	H.M.B. Ferris
Counsel for Farouk Ratansi, Salim Jiwa and Sui Chun Chao-Dietrich:	S.R. Andersen
Counsel for 636455 B.C. Ltd.:	G.J. Gehlen
Counsel for Crestmark Holdings Corp.:	A.H. Brown
Date and Place of Hearing:	March 27, April 14, May 29 and June 9, 2008 Vancouver, B.C.

[1] These are foreclosure Actions. To date, no Orders Nisi have been granted. In both Actions, an order was made on November 28, 2007 appointing The Bowra Group Inc. as Receiver and Manager without security (“Receiver and Manager”), of all of the assets, undertakings and properties of Chandler Homer Street Ventures Ltd. (“Chandler”) and Cook and Katsura Homes Inc. (“Cook”). As part of that Order, the Receiver and Manager was granted a number of powers including the ability to: “... manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of other business, or cease to perform any contracts of the Debtor”.

[2] It was further provided in each of the Orders that:

... no proceeding or enforcement process in any Court or tribunal (each, a “Proceeding”), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

... no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph.

[3] Each of the Orders also provided the Receiver and Manager was empowered and authorized but not obligated to do any of the following where the Receiver considered it “necessary or desirable”:

(2)(c) manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the

ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtor; ...

(k) market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof out of the ordinary course of business ...

(ii) with the approval of this Court in respect of any transaction in which the purchase price [exceeds \$10,000.00] or the aggregate purchase price exceeds [\$10,000.00] ...

(m) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; ...

(s) take any steps reasonably incidental to the exercise of these powers.

[4] In both Actions, the Receiver and Manager now applies for “Directions” concerning either to disclaim certain contracts of purchase and sale (“Contracts”) or to allow it to sell the strata lots involved at current market value free and clear of any obligation of Chandler or Cook that may arise under the Contracts on the bases that the discount contained in the Contracts constitutes payment of a pre-receivership unsecured claim or that the purchase price set out under the Contracts does not represent fair market value as at the date of those Contracts.

BACKGROUND

[5] Action H070699 relates to a 192 unit project in Yaletown (“Vancouver Project”). Action H070700 relates to two residential towers in Richmond (“Richmond Project”), being 9188 Cook Road (“Tower I”) and 633 Katsura Road (“Tower II”).

[6] The Receiver and Manager has provided the following estimates of the present secured debt owing: (a) Vancouver Project: \$59,800,000.00 (Petitioner); \$1,000,000.00 (New Home Warranty provision); \$1,000,000.00 (borrowings of the Receiver and Manager); \$3,500,000.00 (second charge holder); \$6,300,000.00 (third charge holder); \$20,300,000.00 (fourth charge holder having a charge for this amount against both the Vancouver Project and the Richmond Project); (b) Richmond Project: \$25,400,000.00 (Petitioner); \$1,000,000.00 (New Home Warranty provision); \$1,000,000.00 (borrowings of the Receiver and Manager); and \$20,300,000.00 (second charge holder having a charge for this amount against both the Richmond Project and the Vancouver Project). The Receiver and Manager also estimates that the unsecured creditors claim \$30,100,000.00 against the Vancouver Project and \$32,300,000.00 against the Richmond Project. Approximately \$30,000,000.00 of those amounts are said to be owing to the Respondent, Theodore Freeman a.k.a. Ted Freeman.

[7] The Receiver and Manager estimates that the equity that will be available on Tower I of the Richmond Project will be \$3,700,000.00 prior to the application of the debt owing under collateral security. The Receiver and Manager estimates that the equity that may be available on the Vancouver Project is \$3,746,000.00 prior to the application of the debt owing under collateral security. Overall, the estimated shortfall to Gibrait Capital under its *inter alia* charge after applying all equities available would be in the neighbourhood of \$3,764,000.00.

[8] There were a number of pre-sales on both the Vancouver Project and on the Richmond Project with those pre-sales occurring prior to the construction of the Projects. Because of escalating construction costs, it became apparent that the total

purchase prices on the pre-sales were insufficient to allow the completion of the two Projects.

[9] After a review of the pre-sales that had been arranged by Chandler and Cook, it was the opinion of the Receiver and Manager that certain Contracts should be disclaimed as the pre-sales for many of the Units were significantly below the current market value at the time of the Contracts, at the time of the appointment of the Receiver and Manager, and presently.

[10] In agreements in place between the Petitioner and Chandler and between the Petitioner and Cook, the Petitioner required that there be a number of firm and binding pre-sale agreements in place and that these agreements achieve a certain minimum price determined by the Petitioner prior to providing construction financing being made available to Chandler and to Cook. Regarding the Vancouver Project, the Petitioner advised that it was prepared to advance funds and to give partial discharges of its security if the sales proposed by Chandler for units met the criteria set out in the charge of the Petitioner. The Mortgages of the Petitioner in place as against the Vancouver Project and the Richmond Project include the following provisions:

3.3 PREPAYMENT

- (a) When not in default, the Mortgagor may prepay the Principal Amount, in whole or in part, prior to the Balance Due Date.
- (b) Provided that:
 - (i) The Mortgagor is not in default in the payment of any amount owing to the Mortgagee hereunder;
 - (ii) The Lands have been subdivided by a strata plan approved by the Mortgagee and filed in the appropriate Land Title Office and separate titles have

been issued for each lot or strata lot ("Strata Lot") created by the said strata plan;

- (iii) The Mortgagor has entered into an unconditional bona fide agreement of purchase and sale for a Strata Lot created on the Lands with a purchaser or purchasers who are at arm's length to the Mortgagor and has provided the Mortgagee with a true copy of the agreement of purchase and sale; and
- (iv) The Mortgagor has paid to the Mortgagee a partial discharge fee of \$75.00 for each Strata Lot discharged from the charge of this Mortgage;

the Mortgagee will grant a partial discharge of this Mortgage from title to the Strata Lots so created upon payment of all interest due and payable to the date of payment and upon payment of 100% of the Net Sale Proceeds (hereinafter defined) for each of the Strata Lots, less Extra Costs (hereinafter defined) paid for by the Purchaser over and above the gross sale price of each of the Strata Lots. "Net Sale Proceeds" means the gross arm's length sale price of an individual Strata Lot less the aggregate of the following:

- A. Any net GST included within the gross sale price (i.e., GST payable less rebate to be received by the Mortgagor or a purchaser);
- B. Real estate commissions;
- C. Reasonable legal fees and disbursements and GST and PST applicable thereto of the Mortgagor's solicitor for acting for the Mortgagor on sales of Strata Lots;
- D. Normal closing adjustments between a vendor and a purchase[r] of real estate;

together with the holdback which a purchaser of a strata lot is permitted to retain pursuant to the provisions of the **Strata Property Act** provided that this holdback is maintained in trust by the solicitor or notary public acting for the Purchaser or the Mortgagor on his or her undertaking to forward the holdback to the Mortgagor's solicitor once the purchaser authorizes its release, and the Mortgagor irrevocably authorizes and directs its solicitors to forward and remit such holdback(s) when received to the Mortgagee.

“Extra Costs” refers to items specifically requested and paid for by the purchaser and not included in the gross sale price of a Strata Lot.

- (c) The Mortgagor shall not enter into an agreement of purchase and sale at prices less than the pro forma price list approved by the Mortgagee, without the prior approval of the Mortgagee, and the Mortgagee’s obligation to provide a partial discharge of the Mortgage is conditional upon the sale prices for Strata Lots being not less than the prices listed in the price list (the “Price List”) submitted by the Mortgagor to and approved by the Mortgagee or at such sale prices that the Mortgagee has approved in writing, provided that the sale price of each Strata Lot shall not be less than 95% of the listed price for such Strata Lot shown on the Price List.

[11] The Petitioner takes the position that it is not prepared to grant partial discharges of its Mortgage relating to a number of the Contracts as they do not comply with that Mortgage provision. Partial discharges would be available where provisions of the Mortgage have been met.

[12] The Contracts relating to these pre-sales all contained the same provisions. Those provisions include the following:

8. **COMPLETION**

The completion of the purchase and sale of the Strata Lot shall take place on a date (the “**Completion Date**”) to be specified by the Vendor which is not less than ten business days after the Vendor or the Vendor’s Solicitors notifies the Purchaser or the Purchaser’s solicitor that:

- (a) the City of Vancouver [or the City of Richmond] has given permission to occupy the Strata Lot; and;
- (b) the Strata Plan in respect of the Development has been or is expected to be fully registered in the New Westminister/Vancouver Land Title Office prior to the Completion Date.

10. **DELAY**

If the Vendor is delayed from completing the Strata Lot, depositing the Strata Plan for the Development in the Land Title Office or in doing

anything hereunder as a result of fire, explosion or accident, howsoever caused, act of any governmental authority, strike, lockout, inability to obtain or delay in obtaining labour materials or equipment, flood, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, unforeseen geotechnical conditions, climatic conditions, acts or omissions of third parties, interference of the Purchaser, or any other event beyond the control of the Vendor, then the time within which the Vendor must do anything hereunder, and the Purchaser's Termination Option Date will be extended for a period equivalent to such period of delay.

16. **RISK**

The Strata Lot is to be at the risk of the Vendor to and including the day preceding the Completion Date, and thereafter at the risk of the Purchaser and, in the event of loss or damage to the Strata Lot deemed material by the Vendor and occurring before such time by reason of fire, tempest, lightning, earthquake, flood, act of God or explosion, either party may, at its option, by written notice to the other party cancel this Agreement and thereupon the Purchaser will be entitled to repayment of the Deposit together with all interest accrued thereon and neither the Vendor nor the Purchaser shall have any further obligation hereunder. If neither party elects to cancel this Agreement, the Purchaser shall be entitled to an assignment of insurance proceeds in respect of the material loss or damage to the Strata Lot, if any. All other remedies and claims of the Purchaser in the event of such damage are hereby waived.

25. **ASSIGNMENT BY PURCHASER**

The Purchaser may not assign or list for sale on MLS (Multiple Listing Service) the Purchaser's interest in this Agreement until all Deposits contemplated under this Agreement have been paid in full and thereafter may not list without the prior written consent of the Vendor,. No assignment by the Purchaser shall release the Purchaser from his/her obligations hereunder. This Agreement creates contractual rights only between the Vendor and the Purchaser and does not create an interest in the Strata Lot The Purchaser shall pay the Vendor an administration fee of \$2,000 plus GST for any assignment of this Agreement or conveyance of the Strata Lot other than to the Purchaser named herein provided that the Vendor shall waive such fee for an assignment to a Spouse, child or parent of the Purchaser on receipt of evidence of such relationship satisfactory to the Vendor.

26. **LIABILITY OF PURCHASER**

In the event of an assignment in accordance with section 25, the Purchaser will remain fully liable under the Agreement and such

assignment will not in any way relieve the Purchaser of its obligations under this Agreement.

28. **CONTRACTUAL RIGHTS ONLY**

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

MPC INTELLIGENCE INC. REPORT

[13] The Receiver and Manager obtained a February 27, 2008 “Analysis” from MPC Intelligence Inc. (“MPC”) relating to both Projects. The “Analysis” for the Vancouver Project and the “Analysis” for the Richmond Project contain the following “Forward”:

The information provided in this pricing summary is intended for use by Bowra Group in the historical market analysis of the H&H development in Vancouver, BC and Garden City development in Richmond. This is not an appraisal. This report was prepared as an opinion of competitive conditions and is a past assessment of the market and the demand for such product. This is not an opinion of the market from a sales and marketing strategy perspective but a narrative of the previous climate and demand for the developments at time of launch.

All information and detail within the report is compiled through public sources or through the developers and property owners associated with each project. The data is deemed to be accurate at the time of assembly and delivery of the report. Every reasonable effort will be made to compile accurate and reliable information and the data contained within the report is deemed to be that. MPC Intelligence assumes no responsibility for inaccuracies provided by the developer, agents or other reporting parties.

[14] The “Analysis” of MPC for the Vancouver Project was as follows:

... it is obvious that there are a selection of units that have been sold for well below the market value at the time. Determining the market value for a period of time starting almost two years ago is a difficult challenge because prices in the Downtown condo market have risen so quickly. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from \$15,000 to over \$50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the

launch to try to earn more money for the developer. This does not mean that the units that were sold initially were under priced, as the overall market can shift quite quickly as was experienced when the Woodward's project sold out at \$600/sq ft and instantly increased what all other projects could achieve.

From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2006 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than \$20,000 because of the difficulty in reaching consensus on the value of these units.

[15] The "Analysis" of MPC for the Richmond Project was as follows:

When analyzing the sale prices of the units at Garden City there does not appear to be many units that were sold below market values. Determining the market value for a period of time starting over two years ago is a difficult challenge because prices in the Richmond condo market have rose very quickly from 2005 to 2007. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from \$15,000 to over \$50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. The Richmond market is also unlike most of the other markets in the Lower Mainland when it comes to purchaser incentives. The Chinese buyer in this market almost always expects for there to be some sort of incentive or negotiation process to save money. This was seen in the second phase of Garden City with the first 20 buyers at the public grand opening receiving \$5,000 off the purchase price along with no GST (4.48% value). This resulted in many of the units having credits of approximately \$20,000 to \$25,000. This is very typical in the Richmond market and is considered a cost of doing business.

From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2005 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have

excluded any of the units that look like they were under priced by less than \$20,000 because of the difficulty in reaching consensus on the value of these units.

[16] It is clear that the two reports are not appraisals. It is the position taken on behalf of counsel for the pre-sale Contract holders that the reports are inadmissible. While I find that the reports are inadmissible for the truth of their contents, I admit them into evidence for the purpose of ascertaining the grounds upon which the Receiver and Manager is of the belief that the market value at the time of the Contracts or the current market value is such that the Receiver and Manager should be in a position to either disclaim the Contracts or to allow the sale of the strata lots involved free and clear of any obligation of Chandler and Cook that may arise under the Contracts.

APPLICATIONS OF THE RECEIVER AND MANAGER

[17] Originally, the Receiver and Manager sought directions to disclaim 17 Contracts relating to the Vancouver Project and 10 Contracts relating to the Richmond Project. The Motion of the Receiver and Manager is now restricted to Strata Lots 12 and 85 of the Vancouver Project and Strata Lots 12, 46, 85, 92 and 95 of the Richmond Project. The Petitioner supports most of the applications of the Receiver and Manager. However, the Petitioner does not support the application of the Receiver and Manager to disclaim the Contract relating to Strata Lot 12 in the Vancouver Project as it is satisfied that the proposed purchase price met the minimum pre-sale criteria set in the agreement reached with Chandler.

(a) Contracts of Siu Chun Chao-Dietrich

[18] Ms. Chao-Dietrich had Contracts relating to Strata Lot 46 in the Richmond Project and Strata Lot 85 in the Vancouver Project. Strata Lot 46 has been complete and ready for occupancy since late 2007. Strata Lot 85 in the Vancouver Project will not be completed until the Fall of 2008.

[19] Ms. Chao-Dietrich is a former employee of Chandler and is a licensed realtor. Ms. Chao-Dietrich states that she was instrumental in arranging for the purchase by Cook of the land that later would be the site of the Richmond Project. By reason of her efforts, Ms. Chao-Dietrich claims to be entitled to a fee of \$200,000.00 and that this fee remains unpaid. In a September 20, 2006 agreement with Chandler, Ms. Chao-Dietrich was to receive a further \$100,000.00 "... for deferring paying the commission which you earned on July 16, 2007. The owed commission and compensate [sic] payment in total of \$300,000.00 shall be discounted from the purchase price." In her March 25, 2008 Affidavit, Ms. Chao-Dietrich states that the purchase price for Strata Lot 46 of the Richmond Project was to be further reduced in order to reflect \$34,800.00 in commissions on previous sales in that Project and \$6,000.00 to reflect late closing expenses relating to the "...original unit of that she was to have obtained in satisfaction of the amount owing in respect of the commission".

[20] Ms. Chao-Dietrich states that Chandler verbally agreed in March of 2006 that the net purchase price of \$349,000.00 for Strata Lot 85 would be made available to her. In this regard, a \$100,000.00 "decorating allowance" was provided to Ms. Chao-Dietrich so that the original offer of \$449,000.00 with a \$5,000.00 deposit became a net offer of

\$349,000.00. Though Ms. Chao-Dietrich states that the price was agreed to in March of 2006, the Contract was not signed until July 6, 2007.

[21] It is the position of Ms. Chao-Dietrich that the discount was not a discount for “unpaid services” but, rather, was a price equal to a similar unit on a per square foot basis of a unit in the Vancouver Project sold to “Darren”, another employee of Chandler. It is said that the units sold to “Darren” and to her reflected “employer’s discount” given to employees. In this regard, Ms. Chao-Dietrich notes that the Receiver and Manager has not sought to disclaim the contract relating to that other unit even though that unit is of a comparable size. In a March 3, 2008 letter to the Receiver and Manager, Ms. Chao-Dietrich states: “in order to maintain the value of the Project, giving a decorating allowance instead of discounting off the purchase price seemed to be appropriate at the time”.

[22] It is the position of the Receiver and Manager that the market value for Strata Lot 85 at the time of the Contract was either \$399,000.00 (based on the “Contract Analysis” prepared by MPC), or \$424,000.00 (based on the comments relating to that unit prepared by a realtor advising the Receiver and Manager).

[23] MPC gave the following “Analysis” relating to the market value of Strata Lot 85 at the time of the Contract:

Gross Selling Price \$449,900	Net Selling Price \$349,900	Incentives: \$100,000
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This unit was under priced because the identical unit one floor above (614) sold for \$50,000 more when it sold six months previously. The market would have escalated in this time and there should only be a \$5,000 discount for being located one floor below.

Estimated Market Value at time of Pre Sale	\$429,900
Estimated Selling Discount	\$80,000

[24] Regarding Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich states that the purchase price was in the aggregate of \$500,800.00 but that “Much of that consideration, however, was paid by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser”. After deductions, the remaining amount owing is stated to be \$160,000.00. It is this amount which is shown as the sale price in the Contract. A deposit of \$40,000.00 was paid in two instalments: \$32,000.00 on September 20, 2006 and \$8,000.00 on April 30, 2007. The Richmond Project is now complete. On August 21, 2007, Ms. Chao-Dietrich received a Notice of completion.

[25] While it has not been accepted by the Receiver and Manager, the Receiver and Manager states that it has received an offer on Strata Lot 46 in the amount of \$469,200.00.

[26] MPC gave the following “Analysis” relating to the market value of Strata Lot 46 at the time of the Contract:

Gross Selling Price \$160,000	Net Selling Price \$160,000	Incentives: \$0
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This unit was severely under priced. An example why would be the unit below (801) selling for \$283,620 more 10 months later. Another example is the unit beside it (908) which is the same plan but with a SE instead of SW exposure sold for \$378,259 more than it sixteen months previous. It is assumed that unit 901 could have sold for somewhere near what 908 sold for with the increase in the market over the four months being balanced by the fact that the 08 units were more popular and commanded a higher value.

Estimated Market Value at time of Pre Sale	\$417,900
Estimated Selling Discount	\$257,900

[27] An action for specific performance of the Contract and for damages in the alternative relating to Strata Lot 46 in the Richmond Project was commenced and Certificate of Pending Litigation No. BB0207241 was filed against the Richmond Project

by Ms. Chao-Dietrich on March 7, 2008. Ms. Chao-Dietrich states that those steps were taken on the basis that: “The Receiver has indicated that he will not be completing the Contract.” That action was commenced without the “written consent of the Receiver or with leave of this Court”. There is no Motion before the Court that Ms. Chao-Dietrich be at liberty to commence or to continue that action.

(b) Contract of Wayne Nikitiuk Assigned to Salim Jiwa and Farouk Ratansi

[28] This Contract relates to Strata Lot 12 in the Vancouver Project. This unit is presently unfinished and is not scheduled to be finished until the Fall of 2008.

Originally, Wayne Nikitiuk made an offer of \$649,000.00 (excluding GST) and provided a deposit of \$64,900.00. Mr. Nikitiuk was given a \$32,450.00 “decorating allowance” so that the “net” purchase price reflected in the Contract was \$616,550.00 (excluding GST).

[29] By a July 29, 2007 assignment of the Contract between Mr. Nikitiuk and Messrs. Ratansi and Jiwa and with the consent of Chandler, the Contract was assigned to Messrs. Ratansi and Jiwa. The price paid by Messrs. Ratansi and Jiwa for that assignment was \$150,900.00 and that sum has been disbursed to Mr. Nikitiuk. It was a term of the consent of Chandler that \$2,000.00 of the assignment price was paid by Mr. Nikitiuk to Chandler.

[30] MPC gave the following “analysis” relating to the market value of Strata Lot 12 at the time of the Contract:

Gross Selling Price \$649,000 Net Selling Price \$616,500 Incentives: \$32,450

This unit was under priced as it sold for \$12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale \$649,000
Estimated Selling Discount \$32,450

[31] The Petitioner does not support the application to disclaim the Contract as the Contract would net \$616,550.00 and this price met the minimum pre-sale criteria set by the Petitioner. In seeking to disclaim the Contract, the Receiver and Manager is of the view that the current market value of Strata Lot 12 is \$730,000.00.

(c) Contracts of Crestmark Holdings Corp.

[32] Applying pursuant to Rules 47 and 50 of the ***Rules of Court*** and the inherent jurisdiction of the Court, Crestmark Holdings Corp. (“Crestmark”) seeks an order that it be at liberty to commence an action against Chandler, Cook, and the Receiver and Manager so that it may seek an order for specific performance, a Certificate of Pending Litigation and related relief in relation to August 10, 2007 Contracts relating to Strata Lots 12, 85, 92, and 95 in the Richmond Project.

[33] In July of 2007, Chandler contacted Edward Wong & Associates Realty Inc. (“Wong”) requesting that Wong submit a marketing proposal for the unsold units in Tower I and Tower II in the Richmond Project. On July 18, 2007, Wong signed an Exclusive Listing Agreement relating to the Richmond Project (“Listing Agreement”). 37 units in Tower I and 50 units in Tower II were unsold at the time of the Listing

Agreement. The term of the Listing Agreement was to end on November 30, 2008 but Chandler had the right to terminate the Listing Agreement after December 15, 2007 if Wong had not sold 20 units by that time.

[34] In accordance with the agreement in place, the Petitioner advised Chandler that it was prepared to give partial discharges of its security providing sales of the Units met the criteria set out in the Mortgage including that the gross sale price of any units was not less than 95% of the list sale price approved by the Petitioner for each phase of the construction of each phase of the Richmond Project. The list prices relating to the Strata Lots in issue were as follows: (a) Strata Lot 12 (\$534,900.00); (b) Strata Lot 85 (\$379,900.00); (c) Strata Lot 92 (\$384,900.00); and (d) Strata Lot 95 (\$498,900.00).

[35] Chandler and Wong agreed to an amendment of the Listing Agreement which saw potential purchasers being offered a price discount of up to 10% off the then list price and a bonus of up to \$250,000.00 to Wong. As at August 8, 2007, offers on 28 units had been received at prices discounted from between 6% to 10% and six units remained unsold. It is stated by Wong that all sales contracts showed the full list price with reductions recorded in the form of payment of cash or credit towards the purchase price on closing so that there would be no jeopardy to the pricing on the remaining unsold units.

[36] In August, 2007, Chandler is stated to have requested that Wong purchase some units so that the goal of meeting the financial commitments set by the Petitioner could be met. It is stated that, as an additional incentive for Wong to purchase. A Mr. Aguirre on behalf of Chandler offered a 50% interest in his entitlement to purchase a unit in Tower II.

[37] On August 10, 2007, Wong agreed through his company (Crestmark) to purchase four units with a 15% discount from the list price. Contracts were executed to reflect the following:

- (a) Strata Lot 12 – gross sale price of \$498,800.00 with a “decoration allowance” of \$74,820.00 (\$423,980.00 net) with a deposit of \$5,000.00;
- (b) Strata Lot 85 – gross sale price of \$418,800.00 with a “decoration allowance” of \$62,820.00 (\$356,180.00 net) with a deposit of \$5,000.00;
- (c) Strata Lot 92 – gross sale price of \$421,800.00 with a “decoration allowance” of \$63,270.00 (\$358,530.00 net) with a deposit of \$5,000.00; and
- (d) Strata Lot 95 – gross sale price of \$513,800.00 with a “decoration allowance” of \$77,070.00 (\$436,730.00 net) with a deposit of \$5,000.00.

[38] In a February 12, 2008 letter to counsel for the Receiver and Manager, counsel for Crestmark stated:

When construction of the Development was completed and our client received notice to close the purchase of the Units, [the] ... developer agreed to extend the closing date to November 30, 2007 “or within 5 business days after the Vendor has paid the commission bonus to Edward Wong & Associates Realty Inc. in an amount of \$250,000.00 plus G.S.T. whichever occurs later”. The bonus has not been paid, however our client is ready, willing and able to complete the purchase of the Units forthwith.

[39] On August 22, 2007, Notices of Completion relating to Strata Lots 12, 85, 92 and 95 were issued. At that time, Wong asked for payment of his bonus under the amended Listing Agreement but was advised that, due to cash flow problems, the bonus could only be paid after the sale of all units in Tower I had been completed.

[40] On October 11, 2007, a further addendum to the Listing Agreement was signed providing the following:

(a) "The Completion Date is to be extended to Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of \$250,000.00 + GST whichever occurs later."

(b) "Upon closing, the Purchaser may elect to apply \$62,500 + GST, being part commission ... due to Edward Wong & Asso. Realty Inc. ('EWA') towards the purchase price provided EWA authorizes to do so."

[41] Crestmark states that it has now agreed to waive as a condition of closing its entitlement to apply the amount of the unpaid \$250,000.00 bonus against the purchase price of the four Strata Lots and that it is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95. In this regard, Edward Wong in his April 29, 2008 Affidavit states:

I agree to cause both of those companies [Wong and Crestmark] to sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum. While my preferred completion date is June 30, 2008, Crestmark is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95 at any time. In my opinion, taking into account the value to ... [Cook] of the services I have already caused ... [Wong] to perform, it would be extremely unfair to allow the receiver to disclaim or refuse to close on the sales of Crestmark's 4 units.

[42] In the circumstances, Crestmark requests that the Court lift the stay contained in paragraphs 6 and 7 of the November 28, 2007 Order to allow it to commence an action for specific performance relating to Strata Lots 12, 85, 92 and 95.

[43] The Petitioner supports the application of the Receiver and Manager to disclaim the proposed sale of Strata Lots 12, 85, 92 and 95 to Crestmark as those sales are said

not to meet the minimum pre-sale requirements set by the Petitioner. The Petitioner also states that: “Even if the sales are not disclaimed, ... [the Petitioner] will not be issuing partial discharges for them.”

[44] The MPC “Analysis” relating to the market value of Strata Lots 12, 85, 92 and 95 at the time of the Contracts was as follows:

Strata Lot 12 Gross Selling Price \$649,000 Net Selling Price \$616,500 Incentives: \$32,450

This unit was under priced as it sold for \$12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale	\$649,000
Estimated Selling Discount	\$32,450

Strata Lot 85 Gross Selling Price \$418,800 Net Selling Price \$355,980 Incentives: \$62,820

This unit was under priced because the unit below it (1506) sold for only \$5,875 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 – 5088 Kwantlen St that sold for \$402,300 (\$480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	\$419,900
Estimated Selling Discount	\$63,920

Strata Lot 95 Gross Selling Price \$513,800 Net Selling Price \$436,730 Incentives: \$77,070

This unit was under priced because the unit below it (1601) sold for \$72,070 more than it four months before. It is assumed that 1701 should have been able to sell at a premium to 1601.

Estimated Market Value at time of Pre Sale	\$519,900
Estimated Selling Discount	\$83,170

Strata Lot 92 Gross Selling Price \$421,800 Net Selling Price \$358,530 Incentives: \$63,270

This unit was under priced because the unit two levels below it (1506) sold for only \$8,426 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 – 5088 Kwantlen St that sold for \$402,300 (\$480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	\$425,900
Estimated Selling Discount	\$67,370

[45] While these offers have not been accepted by the Receiver and Manager as yet, the Receiver and Manager has now received offers as follows: (a) Strata Lot 12 (\$519,200.00); and (b) Strata Lot 95 (\$504,200.00).

SHOULD CONTRACT HOLDERS HAVE BEEN GIVEN NOTICE OF THE APPLICATION TO APPOINT THE RECEIVER AND MANAGER?

[46] It is the submission of Crestmark that, because the proposed purchasers under the Contracts were not parties to this action and were not served or given notice of the application by the Petitioner to appoint the Receiver and Manager, the November 28, 2007 Order is not binding on them and does not affect any interest in the Property held by them. In this regard, Crestmark relies on the decisions in ***Lochson Holdings Ltd. v. Eaton Mechanical Inc.*** (1984), 55 B.C.L.R. 54 (B.C.C.A.) and ***Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*** (2006), 25 C.B.R. (5th) 199 (B.C.C.A.).

[47] In ***Lochson***, *supra*, the issue was whether Lochson as the holder of the first and second mortgages against property should be bound by an order allowing the borrowing powers of a receiver to have priority over the interest of Lochson when that order was granted to a subsequent charge holder. The Court concluded that, subject to three exceptions not applicable here, a prior charge holder must have notice of or consent to any application purporting to grant priority to the borrowing powers of a Receiver. Of similar effect is the decision in ***Terra Nova***, *supra*, where the Court dealt with the priority of the proposed remuneration of a receiver and concluded that, because a prior charge holder had no notice of the application to appoint a receiver and manager with borrowing powers of \$5,000.00, it was not bound by the priority given in that order (at para. 14).

[48] I am satisfied that the decisions in ***Lochson*** and ***Terra Nova***, both *supra*, have no application to the position of Crestmark. First, Crestmark is not a secured creditor. Second, Crestmark only takes whatever interest it may have from Chandler.

[49] Assuming Crestmark is an unsecured creditor, there was no obligation to join unsecured creditors as parties or to provide them with notice of an application to appoint a receiver and manager. Once appointed, one of the duties of a receiver and manager is to ascertain what creditors have claims, the amount of those claims, and the priority of those claims. That duty is fulfilled after and not before the appointment. The secured creditor applying to appoint a receiver and manager will not have knowledge of the identity of all unsecured creditors or of the amounts owing. It would be impossible for all unsecured creditors to be given notice of an application for the appointment of a receiver and manager.

[50] Assuming Crestmark has an equitable interest, that interest is by way of an assignment of the equity of redemption that was retained by Chandler or Cook when those entities mortgaged their interest in the two Projects in favour of the Petitioner. The foreclosure proceedings seek declarations that, if a certain amount is not paid to redeem the charges against the two Projects, the interest of Chandler or Cook will be foreclosed as will the interest of any parties claiming under them. As potential purchasers of an interest that Chandler and/or Cook might have in the two Projects, Crestmark would be in a position to apply to approve the sale of a particular part of the property if it could be shown that their offer represented fair market value at the time their application was made. Alternatively, Crestmark could request that the Receiver and Manager apply to Court to have their offer approved or could place its offer before

the Court if the Receiver and Manager applied to Court to approve an offer which, in the view of the Receiver and Manager, represented fair market value at the time the application was made.

[51] Whether Crestmark is an unsecured creditor or is a creditor claiming an interest in land, it was only after the appointment of the Receiver and Manager that the Receiver and Manager would know for certain what Contracts were in place. There was no obligation on the Petitioner, on Chandler, or on Cook to notify Crestmark or any other holders of Contracts that an application was being made to appoint a Receiver and Manager. It was not necessary to join Crestmark or any other holders of Contracts as parties to these proceedings. The preliminary position taken by Crestmark is rejected.

[52] Quite properly, the Receiver and Manager has notified the holders of the Contract that applications would be made to either disclaim the Contracts or allow the Receiver and Manager to sell the Strata Lots at the current market value free of any obligation of Chandler and Cook that might arise under the Contracts so that the holders of the Contracts would be bound by any Order made. Holders of Contracts were entitled to no other notice.

CAN THE RECEIVER AND MANAGER DISCLAIM CONTRACTS?

[53] I have concluded that the Receiver and Manager has the power to disclaim these Contracts. In this regard, the learned author of ***Bennett on Receiverships***, 2nd Ed. (Toronto – Carswell) states:

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership.

However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. (at p. 341)

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages. (at p. 342)

[54] There are numerous decisions which establish the principle that a Court appointed receiver and manager has the ability to disclaim contracts even though the effect of doing so is that the contract holder will have a claim for damages against the company. In ***New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*** (2005), 39 B.C.L.R. (4th) 327 (B.C.C.A.), the issue was whether the receiver and manager was entitled to disclaim "executory contracts" and apply to approve a better offer. Braidwood J.A. with Oppal J.A. concurring stated:

In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:

The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159

(N.S.C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341.

(at para. 16)

In another leading case, *Bayhold Financial Corp. v. Clarkson* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or realizing upon the Assets or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:

* * *

(c) *apply for any vesting Order or Orders which may be necessary or desirable in the opinion of the Receiver in Order to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the Assets*

[Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order.

(at paras. 19-21)

[55] In the *Bayhold Financial Corp.* decision referred to, the Court dealt with a court appointed receiver and manager and the question of whether there was personal liability for breaching contracts entered into by the company prior to receivership. On

behalf of the Court, Hallett J.A. referred to the decision in ***Re Newdigate v. The Company***, [1912] 1 Ch. 468 (C.A.) and stated:

... The *Newdigate* case is authority for the following valid proposition (p. 468):

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims. (at paras. 27-8)

[56] On the question of whether there was an obligation on the receiver and manager to honour contracts which were in existence prior to the receivership, Hallett J.A. stated:

There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:

The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force.

The inference is that as between the company and the appellants the contracts continued to subsist.

[Emphasis added.]

The duty to preserve “the goodwill” is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts.

(at paras. 55-6)

[57] In ***The Matter of the Receivership of Pope & Talbot Ltd.*** (Vancouver Registry: S077839), Brenner C.J.S.C. in oral reasons for judgment in chambers on May 29, 2008 stated:

The power of a receiver to disclaim contracts is set out in Bennett on *Receiverships*, (2d) Toronto, Carswell 1999, at page 341, which was referred to by both sides in their submissions on this application. That extract states:

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership.

The paragraph goes on to outline the consequences of the steps that a receiver may choose to take.

This extract was recently the subject of judicial consideration in the Court of Appeal decision, *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005, BCCA 154. That judgment reaffirms the foreseeability of disclaimed contracts, even where the party contracting with the debtor has an equitable interest in a contract. In that case, apart from noting the authorities supporting the principle, Braidwood J. noted that the order appointing the receiver included a term granting the receiver the following power:

Apply for any vesting order or orders which may be necessary or desirable in the opinion of the Receiver in order to convey the

assets or any part or parts thereof by a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the assets.

In Braidwood J.A.'s opinion the foregoing clause determined the issue.

(at paras. 17-8)

[58] I am satisfied that the decisions referred to establish the following propositions:

(a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

[59] Ms. Chao-Dietrich and Messrs. Ratansi and Jiwa submit that the content of the Order appointing the Receiver is determinative of the powers available to the Receiver and Manager and that paragraph 2(c) of the Order only granted the Receiver and Manager the power to "... cease to perform any contracts of the Debtor". They submit that no performance was required under their Contracts until completion dates came into effect and that the completion dates for the purchase of Strata Lot 85 by Ms. Chao-Dietrich and the purchase of Strata Lot 12 by Mr. Jiwa and Mr. Ratansi in the Vancouver

Project has not been set because the units remain unfinished. Regarding the completion date for Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich submits that the completion date was September 14, 2007, that she was ready willing and able at that time to complete the purchase, a caveat was filed when Chandler did not complete the sale, and an action seeking specific performance was commenced. In the absence of a power given to disclaim, it is the submission that the remedy that will be available for anticipatory breach of contract is both a specific performance and/or a mandatory injunction and only in the alternative, for damages.

[60] While I am satisfied that the power available to the Receiver and Manager to cease to perform any Contracts is sufficient to allow the Receiver and Manager to apply to the Court to be at liberty to disclaim the Contracts, I also note that the submissions of Ms. Chao-Dietrich and Mr. Ratansi and Mr. Jiwa ignore a number of powers given to this Receiver and Manager including the power to "... cease to carry on all or any part other [sic – of the] business" of Chandler or Cook. The business of these two companies was to create, enter into contracts to sell, and to sell condominium units. The refusal to proceed to complete Contracts is included within the power given to the Receiver and Manager to cease part of the business of Chandler and Cook. The power to "cease to perform any contracts" includes the ability to advise Contract holders that the Receiver and Manager will not proceed to complete the sales contemplated by the Contracts. The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager

to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application.

[61] I also note that paragraph 2(m) of the Orders appointing this Receiver and Manager is identical to the paragraph referred by the Chief Justice in ***Pope & Talbot Ltd., supra*** and that it was this paragraph which was relied upon by the Chief Justice to conclude that the receiver there was in a position to disclaim an existing contract and proceed with an application to approve a different sale. In the circumstances, I am satisfied that the powers granted to this Receiver and Manager are sufficient to allow the Receiver and Manager to disclaim the Contracts.

[62] The holders of the Contract also submit that the Receiver and Manager must maintain the goodwill of Chandler and Cook for their benefit. That submission cannot be maintained in view of the decision in ***Bayhold Financial Corp., supra***. Additionally, there is no goodwill to maintain here. First, it is clear that there will be a massive shortfall to one of the secured creditors even after both Projects have been completed and sold. Second, the unsecured debt is in excess of \$30,000,000.00. Third, I anticipate that these companies were incorporated solely for the purpose of developing these two Projects so that the corporate entities will be abandoned by the shareholders once the Projects have been completed and the Units within the Projects sold.

DO THE CONTRACT HOLDERS HAVE AN EQUITABLE INTEREST?

[63] Paragraph 28 of the Contracts is specific. Any offer made and the agreement which results from the acceptance of the offer by Chandler and/or Cook creates: "... contractual rights only and not any interest in land." A similar provision was considered

by Myers J. in ***Romfo et al v. 1216393 Ontario Inc.***, [2006] B.C.J. (Q.L.) No. 2897 (B.C.S.C.) where the clause in issue stated that the purchaser "... acknowledges and agrees that the Purchaser: (a) will not have any claim or interest in the Strata Lot, the Development or the Property until the Purchaser becomes the registered owner of the Strata Lot, and (b) the Purchaser does not now have and will not have at any time hereafter notwithstanding any default of the Vendor, any right to register this Offer or the Agreement, or any part of or right contained in this Offer to the Agreement against the Strata Lot, the Development or the Property in the Land Title Office." The effect of this provision was not determined because the plaintiffs had argued that the developer was estopped from reliance on the clause and Myers J. was of the view that estoppel issues should not be dealt with on a Rule 18A application.

[64] The contract in ***Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*** (2007), 61 R.P.R. (4th) 277 (B.C.S.C.) contained this provision: "This offer and the agreement which results from its acceptance create contractual rights only and not any interest in land." In deciding that the certificates of pending litigation should not be discharged, Goepel J. made reference to that provision and concluded:

The defendants submit that paragraph 2.1 of the Contracts that states the Contracts do not create "any interest in land" precludes such a claim. With respect, I disagree. At this stage the issue is not whether the plaintiffs can prove an interest in land; the issue is whether they are claiming such an interest. The Statement of Claim makes such a claim. That is all that is required to file a CPL.

[65] While it would have been preferable for the clause used in ***Romfo***, *supra*, to have been incorporated into these Contracts to more fully set out when and only when an equitable interest is created, I see no reason not to enforce paragraph 18 of these

Contracts wherein the holders of the Contract forego any interest in land. If the Contract holders claim an equitable interest, should I ignore this clear provision in their Contracts? I have concluded that I should give effect to paragraph 28 in the Contract. The provision is clear and the Contract holders agreed to that provision when they signed the Contract. It is not submitted that Chandler or Cook is estopped from reliance on that paragraph.

[66] On the assumption that I am incorrect in arriving at the conclusion that paragraph 28 determines the issue of whether they have any equitable interest, I will now consider the submissions made by the Contract holders. It is submitted on behalf of the holders of the Contracts that they have an equitable interest in the Property and the Strata Lots so that the Receiver and Manager should not be in a position to disclaim the Contracts. On this question, the Contract holders rely on the decision in ***CareVest Capital Inc. v. CB Development 2000 Ltd.***, [2007] B.C.J. (Q.L.) No. 1698 (B.C.S.C.).

[67] ***CareVest*** dealt with the fact that the prices available on 32 pre-sold units would not be sufficient to discharge the mortgages against the property. The holders of the pre-sale contracts took the position that the contracts created an equitable charge which was entitled to priority over the registered mortgage. While dismissing the application for a direction that the receiver and manager be permitted to disclaim the contracts, Pitfield J. ordered that the receiver and manager could sell each of the units but then hold in trust for CareVest and any purchasers under pre-sale contracts the excess of the sale price payable pending determination of: "... priority and/or entitlement thereto as between the pre-sale contract buyer and CareVest".

[68] On the issue of whether the pre-sale buyers had an unregistered equitable charge, Pitfield J. stated:

I do not think it is appropriate to attempt to resolve, on a summary application of this kind, the question of whether the presale buyers have an unregistered equitable charge which will entitle them to recover their damages out of the sale proceeds of the strata lot which they were to be the purchaser in priority to the registered second charge in favour of CareVest. That claim warrants more detailed consideration in the circumstances surrounding the financing of this development.
(at para. 16)

[69] The Contract holders also submit that the following statement of the learned author in ***The Law of Vendor and Purchaser***, 3rd Ed. (Toronto: Thomson Canada Limited, 2007) applies:

Ranking high on the list of venerable doctrines postulated by high authority is the equitable landmark decreeing that *instanter* a valid contract for the sale of land comes into existence the vendor becomes in equity a constructive trustee for the purchaser and (1) the beneficial ownership passes to the purchaser, the vendor retaining a reciprocal right to the purchase money carrying with it and for its security a lien on the premises; (2) the vendor, in the absence of an agreement to the contrary, is entitled to retain possession and is entitled to the rents and profits up to the date fixed for completion. But it is then said that although the vendor becomes a constructive trustee, he does so *sub modo* only: (1) he is not a mere dormant trustee; (2) he is a trustee having a personal and substantial interest in the property: he has a right to protect and an active right to assert that interest if anything is done in derogation of it; (3) his right to protect his own interest is paramount and overriding, and until he is bound to convey he retains for certain purposes his old dominion over the estate.

Further, the purchaser's status as equitable owner is contingent upon the contract being specifically enforceable.

It is clear, then, that the precise position in which the parties stand with respect to each other is *in fieri*, until certainty as to the consummation of the contract by conveyance or transfer is established, at which point the respective characters of the parties as trustee and *cestui que trust* relate back to the date of the contract and confirm that throughout the contract the legal estate was in the vendor and the equitable interest in the purchaser. (at pp. 1-12 and 1-13) (footnotes omitted)

[70] However, the status of a potential purchaser as having an equitable interest is contingent upon the contract being specifically enforceable: ***Buchanan v. Oliver Plumbing & Heating Ltd.***, [1959] O.R. 238 (C.A.); ***Cornwall v. Henson***, [1899] 2 Ch. 710 at p. 714; ***Howard v. Miller*** (1914), 7 W.W.R. 627 at p. 631 (P.C.) (B.C.); and ***Central Trust & Safe Deposit Co. v. Snider***, [1916] 1 A.C. 266 (P.C.) (Ont.) at p. 272. A purchaser has an equitable interest in land only as long as he or she would be entitled to specific performance of the agreement: ***DiGuilo v. Boland*** (1958), 13 D.L.R. (2d) 510 (Ont. C.A.); ***Howard***, *supra*, at pp. 79-80; ***Kimniak v. Anderson***, [1929] 2 D.L.R. 904 (Ont. C.A.); ***Freevale Ltd. v. Metrostore (Holdings) Ltd. et al***, [1984] 1 All E.R. 495 (Ch. D); and ***St. James (Rural Municipality) v. Bailey*** (1957), 21 W.W.R. 1 (Man. C.A.).

[71] In ***St. James***, the Court dealt with a request for a declaration that the defendants had no right, title or interest in property so that the plaintiff was entitled to a declaration that the defendants were trespassing upon the property. Regarding the question of whether a sale of property produced an equitable interest in the proposed purchaser, Adamson C.J.M. stated:

When a binding agreement for sale of lands is entered into, the immediate effect of the contract is that the purchaser acquires an equitable estate in the land": *Remedies of Vendors & Purchasers, McCaul*, 2nd ed., p. 1; *Rose v. Watson* (1864) 10 HL Cas 672, 33 LJ Ch 385; *McKillop v. Alexander* (1912) 1 W.W.R. 871, 45 S.C.R. 551; *Thorn's Canadian Torrens System*, p. 129. (at para. 18)

[72] A similar statement was made by Montague J.A.:

I am of the opinion that in the light of all the circumstances in the instant case the defendants have acquired an equitable interest in the lands of such a nature that an action for trespass by the plaintiffs cannot succeed.

The appeal therefore should be allowed and the action of the plaintiff dismissed with costs to the defendant Bailey.. (at para. 71)

[73] The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In ***CareVest***, *supra*, Pitfield J. stated in this regard:

It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.

As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.

(at paras. 13-4)

[74] The question which then arises is whether the holders of the Contracts have an equitable interest and, if so, whether the Receiver and Manager should still be provided with the Direction sought that it can disclaim the Contracts.

DISCLAIMING CONTRACTS RELATING TO THE VANCOUVER PROJECT

[75] Regarding the Contracts of Ms. Chao-Dietrich (Strata Lot 46) and Salim Jiwa and Farouk Ratansi (Strata Lot 12) relating to the Vancouver Project, construction is not

complete and stratification has not occurred. A purchaser is not entitled to specific performance until the time for the completion of the contract has arrived and all conditions precedent have been met. For the Vancouver Project, this would include a filing in the Land Title Office to subdivide the existing property into the Strata Lots which will constitute the Strata Plan.

[76] Until a proper subdivision plan is registered, no interest in land is created:

Nesrallah v. Pagonis (1982), 38 B.C.L.R. 112 (B.C.S.C.) where Taylor J. concluded that the right to create a leasehold interest arose only when a duly approved subdivision plan had been registered and that no interest in land was created prior to such a registration (at para. 14). Similarly, a contingent option granted prior to a strata corporation coming into existence was found to be unenforceable: ***Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*** (2007), 74 B.C.L.R. (4th) 89 (B.C.S.C.).

[77] As well, I am satisfied that it is not possible to imply a covenant or obligation on the part of Chandler to seek and obtain subdivision approval for the Vancouver Project: ***International Paper Industries Ltd. v. Top Line Industries Inc.*** (1996), 20 B.C.L.R. (3d) 41 (B.C.C.A.), being a decision involving whether a lease granted prior to subdivision approval was enforceable or not.

[78] Because construction is not complete and because stratification has not taken place, Ms. Chao-Dietrich (Strata Lot 46) and Messrs. Jiwa and Ratansi (Strata Lot 12) have no equitable interest in the Vancouver Project. There is considerable construction to be undertaken by the Receiver and Manager to complete the Vancouver Project even before the preparation and filing of the documents which will be required before the subdivision plan and the Strata Plan can be registered in the Land Title Office. The

property which is the subject matter of the Contracts does not yet exist. In order for it to exist, further funds must be borrowed by the Receiver and Manager, and those funds must be expended. The Receiver and Manager must “pick up” where Chandler left off. I am bound by the decisions in ***New Skeena*** and ***Pope & Talbot***, both *supra*, so that the Receiver and Manager is in a position to disclaim the Contracts even if I could conclude that the holders of these Contracts had an equitable interest in the Contract or in the interest in land created by the Contract.

[79] Even if I could conclude that Ms. Chao-Dietrich and Messrs. Jiwa and Ratansi had an equitable interest in the Vancouver Project and the Strata Lots which will eventually be created, I could not conclude that the Receiver and Manager should not be given the power to disclaim the Contracts relating to Strata Lots 85 and 12 in the Vancouver Project.

[80] In coming to this conclusion, I rely on the following related to Strata Lot 85: (a) the \$100,000.00 discount made available to Ms. Chao-Dietrich would amount to now preferring Ms. Chao-Dietrich in priority to other unsecured creditors of Chandler as she would be entitled to a fee for services rendered by a reduction of the purchase price agreed to on July 6, 2007; (b) there appears to be at least some evidence that the net selling price at July 6, 2007 was significantly less than the net selling price of \$349,900.00 that was to be made available to Ms. Chao-Dietrich as the net selling price acceptable to the Petitioner was significantly higher than the price made available to Ms. Chao-Dietrich; and (c) I can find no obligation on the Petitioner to provide a partial discharge of its security in order to accommodate the contemplated sale to Ms. Chao-Dietrich.

[81] For Ms. Chao-Dietrich and all other holders of Contracts, the notice set out in the Disclosure Statement was clear:

The Developer will cause and each Lender will agree to provide the partial discharge of the Construction Security in respect of any Strata Lot and its undivided interest in the Common Property sold hereunder within a reasonable period after completion of the purchase and sale thereof provided a certain minimum purchase price is obtained and upon receipt of the net purchase price (after deduction of real estate commission and usual closing costs).

[82] As well, holders of Contracts signed after the security of the Petitioner was registered had notice that partial discharges would only be provided in accordance with the net sale prices established in accordance with the provisions of the security. Additionally, now that the security of the Petitioner is in default, I am satisfied that there is no obligation on the Petitioner to provide partial discharges even if the net sale prices agreed to between Chandler and/or Cook and the Petitioner were being met.

[83] I provide the Direction to the Receiver and Manager that it can disclaim the Contract relating to Strata Lot 85 or, alternatively, to offer for sale that Strata Lot at current market value free and clear of any obligation of Chandler that might arise under the Contract with Ms. Chao-Dietrich.

[84] Regarding the Contract relating to Strata Lot 12, I cannot be satisfied that the price at the time of the Contract was so much lower than the then current market value so that the Receiver and Manager is correct in concluding that this is a Contract which should be disclaimed. However, I am satisfied that the current market value of Strata Lot 12 is such that the Receiver and Manager should be at liberty to offer that Strata Lot for sale free and clear of any obligation of Chandler that might arise under the Contract

as I am satisfied that the purchase price set out under the Contract does not reflect the current market value of Strata Lot 12.

[85] In this regard, I take into account not only the view of the Receiver and Manager that the current market value is \$730,000.00 but also the view of Messrs. Jiwa and Ratansi that the current market value or, at least the market value as at July 29, 2007, is far in excess of the original Contract amount of \$649,000.00. In the July 29, 2007 assignment of the Contract, it was the view of Messrs. Ratansi and Jiwa that the value was \$767,450.00 made up of the original offer of \$649,000.00 plus the \$150,900.00 that they paid to Mr. Nikitiuk for the assignment. In view of the current market value, I am satisfied that the Receiver and Manager would be subject to criticism from the creditors having security against the Vancouver Project if it proceeded to complete the sale at \$649,000.00.

[86] Whether or not I am correct in coming to the conclusion that Messrs. Jiwa and Ratansi do not have an equitable interest because an action for specific performance is not available to them, I provide the Direction that the Receiver and Manager will be permitted to sell Strata Lot 12 at current market value free and clear of any obligation of Chandler or Cook that might arise under the Contract originally with Mr. Nikitiuk. However, any offer on Strata Lot 12 which is accepted by the Receiver and Manager shall only be accepted subject to Court approval. Notice of any application to approve a sale shall be provided to Messrs. Jiwa and Ratansi.

DISCLAIMING CONTRACTS RELATING TO THE RICHMOND PROJECT

[87] The question which then arises is whether the Receiver and Manager should be allowed to disclaim the Contracts relating to the Richmond Project. Regarding the Contract of Ms. Chao-Dietrich relating to Strata Lot 46, I am satisfied that it is in order for the Receiver and Manager to disclaim the Contract. First, the considerable discount of \$340,800.00 that was made available to Ms. Chao-Dietrich for what was described as payments: "... by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser" would create a significant preference to Ms. Chao-Dietrich if the Contract was allowed to stand. Second, the "analysis" of MPC even though flawed allows me to conclude that a similar unit in the floor below Strata Lot 46 sold for \$283,620.00. Third, the proposed price to Ms. Chao-Dietrich is well below the net sale price agreed to between the Petitioner and Chandler which I take to be an indication of the market value at the time. Fourth, the inability to provide a discharge of the security against Strata Lot 46. All of those factors allow me to conclude that the Receiver and Manager is not acting arbitrarily in the exercise of its discretion to request a Direction that it be at liberty to disclaim this Contract. I provide that Direction to the Receiver and Manager. If Ms. Chao-Dietrich does not volunteer to remove the Certificate of Pending Litigation filed against Strata Lot 46 in the Richmond Project, then I will hear any application on behalf of the Receiver and Manager that the Certificate of Pending Litigation be discharged from title.

[88] Regarding the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95, I am satisfied that Crestmark does not have an equitable interest in those Strata Lots as the Contracts are not specifically enforceable. Even if I could be satisfied that

Crestmark had an equitable interest, I would be satisfied that the Direction should be given to the Receiver and Manager that those Contracts be disclaimed.

[89] The doctrine of specific performance continues to apply where a deadline has passed even in the presence of a “time is of the essence clause” where the conduct of the parties has waived the requirement to close by the given deadline and a closing date has been extended. In this regard, see ***Cheema v. Chan***, [2004] B.C.J. (Q.L.) No. 2222 (B.C.S.C.).

[90] Once a deadline for closing has been extended by the conduct of the parties even in the presence of a “time is of the essence” clause, the deadline must be reset with reasonable notice of the new deadline before a party can rely upon the failure to close by that date as a ground for treating the contract as being at an end or for permitting an action for specific performance. For time to be of the essence again, the person wanting a new date must specify a reasonable new completion date in such a manner that the other person would realize that he or she is now bound by the new date: ***Ambassador Industries v. Kastens***, [2001] B.C.J. (Q.L.) No. 825 (B.C.S.C.); ***Norfolk v. Aikens*** (1989), 41 B.C.L.R. (2d) 145 (B.C.C.A.); and ***Abramowich v. Azima Developments Ltd.*** (1993), 86 B.C.L.R. (2d) 129 (B.C.C.A.).

[91] Under the Crestmark Contracts, the original completion dates were to be not less than ten business days after Crestmark had been notified that the City of Richmond had given permission to occupy the Strata Lot and the Strata Plan was fully registered in the Land Title Office. That date would have been sometime in August or September of 2007. While the dates for completion set out in the Contracts may well have already expired, Crestmark and Chandler agreed in the October 11, 2007 Addendum that the

completion date was to be extended to: "... Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of \$250,000.00 + G.S.T. whichever occurs later." November 30, 2007 has passed and the sale of Strata Lots 12, 85, 92 and 95 were not completed. To date, the amount of \$250,000.00 has not been paid. It is more than probable that the \$250,000.00 will never be paid.

[92] While Mr. Wong states that he has agreed to "sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver [a waiver of the condition to apply the amount of the unpaid \$250,000.00 bonus against the purchase price of the four Strata Lots] and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum ...", there was nothing in evidence which would allow me to conclude that there has been an addendum executed by Crestmark amending the completion date agreed upon, there is nothing executed by Crestmark making time of the essence again, and there is nothing in evidence executed on behalf of Chandler which either changes the completion date to make time of the essence again or accepts an addendum to the Contract to provide for a completion date other than in accordance with the October 11, 2007 Addendum.

[93] While I recognize that it would not be necessary for the Receiver and Manager to sign a further addendum accepting reasonable notice from Crestmark of the new date for completion, I am satisfied that it would be necessary for the Receiver and Manager to sign a further addendum relating to these Strata Lots to amend the purchase price so that the "decoration" allowances of \$74,820.00 (Strata Lot 12), \$62,820.00 (Strata Lot

85), \$63,270.00 (Strata Lot 92), and \$77,070.00 (Strata Lot 95) are removed so that the price to be paid does not reflect decoration allowances totalling \$277,980.00 which were added to provide Crestmark with its “bonus”. If these decoration allowances are not removed, then the unsecured amount said to be payable to either Wong or Crestmark would be available as a preference if the four sales were to complete.

[94] I can find no contractual obligation requiring the Receiver and Manager to execute a further Addendum. Specific performance is not available to Crestmark. Accordingly, it is clear that an equitable interest is not available because there are further steps to be taken before it could be said that an equitable interest exists.

[95] There is another reason why specific performance would not be available. There is nothing about these Strata Lots which would allow me to conclude that they are of a unique character and of particular value to Crestmark: ***Behnke v. Beede Shipping Co. Ltd.***, [1927] 1 K.B. 649. It is clear that specific performance will only be generally available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available: ***Semelhago v.***

Paramadevan, [1996] 2 S.C.R. 415 where Sopinka J. on behalf of the majority stated:

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:

Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

[96] I cannot conclude that the Strata Lots are of an unique character and of particular value to Crestmark. Even if I could conclude that Crestmark had an equitable interest, I would also conclude that it was appropriate for the Receiver and Manager to disclaim the Contracts relating to these four Strata Lots. The four August 10, 2007 Contracts provide for “decoration” allowances totalling \$277,980.00. Unless Crestmark and the Receiver and Manager are prepared to execute a further Addendum removing those decoration allowances, the significant reductions from the “gross sale price” agreed to and the significant reduction from the “minimum pre-sale requirements set by the Petitioner” allows me to conclude that, if the Contracts are not disclaimed, Crestmark and Wong will receive significant preferences not otherwise available to other unsecured creditors of Chandler or Cook. Assuming that Crestmark has an equitable interest in the four Strata Lots, equity would require that I not approve any sales which would incorporate such significant preferences. The “analysis” performed by MPC and the minimum pre-sale requirement set by the Petitioner allow me to conclude that the Contracts were at prices not in accordance with fair market value at the time of the Contracts.

[97] Accordingly, I provide the Direction to the Receiver and Manager that it can disclaim the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95 of the Richmond Project or alternatively, offer for sale those Strata Lots at current market value free and clear of any obligation of Chandler that might arise under the Contracts with Crestmark.

THE APPLICATION OF CRESTMARK

[98] The application is that Crestmark be at liberty to commence an action against Chandler, Cook and the Receiver Manager for specific performance. The application of Crestmark pursuant to Rules 47 and 50 of the Rules of Court and the inherent jurisdiction of the Court is dismissed to the extent that the order sought relates to an action claiming specific performance. Regarding the proposed action against the Receiver and Manager, there is nothing before me which will allow me to conclude that the Receiver and Manager has adopted the Contract and has agreed to perform pursuant to it. Accordingly, there can be no action against the Receiver and Manager for specific performance. Regarding the proposed action against Chandler or Cook, Crestmark will be at liberty to commence an action claiming damages against either or both of those companies. However, Crestmark will not be at liberty to commence an action against either Chandler or Cook for specific performance. Crestmark has not met the onus of establishing a reasonable cause of action is disclosed.

COSTS

[99] The Receiver and Manager will be at liberty to speak to the question of costs against Crestmark Holdings Corp., Farouk Ratansi, Salim Jiwa, and Sui Chun Chao-Dietrich.

“The Honourable Mr. Justice Burnyeat”

October 16, 2008 – ***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice G.D. Burnyeat dated July 9, 2008 have been edited.

- On the front page, the first docket number should read: **H070700** instead of **H070699**.
- Also on the front page, the second docket number should read: **H070699** instead of **H070700**.
- The Respondents in action H070700 have been amended to include:

“...
Susan Richards Investments Ltd.,
.....**and**
.....”

- The Petitioner in action H070699 has been amended to read:

“bcIMC **Specialty** Fund Corporation”

- The Respondents in action H070699 has a word added:

“... Freeman **and** ...”

TAB 10

CITATION: Romspen Investment Corporation v. Horseshoe Valley Lands Ltd., 2017 ONSC 426
COURT FILE NO.: CV-16-11468-00CL
DATE: 2017013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Romspen Investment Corporation, Applicant

AND:

Horseshoe Valley Lands Ltd. and Horseshoe Ridge Homes Inc., Respondents

BEFORE: Wilton-Siegel J.

COUNSEL: *Edward D'Agostino*, for the Applicant by Cross-Motion, Lotco Limited

Eric Golden, for the Respondent by Cross-Motion, Romspen Investment Corporation

David Preger, for the Receiver, Rosen Goldberg Inc.

HEARD: January 18, 2017

ENDORSEMENT

[1] In this receivership proceeding, Rosen Goldberg Inc., in its capacity as receiver of Horseshoe Valley Lands Ltd. (“HVL”) (the “Receiver”), has brought a motion seeking an order authorizing it to disclaim an agreement of purchase and sale dated July 21, 2016, entered into between HVL and Garo Bostajian in trust for a company to be incorporated (“Lotco”) (the “Grandview APS”). The Grandview APS pertained to a proposed sale by HVL to Lotco of 29 single-family lots in a residential development owned by HVL (the “Grandview Transaction”). Lotco opposes the Receiver’s motion. Lotco has brought a cross-motion seeking, among other things, an order requiring that certain individuals attend for examinations as described below in aid of Lotco’s position on the Receiver’s motion. This Endorsement addresses Lotco’s request to conduct such examinations.

Background

[2] Romspen holds a mortgage over the lands of HVL to secure an outstanding loan in the principal amount of over \$21.3 million (the “Romspen Loan”).

[3] The Grandview APS was entered into on July 21, 2016.

[4] At the time, Romspen had commenced an application for the appointment of a receiver over the property of HVL based on a payment default of \$3 million under the Romspen Loan on May 30, 2016 (the “Application”).

[5] On July 19, 2016, counsel for HVL provided counsel for Romspen with a copy of the Grandview APS that had not yet been executed and requested a meeting between HVL and Romspen. On July 26, 2016, counsel for HVL provided counsel for Romspen with an executed copy of the Grandview APS.

[6] Lotco waived a due diligence condition in its favour in the Grandview APS on July 28, 2016 thereby making the agreement binding between the parties thereto. Lotco also paid deposits totaling \$200,000 due under the Grandview APS on or about August 3, 2016.

[7] The meeting between Romspen and HVL occurred on July 28, 2016. At that meeting, Steve Mucha and Bill Ulicki (“Ulicki”) attended on behalf of Romspen together with Romspen’s lawyers Brendan Bissell (“Bissell”) and Walter Traub. Jim Cooper (“Cooper”) attended on behalf of HVL together with HVL’s lawyers William Friedman (“Friedman”) and Judy Hamilton.

[8] HVL and Romspen negotiated the general terms of a forbearance agreement between July 28, 2016 and August 1, 2016 (the “Forbearance Terms”). As a result of an agreement on the Forbearance Terms, Romspen adjourned the Application *sine die*. Among other things, the Forbearance Terms required HVL to pay a minimum of \$3.2 million net of all costs on or before September 30, 2016 out of proceeds of sale of HVL’s property or otherwise. The Forbearance Terms contemplated the appointment of Rosen Goldberg Inc. as a Monitor whose consent was required to any sale of land by HVL.

[9] On or about August 21, 2016, the parties commenced drafting a forbearance agreement giving effect to the Forbearance Terms. The final version of the forbearance agreement, dated September 20, 2016 (the “Forbearance Agreement”), required payment on or before September 30, 2016 of “\$3.2 million less all applicable costs including, without limitation, real estate commissions, and legal fees and disbursements arising out of the sale of property subject to the [Romspen Mortgage] or otherwise”. Lotco did not participate at all in the negotiations regarding the Forbearance Terms or the form of the Forbearance Agreement.

[10] In support of this cross-motion, Lotco has filed an affidavit of Paul Grespan (“Grespan”) dated November 25, 2016 (the “Lotco Affidavit”). The Lotco Affidavit generally sets out the facts described above. The Lotco Affidavit further states that Lotco tendered the balance of the purchase price under the Grandview APS on September 22, 2016. Grespan states that on that date, in the absence of a discharge from Romspen, Lotco and HVL agreed to extend the closing to September 28, 2016. Grespan further states that HVL’s counsel advised him on September 28, 2016 that Romspen would agree to a partial discharge under the Romspen Mortgage in respect of the 29 lots (the “Lots”) if Lotco paid an additional \$500,000. Lotco was not prepared to pay the additional amount demanded by Romspen. However, it says it was, and remains, ready, willing and able to complete the Grandview Transaction.

[11] Ultimately, Romspen refused to discharge the Lots subject to the Grandview APS to allow the closing of the Grandview Transaction. Romspen says that the Grandview APS was an improvident offer.

[12] As a result of Romspen's refusal to provide a partial discharge, the Grandview Transaction did not close and HVL failed to make the payment required on September 30, 2016 under the Forbearance Agreement. HVL and Romspen disputed whether such non-payment constituted a default under the Forbearance Agreement. HVL alleged that it was understood and agreed by Romspen that the Grandview Transaction would be completed and that the proceeds of sale of the Grandview Transaction would be the funding source for the payment required under the Forbearance Agreement on or before September 30, 2016. For its part, Lotco has registered a caution against the Lots.

[13] Subsequently, HVL also failed to make a further payment that was required under the Forbearance Agreement to be made by November 30, 2016.

[14] As a result of the foregoing events, Romspen brought on the Application. The Receiver was appointed pursuant to an order of Newbould J. dated November 29, 2016 (the "Receivership Order").

The Lotco Cross-Motion

[15] In its cross-motion, Lotco seeks a declaration confirming that the Receiver is obligated to complete the Grandview Transaction.

[16] At this time, to support that position, Lotco seeks interim relief in the form of an order requiring that the following individuals attend for an examination on their affidavits filed in the Application: (1) two Romspen representatives, being Mark Hilson, who swore affidavits dated July 22, 2016 and November 15, 2016, and Ulicki, who swore an affidavit dated November 21, 2016; and (2) Cooper, who swore a responding affidavit on November 16, 2016 on behalf of HVL. In addition, Lotco seeks to examine Friedman and Bissell, as the lawyers who negotiated the Forbearance Terms and the Forbearance Agreement on behalf of HVL and Romspen, respectively.

[17] In its factum on this cross-motion, Lotco states that it wishes to obtain evidence to show that "[HVL] was authorized by Romspen to complete the [Grandview APS] and that, as at the time when the Forbearance Agreement was signed, Romspen did not require [HVL] to obtain the written consent of [the Monitor] to do so." Essentially, Lotco's position is that (1) Romspen committed to HVL to grant a partial discharge of the Romspen Mortgage respecting the Lots on the closing of the Grandview Transaction and to waive any requirement for Monitor approval of the Grandview Transaction, and (2) that Romspen then defaulted on that obligation after concluding that the value of the Lots had risen following the execution of the Grandview APS.

[18] Romspen has raised a preliminary objection that Lotco has no right to examine on the affidavits filed in the Application on the grounds that they are spent. While this may be technically correct, it does not address the substance of Lotco's cross-motion, which is that it

wishes to examine the individuals named above as third parties to the events giving rise to Romspen's refusal to grant a partial discharge under the Romspen Mortgage in respect of the Lots. Accordingly, I have proceeded on the basis that Lotco seeks an order that these individuals attend an examination under Rule 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Analysis and Conclusions

[19] As mentioned, Lotco seeks the right to examine the individuals identified above in order to obtain evidence to support its position that Romspen defaulted on a commitment given by it to HVL to grant a partial discharge of the Lots upon the closing of the Grandview Transaction and to waive any requirement for Monitor consent to this transaction. For the purposes of this cross-motion, I have proceeded on the basis that the examinations sought by Lotco would demonstrate the existence of such a commitment although, to be clear, I am not making any finding to such effect. The issue for the Court is one of relevance, that is, whether the subject-matter of the proposed examinations would be relevant to the Receiver's motion seeking court approval to disclaim the Grandview APS.

[20] The examinations sought by Lotco, given the questions it wishes to put to the individuals named above, are directed toward the issue of whether there is direct or inferential evidence that Romspen made such a commitment. If such a commitment by Romspen is a relevant consideration on the Receiver's motion, then I consider that the Lotco cross-motion should be granted, except insofar as it extends to the examination of Bissell, which I would deny on the ground that it would entail a breach of solicitor-client privilege that cannot be justified in the present circumstances.

[21] Accordingly, the question on this cross-motion can be stated as follows: is the issue of whether Romspen defaulted on a commitment to HVL to grant a partial discharge over the Lots a relevant consideration in the determination of the Receiver's motion to disclaim the Grandview APS?

[22] I conclude on the basis of the following reasoning that, even if established by such examinations, the alleged Romspen default of an obligation to HVL would not be a relevant consideration for a court on the Receiver's disclaimer motion. The principal reason for this conclusion is that, as discussed below, Romspen did not owe any contractual or other duty to Lotco and the Receivership Order did not change this legal position, or the equities, between Lotco and Romspen.

[23] It is important to note that, in this case, Romspen had no direct contractual obligation to Lotco to grant a partial discharge. At the time of execution of the Grandview APS, Lotco could have required that HVL provide it with an undertaking by Romspen to provide a partial discharge of the Lots on closing, but it did not do so. Further, the Grandview APS does not contain a covenant of HVL to obtain such a discharge from Romspen. Instead, the existence of a partial discharge is effectively a condition of closing. In addition, Lotco does not plead that Romspen made any representations, or took any other actions, that would give rise to a duty of Romspen to Lotco to grant a partial discharge on the closing of the Grandview Transaction.

[24] These circumstances define the remedies that would have been available to Lotco if the receivership had never occurred. In such circumstances, Lotco may have had an unsecured claim against HVL for breach of contract. However, Lotco's entitlement to a mandatory injunction requiring Romspen to grant a partial discharge of the Lots from the charge under the Romspen Mortgage to permit completion of the Grandview Transaction would be governed by the absence of any legal duty of Romspen to grant such a partial discharge. Further, while Lotco says that, prior to the Receivership Order, it would have been able to stand in the shoes of HVL and obtain an order requiring Romspen to grant a partial discharge on behalf of HVL, there is no case law of which Lotco's counsel, or the Court, is aware that would support such a right. Further, and in any event, as HVL consented to the Receivership Order, HVL has waived its right to assert such a claim against Romspen on this basis.

[25] The Receivership Order provides that the Receiver steps into the shoes of HVL but it does not alter or otherwise affect the rights of HVL's creditors relative to HVL. Nor does it alter Lotco's position vis-à-vis Romspen. Lotco's claim against Romspen will continue to be governed by the absence of a legal duty of Romspen to Lotco.

[26] Lotco argues that, in determining the disclaimer motion, a court will be required to have regard to all of the equities between the parties. In this regard, it relies on the decision of Strathy J. (as he then was) in *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848 (Ont. Sup. Ct.). Lotco says that, in addition to the legal relationship between Lotco and Romspen as described above, a relevant equitable consideration would be that Romspen caused the receivership proceedings by defaulting on its obligation to grant HVL a partial discharge in respect of the Lots to permit HVL to close the Grandview Transaction. Lotco says that, as a result of that default and the appointment of the Receiver, Romspen is benefitting from the Receiver's ability to bring the disclaimer motion. Lotco says this is inequitable because Romspen is effectively benefitting from its own default and that this inequity should be addressed by enforcing the Grandview APS rather than permitting the Receiver to disclaim it.

[27] There are three problems with this analysis.

[28] First, I agree that, in making its determination on the Receiver's disclaimer motion, a court will have regard to other considerations in addition to the absence of any legal duty or obligation of Romspen in favour of Lotco. Specifically, the right of the Receiver to disclaim Lotco's interest will depend upon, among other things, the nature of Lotco's interest (i.e. whether it is contractual or proprietary), the relative priorities of the Romspen Mortgage, the evidence regarding the equity in the Lots, and the operation of the doctrine of marshalling, if applicable.

[29] However, Lotco's right to rely on such factual and legal circumstances, to the extent that they support its position, has not been affected in any way by the Receivership Order. Romspen has not improved its position relative to Lotco as a result of the receivership. Even if it could be established that Romspen's default of a commitment to HVL to deliver a partial discharge on the closing of the Grandview Transaction set off a chain of events that has ultimately resulted in the receivership as HVL suggested, this is a matter solely between HVL and Romspen.

[30] Second, as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.

[31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, “[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96.”

[32] In accordance with this standard, a receiver’s duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[33] Third, and most importantly, I do not accept the premise of Lotco’s argument that Romspen is benefitting from the receivership in a manner that is relevant to any consideration of whether to permit the Receiver to disclaim the Grandview APS. Simply put, as discussed above, the Receivership Order did not change the legal position or the equities between Lotco and Romspen.

[34] Lotco argues, however, that Romspen will benefit from the Receiver’s ability to seek court approval to disclaim the Grandview APS. However, the Receivership Order involves only a procedural rather than a substantive change in circumstances. The Receivership Order effected a stay of any proceedings that Lotco might otherwise have brought seeking a mandatory injunction against Romspen. Under the receivership, Lotco’s entitlement to such relief will be determined in the context of the Receiver’s motion to disclaim the Grandview APS. However, to repeat, the Receivership Order, and the principles governing a receiver’s right to disclaim a contract, do not alter in any way the substantive rights that Lotco can assert on that motion.

[35] Based on the foregoing, I conclude that, even if Lotco could establish that Romspen defaulted on a commitment to HVL to grant a partial discharge of the Lots, Romspen’s rights relative to Lotco have not increased as a result of the receivership nor have Lotco’s rights relative to Romspen been diminished or prejudiced. On this basis, a Romspen default of its obligations to HVL, even if established, would not be a relevant consideration for a court in its determination of the Receiver’s disclaimer motion. Accordingly, Lotco’s motion for an order requiring that the individuals identified above attend examinations is denied on the grounds that such examinations are not directed to a matter of relevance on the disclaimer motion.

[36] The parties have agreed that costs of this motion are to be reserved for the motion judge hearing the Receiver's motion for authorization to disclaim the Grandview APS.

Wilton-Siegel J.

Date: February 13, 2017

TAB 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*,
2018 BCSC 1251

Date: 20180725
Docket: H170498
Registry: Vancouver

Between:

Forjay Management Ltd.

Petitioner

And

**0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust,
HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier,
Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association,
Baramundi Investments Ltd., Charanjit Kaur, Simrat Viridi,
Mukhtiar Singh Nijar, Mohan Vilku, Jaspreet Singh Khatra,
Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain,
Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain,
Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd.,
1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar,
Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd.,
Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc.,
Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd. and 1083516 B.C. Ltd.**

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 19 on
July 31, 2018.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Disclaimer – Cont'd)

Counsel for the Petitioner and Reliable Mortgages
Investment Corp.:

Kibben Jackson
Layne Hellrung

Counsel for the Receiver, The Bowra Group Inc.:	Daniel Nugent Janet Kwong
Counsel for 0981478 B.C. Ltd. and Mark Chandler:	Robert Cooper, Q.C. Eric Aitken
Purchaser appearing on his own behalf:	Morris Kadylo
Counsel for PeeverConn Properties Inc., Richard and Jacqueline Johnston:	Diego Solimano
Counsel for Josef and Maria Tomica:	Steven Roxborough
Counsel for the Superintendent of Real Estate:	Joni Worton
Counsel for 625536 B.C. Ltd.:	Jeremy Shragge
Counsel for HMF Home Mortgage Fund Corporation and Canadian Western Trust Company, in trust:	Cobi Dayan
Counsel for Baramundi Investments Ltd.:	Sanjeev Patro
Place and Date of Hearing:	Vancouver, B.C. July 3, 2018
Place and Date of Judgment:	Vancouver, B.C. July 25, 2018

INTRODUCTION

[1] This application concerns the disclaimer of certain pre-sale contracts in relation to a 92-strata unit condominium development, known as “Murrayville House” located in Langley, B.C. The defendant developer, 0981478 B.C. Ltd. (“098”), executed 152 pre-sale contracts before it was placed into receivership by my order granted on October 4, 2017.

[2] In my earlier reasons issued on April 4, 2018, I addressed the application of the Receiver for directions as to the disclaimer of 40 of those pre-sale contracts. I directed the Receiver to disclaim those contracts: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527 (the “Disclaimer Reasons”). Some of the affected pre-sale purchasers appealed my decision. The appeal was heard on June 12, 2018 and was dismissed on that date: 2018 BCCA 251.

[3] In February 2018, the petitioner, Forjay Management Ltd. (“Forjay”) applied for an order directing the Receiver to disclaim all of the pre-sale contracts. That application has been brought back before me so that I am required to address the potential disclaimer of the remaining 111 pre-sale contracts (one person voluntarily rescinded his contract). The Receiver remains in support of that relief, as does 098 and the other mortgagees.

[4] Forjay has given notice of its application to all pre-sale purchasers by various means. Some have counsel and service was effected in the usual manner. For others, Forjay forwarded the documentation by ordinary mail, and also email if the Receiver had the email addresses. The original application materials were sent on February 15, 2018 and also re-sent on June 21, 2018 with specific reference to this hearing date. Accordingly, I am satisfied that the pre-sale purchasers have been given adequate notice of this hearing, and have been afforded an opportunity to respond.

[5] The vast majority of the parties to the remaining pre-sale contracts have not responded to this application. Many parties who did oppose have subsequently withdrawn their opposition, as did the Superintendent of Real Estate. The only

opposition remaining arises from certain purchasers who are parties to 10 pre-sale contracts: (i) Joseph and Maria Tomica; (ii) Jacquie and Richard Johnston; (iii) PeeverConn Properties Inc. (“PeeverConn”); (iv) Morris Kadylo; and (v) Baramundi Investments Ltd. (“Baramundi”) (collectively, the “Opposing Parties”).

BACKGROUND

[6] The facts set out, and the discussion of the issues from the Disclaimer Reasons remain highly relevant to this application. It is not my intention to repeat what is found there.

[7] The only “new” facts are:

- a) the four levels of mortgagees continue to assert outstanding debts owing of approximately \$53 million;
- b) the most current appraisal obtained by the Receiver dated May 14, 2018 indicates a value well below such debt levels;
- c) in addition, the new appraisal indicates that the specific unit values ascribed to the units under contract to the Opposing Parties are well in excess of the contract prices or amounts yet to be paid under those contracts; and
- d) on May 28, 2018, I granted an order increasing the Receiver’s borrowing powers up to \$3 million, which amounts were to be funded by Forjay.

[8] As I did in the Disclaimer Reasons, I will assume that the contracts of the Opposing Parties were valid and enforceable as at the date of the receivership.

[9] What does bear repeating is my analytical framework for the disclaimer issue (see Disclaimer Reasons at para. 44):

- a) Firstly, what are the respective legal priority positions as between the competing interests?

- b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
- c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

[10] Forjay’s position, supported by the Receiver and the other mortgagees, remains that: (i) the mortgagees have legal priority over the interests of the pre-sale purchasers; (ii) the disclaimer of the remaining pre-sale contracts would enhance the value of the assets, whereas a failure to disclaim would amount to a preference in favour of those pre-sale purchasers; and (iii) it cannot be established on the evidence that the equities support the completion of any of the remaining pre-sale contracts rather than a disclaimer.

[11] Given the substantial facts and arguments, and my resulting conclusions, all as set out in the Disclaimer Reasons, I will now focus on the specific arguments advanced by the Opposing Parties, and whether they have raised sufficient factual and/or legal arguments to distinguish those conclusions, such that a different result is appropriate.

THE TOMICA CONTRACT

Background

[12] In the Disclaimer Reasons, the 40 contracts under consideration were described as “standard” and “first in time” contracts. They were “standard” because:

- a) they were entered into after 098’s issuance of a Disclosure Statement;
- b) a deposit of between 3–10% of the purchase price had been paid and was held in trust by a law firm;
- c) the purchaser has yet to pay the balance of the purchase price;
- d) the purchase price was within 90% of the Price List; and

e) the Receiver “believed” that the pre-sale contract prices were at fair market value at the time of signing.

[13] The Receiver did not seek directions with respect to the remaining 17 “standard” contracts because they were not “first in time”. The Tomica contract falls within this category.

[14] The Tomicas executed a contract on September 16, 2015 in respect of unit #211. It was the third contract executed for that unit, the first and second having been executed in April and May 2015. In fact, there was a fourth contract executed by 098 for that unit in August 2016.

[15] The Tomica purchase price for unit #211 was below the Price List amount, and is substantially below the current appraised value for that unit.

Analysis

[16] The Tomicas seek to distinguish their circumstances as follows.

[17] Firstly, they submit that, since the mortgagees will substantially benefit from the market increase in relation to the 40 previously disclaimed contracts, the equities lean more heavily in their favour. I do not agree, if for no other reason than to reiterate that the overall recovery for all stakeholders, save perhaps for the first mortgagees, remains bleak.

[18] Secondly, the Tomicas argue that prior to deciding this disclaimer issue, an accounting of the amounts outstanding to the mortgagees is necessary. Yet, Forjay and Reliable Mortgages Investment Corp. (“RMIC”), one of the first mortgagees, have provided an accounting, as set out in the affidavit of James Mercier #5 sworn June 8, 2018.

[19] In any event, I do not see that an accounting is necessary as a pre-condition to the Receiver disclaiming contracts. The Tomicas argue that other parties have raised issues about the amounts owing to the various mortgagees, including Forjay and RMIC, under their security. Some of those parties allege limitation issues that

might restrict the amount recoverable in whole or in part; some allege that advances over and above the face value of the mortgages are not secured against the project.

[20] Although I referenced the amounts claimed to be owed to the mortgagees generally in the Disclaimer Reasons at para. 126, I was fully aware, as were all parties, of those outstanding issues. My view then, as it is now, is that the mortgagees have satisfied me that, generally speaking, there are substantial amounts owing under the various mortgages, despite the issues raised which may take some time to resolve. That remains a relevant factor in the disclaimer analysis.

Conclusion

[21] I see nothing advanced by the Tomicas that would cause me to come to a different conclusion than that in the Disclaimer Reasons. I would direct the Receiver to proceed to a disclaimer of their contract.

THE JOHNSTON CONTRACT

Background

[22] The Johnstons also executed a “standard” contract that was not “first in time”. They executed a contract on April 11, 2016, in respect of unit #220. It was the second contract executed for that unit, the first having been executed in September 2014. 098 had also executed a third contract for that unit in October 2016.

[23] The Johnston purchase price for unit #220 is substantially below the current appraised value for that unit.

Analysis

[24] The Johnstons and PeeverConn raise the same issues as the Tomicas, as set out above, in their Response, including:

- a) that it is in the public interest to complete their sale in accordance with *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 (“REDMA”). I considered that factor at paras. 120-122 of the Disclaimer Reasons but it was not dispositive;

- b) that they acquired a trust interest upon execution of the pre-sale agreement, citing *Martin Commercial Fueling Inc. v. Virtanen* (1997), 31 B.C.L.R. (3d) 69 (C.A.). However, I discussed the nature of the “standard” pre-sale contracts in the Disclaimer Reasons beginning at para. 57 and followed previous authorities to the effect that in this circumstance, no such equitable interest arose or at least, if one arose, it did not have priority over the mortgages (see paras. 67-72); and
- c) that the fact that the mortgagees could obtain a higher price for the unit is not the only consideration. I agree with this statement and the Disclaimer Reasons reflect a broad consideration of not only that factor, but many others.

[25] Finally, similar to the Tomicas, the Johnstons argue that there is a need for an accounting and a decision as to the issues raised in relation to the mortgages and the balances outstanding.

Conclusion

[26] I see nothing advanced by the Johnstons that would cause me to come to a different conclusion than that in the Disclaimer Reasons. I would direct the Receiver to proceed to a disclaimer of their contract.

THE PEEVERCONN CONTRACT

Background

[27] PeeverConn executed a “standard” contract in respect of unit #101 that was “first in time”. That contract was disclaimed by the Receiver in accordance with the direction in the Disclaimer Reasons.

[28] In addition, on October 24, 2015, PeeverConn executed another “standard” contract that was not “first in time” in respect of unit #122. It was the second contract executed for that unit, the first having been executed earlier in October 2015. 098 had also executed a third contract for that unit in November 2016.

[29] The PeeverConn purchase price for unit #122 is substantially below the current appraised value for that unit.

[30] PeeverConn is in the business of buying and managing properties. As such, in PeeverConn's case, there is certainly no aspect of personal hardship that arises in respect of any disclaimer, unlike the circumstances of other pre-sale purchasers who attended at or who made submissions at the previous hearing.

Analysis

[31] PeeverConn raises the same issues as did the Johnstons, as set out above.

Conclusion

[32] I see nothing advanced by PeeverConn that would cause me to come to a different conclusion than that in the Disclaimer Reasons. I would direct the Receiver to proceed to a disclaimer of its contract.

THE KADYLO CONTRACTS

Background

[33] Mr. Kadylo's contracts are not "standard" contracts. They are short (two page) documents quite unlike the "standard" contracts referred to above.

[34] Mr. Kadylo states that, in July 2014, shortly after 098 purchased the lands, Mark Chandler, 098's principal, told him that he was selling units in the future development at a discounted price, provided the purchase price was paid up front in cash. Mr. Kadylo agreed to purchase the following units:

- a) on July 25, 2014, he agreed to purchase unit #419 for \$160,000. He paid that amount to 098 in August 2014;
- b) on July 25, 2014 (or September 16, 2014), he agreed to purchase unit #418 for \$1.00. Mr. Kadylo suggests that he in fact provided substantial consideration by granting Mr. Chandler an extension on another real

estate deal in Edmonton, which he estimates cost his company approximately \$250,000; and

c) on December 30, 2014, he and another person agreed to purchase unit #412 for \$97,000. He paid that amount to 098 on that same date.

[35] All three contracts provided, in addition to referring to the specific units and the purchase price, that:

- a) Mr. Kadylo was aware that the agreements were for a “bulk presale of completed units” at a “discounted price”;
- b) the transfer of title was to occur on completion of construction and within fifteen (15) business days of title being “raised” by the Land Title Office; and
- c) title was to be transferred:

... free and clear of all financial encumbrances. Title will be encumbered in accordance with a Disclosure Statement required to sell the individual units to purchasers.

[36] What is noteworthy as to these contracts is that: (i) all were entered into before 098 filed a Disclosure Statement and before 098’s sales centre was opened; (ii) the purchase prices were substantially below 098’s list price for each of the units as set out in the Price List (even assuming a notational consideration of \$250,000 for unit #418); and (iii) the entirety of the purchase prices were paid directly to 098 at the time the contracts were signed.

[37] Needless to say, Mr. Kadylo’s purchase prices for units #412, 418 and 419 are even more substantially below the current appraised values for those units.

[38] A distinguishing factor in relation to Mr. Kadylo versus the 40 pre-sale contracts earlier disclaimed is that, having paid the entire purchase price to 098, there are no deposit monies that can be recovered by him. Accordingly, I accept that these monies are unlikely to be recoverable in these circumstances.

Analysis

[39] In his Response, Mr. Kadylo argues that the Receiver is required to consider the interests of all stakeholders, and not just the mortgagees. In addition, he argues that the Court must assess the relative equities of the competing interests within the disclaimer analysis. I agree with these statements, consistent with my approach in the Disclaimer Reasons.

[40] In specific response to Mr. Kadylo's other arguments in his Response:

- a) he notes that he paid all of his purchase monies up front, and that these funds "likely" assisted in the construction of the development. I acknowledge that this is a relevant factor, however, it remains the case that Mr. Kadylo assumed the risk of losing these payments in the event of non-completion by 098: *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 at paras. 4, 13, 15, 36;
- b) he alleges that he has a "property interest" or purchaser's lien ranking in priority to the mortgages. Mr. Kadylo does not assert any specific term in the contracts to support that such an interest arose; indeed, it is contrary to his specific agreement that he understood that financial encumbrances would be put on the property, and would be discharged in accordance with the Disclosure Statement that was yet to be filed. Even so, I am not aware of any case authority where the *Martin Commercial Fueling* reasoning was applied in the context of a pre-sale contract where, upon execution of the contract, the property did not yet exist. Further, assuming such an interest did exist, I still fail to see how priority can be claimed by him as against the mortgagees who have prior registered interests. Finally, I see no basis upon which Mr. Kadylo could essentially seek specific performance as against the Receiver: see Disclaimer Reasons at paras. 73-90; and
- c) he also points to the factor that the mortgagees made advances while aware of the existence of pre-sale agreements. In this case, there is no evidence that the mortgagees knew of such unusual contracts executed

by its debtor, 098, in this very early stage of the development. Even assuming that 098 had an understanding or agreement with the mortgagees to discharge if the prices were at or above the Price List, Mr. Kadylo's unit prices were well below those amounts. Finally, similar to that found in relation to the pre-sale contracts earlier disclaimed, there is no evidence that the mortgagees agreed to discharge their prior ranking security to allow these sales to close: see Disclaimer Reasons at para. 56.

[41] Mr. Kadylo argues that a disclaimer would be premature until there is more certainty about any shortfall to the mortgagees. He raises vague issues as to the amounts owing to the first three mortgagees, which stands in stark contrast to Mr. Mercier's evidence, which includes the detailed accounting of Forjay and RMIC's mortgages. For the same reasons stated above in relation to the accounting/mortgagee issues, I reject this argument.

[42] Finally, Mr. Kadylo purports to have first-hand knowledge about the value of the development and suggests that he be given time to continue discussions with certain stakeholders toward paying their debt. He purports to know the "true" value of this development even in the face of the Receiver's latest and current appraisal. With respect, such a proposal at this late stage, even assuming that it has some credibility, is not a valid basis upon which to further delay these proceedings.

Conclusion

[43] The Disclaimer Reasons stand as a complete answer to most of Mr. Kadylo's arguments. In addition, I reject the remainder of his arguments as above. I would direct the Receiver to proceed to a disclaimer of Mr. Kadylo's three contracts.

THE BARAMUNDI CONTRACTS

Background

[44] Baramundi's experience in the project was very similar to that of Mr. Kadylo.

[45] In the spring of 2014, Calvin Payne, the principal of Baramundi, had discussions with Mr. Chandler. Mr. Chandler told him that he could do an "all unit"

deal at \$350,000, meaning that he could offer a favourable price if the entire purchase price was paid in advance. Mr. Chandler offered up the prospect to Mr. Payne that once the development was built, Mr. Payne could “flip [the units] out prior to closing”.

[46] Arising from those discussions, Mr. Payne’s brother, Robert Payne, entered into four pre-sale contracts with 098. Robert Payne agreed to purchase the following units:

- a) on May 5, 2014, he agreed to purchase: unit #207 for \$100,000; unit #208 for \$100,000; and unit #216 for \$150,000. A bank draft for \$350,000 was delivered to 098 on that date; and
- b) on September 19, 2014, he agreed to purchase unit #115 for \$92,000, and monies for that purchase were paid to 098 around that date.

[47] The September 2014 contract was in essentially the same form as those signed by Mr. Kadylo and includes similar terms. The same can be said for the “bulk presale” contained in the three May 2014 contracts, save for the additional term:

G. As security for the Buyer to pay the Purchase Price in advance of construction of the Development, the Vendor will provide the Buyer a Promissory Note in a form attached hereto as Schedule B (the “Security”).

No promissory notes were attached to these contracts and there is no evidence as to whether any promissory notes were ever signed by 098.

[48] Robert Payne was the purchaser under these contracts, however, it was on the understanding that Mr. Payne or one of his companies would pay the purchase monies and, if requested, take an assignment of the pre-sale contracts. An assignment of the contracts by Robert Payne to Baramundi was executed on January 2, 2017.

[49] As with Mr. Kadylo, all of these contracts had the following features: (i) all were entered into before 098 filed a Disclosure Statement and before 098’s sales centre was opened; (ii) the purchase prices for each were substantially below 098’s

list price for each of the units as set out in the Price List; and (iii) the entirety of the purchase prices were paid directly to 098 at the time the contracts were signed and are likely unrecoverable in the circumstances. One different factor was that the May 2014 contracts were executed even before 098 had acquired the lands for development on May 28, 2014.

[50] 098 went on to execute further pre-sale contracts with different purchasers for these same units: unit #115 in September 2015; unit #216 in July 2016; and units #207 and #208 in November 2016.

[51] In May 2017, upon learning of these later contracts by 098, Baramundi filed caveats against the titles. In June 2017, Baramundi filed a notice of civil claim against 098 and Mr. Chandler in this Court seeking certain relief, including the following: a declaration of breach of the pre-sale contracts, specific performance of those contracts, a declaration of resulting or constructive trust and, in the alternative, damages.

[52] Needless to say, Robert Payne/Baramundi's purchase prices for units #115, 207, 208 and 216 are substantially below the current appraised values for those units.

Analysis

[53] Baramundi asserts that its contracts are "unique" and that the analysis found in the Disclaimer Reasons does not apply to them. I will address the issues within the disclaimer framework reproduced above.

What are the Respective Legal Priorities?

[54] My analysis of the mortgagee's interests set out in the Disclaimer Reasons at paras. 46-56 has not changed.

[55] As for the interests of Baramundi, as with Mr. Kadylo, I see no basis upon which Baramundi can assert a property interest in the units.

[56] The May 2014 contracts do not suggest any type of immediate interest being granted. To the contrary, recital G quoted above in para. 47 would suggest that Robert Payne knew full well that his payment of the purchase prices was at risk, leading to the need to take a promissory note for security. The fact that such notes were not taken does not detract from my conclusion that this indicates an intention on the part of both 098 and Robert Payne that no such interest arose. I appreciate that the September 2014 contract does not contain the same recital G. However, the same analysis as was applied above at para. 40(b) in relation to Mr. Kadylo is equally applicable in that event.

[57] Baramundi also asserts an interest on the basis of constructive or resulting trust. There is no allegation that the purchase monies were to be held in trust, which makes sense particularly given the need for a promissory note in respect of the May 2014 contracts. Rather, the trust relief sought is more in the nature of a remedial constructive trust in light of the allegations against 098 such as breach of fiduciary duty and unjust enrichment.

[58] However, even if such interests (whether equitable interest or trust) arose at the time of the pre-sale contracts, Robert Payne agreed that mortgages would be placed on the lands and that the discharge of those encumbrances would only take place in accordance with the Disclosure Statement. Baramundi's argument that 098 was required to enter into negotiations with its lenders to protect Baramundi's "beneficial interest" is fanciful and without merit. Again, no authority has been brought to my attention that would support that such a trust or equitable interest can defeat a *bona fide* mortgagee. When I say *bona fide* mortgagee, I mean that no evidence has been brought forward to suggest anything to the contrary.

[59] Further, s. 29(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, confirms that, subject to fraud, a person who takes a charge on land is not affected by any notice, express, implied or constructive, of an unregistered interest affecting land, save for certain types of interests other than those alleged by Baramundi.

[60] Finally, I again refer to my earlier conclusion in relation to Mr. Kadylo at para. 40(b) that, in any event, no claim for specific performance is available as against the Receiver in these circumstances.

What are the Realizations/Preferences?

[61] As was the case at the time of the earlier disclaimer application, there can be no doubt that selling the units at their current market value will result in a substantial increase in the recovery from the realization of the development: Disclaimer Reasons at paras. 91-93. This equally applies to Baramundi's contracts.

[62] This enhanced realization will ultimately be to the benefit of all stakeholders, no matter where they rank (although I recognize that some of them are likely "out of the money").

What are the Equities?

[63] The third prong of the test requires a consideration as to whether the pre-sale purchasers have "established that the equities support overriding the mortgagees' legal priority in their favour, as opposed to allowing a disclaimer": Disclaimer Reasons at para. 94. Again, my conclusions and analysis concerning this branch of the test in the Disclaimer Reasons can be adopted in relation to the present application concerning the disclaimer of Baramundi's pre-sale contracts, with the additional "new" relevant facts set out above.

[64] The most significant factor raised by Baramundi is that it stands to lose its entire monies if it is not allowed to complete these contracts.

[65] Baramundi's counsel suggests that Mr. Payne did not know the risk of the endeavour as opposed to the purchasers under the "standard" pre-sale contracts where there was a Disclosure Statement. Mr. Payne does not give any detail as to his personal circumstances. He does not state what Baramundi's business is. However, the circumstances here include a bulk sale, Mr. Payne's reference to not only Baramundi but his other companies, the reference in the May 2014 contracts to promissory notes, and the clear reference that Baramundi would be in a position to

“flip” these contracts before closing. Baramundi’s submissions amount to saying that Mr. Payne is naive in the way of business and business risk. Indeed, the circumstances of these purchases all point to this being an investment opportunity in the wild stakes of Lower Mainland real estate speculation. Accordingly, I see little basis upon which to accede to Baramundi’s plea for assistance based on an alleged lack of appreciation of the risk, which I reject was the case here.

[66] My earlier comments in relation to Mr. Kadylo, citing *Firm Capital*, equally apply to Baramundi, in that Baramundi assumed the risk of losing their monies in the event that 098 did not close the sales.

Conclusion

[67] The Disclaimer Reasons stand as a complete answer to most of Baramundi’s arguments. In addition, I reject the remainder of its arguments as cited above. I would direct the Receiver to proceed to a disclaimer of Baramundi’s four contracts.

CONCLUSION

[68] Again, this is an unfortunate result for those purchasers under the pre-sale contracts. This is particularly evident for those individuals who thought they had “bought” into the rising market at an opportune time in order to secure a home. It is also very unfortunate for those purchasers who paid the entirety of the purchase price to 098. For the reasons stated above, I do not find that such equities trump the pre-existing interests of the mortgagees.

[69] The order sought is granted in that the Receiver is directed to immediately disclaim all of the remaining pre-sale contracts, and take steps to remarket and sell the subject units.

[70] As with the previous 40 contracts, I agree with Forjay that it is appropriate for the Receiver to offer purchasers under the remaining pre-sale contracts a right of first refusal to purchase their units. The matter is somewhat more complicated for those purchasers who are second or third in time. I agree that fairness dictates that the right of first refusal should be first offered to those “first in time” and if not taken

up, to the “second in time” and if still then available, to the “third in time”. That order is also granted. I would also confirm that on July 3, 2017, I granted an order to clarify the right of first refusal process, such that any purchasers taking up such a right of first refusal will not be subject to any bidding war at the time that court approval of that sale is sought by the Receiver.

“Fitzpatrick J.”

TAB 12

CITATION: Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816
COURT FILE NO.: CV-11-9456-00CL
DATE: 20120830

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

RE: FIRM CAPITAL MORTGAGE FUND INC., Applicant
AND:
2012241 ONTARIO LIMITED, Respondent

BEFORE: MORAWETZ J.

COUNSEL: J. D. Marshall, for Deloitte & Touche Inc., Receiver
J. Finnigan and A. McEwan, for Firm Capital Mortgage Fund Inc.
R. D. Howell and D. Schatzkev for G. Gill et al. (“Unitholders”)
S. Dewart, for LawPro

HEARD: JULY 23 AND 26, 2012

ENDORSEMENT

[1] The Receiver brings this motion for an order (i) approving the Receiver’s proposed marketing and sales process in respect of the Respondent’s commercial property in Brampton, Ontario (the “Property”); and (ii) authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases with respect to certain units in the Property, such vesting order to be issued in the event that the Receiver receives an acceptable offer to purchase the Property which requires vacant possession.

[2] The Receiver takes the position that the only practical approach to maximizing recovery for the stakeholders is to market and sell the Property as a whole (in accordance with the process outlined in the First Report) to the widest of possible market which would include (i) potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as (ii) potential purchasers who may wish to purchase the Property and lease out the units without registering the project as a condominium. In order to reach both potential markets it is the Receiver’s opinion that it is necessary for it to be able to deliver the Property free and clear of the purchase agreements and leases. The Receiver therefore seeks approval of the proposed

marketing proposal with the express condition that it can offer the Property free and clear of the purchase agreements and leases. In effect, the Receiver is seeking an order that those agreements and leases can be “vested out” upon the approval of any agreement to sell the Property, recommended by the Receiver at the completion of the marketing process, if vacant possession is required by the terms of any recommended purchase agreement.

[3] Further, the Receiver recognizes that there is a possibility that a potential purchaser may wish to complete the project as a condominium and may therefore wish to adopt one or more of the agreements or leases or renegotiate such agreements or leases. The Receiver therefore seeks an order that it be authorized, but not bound, to terminate the agreements and leases to allow for the possibility that termination may not be necessary.

[4] On the other hand, a group of purchasers (the “Unitholders”) have entered into agreements with 2012241 Ontario Limited (“the Debtor”) and have made significant investments in the project, in some cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which are currently operating out of the premises. Some of the Unitholders made payments of the entire purchase price at the time of occupancy closings. Others made partial payments and began to make occupancy payments for taxes, maintenance and insurance and have made those payments to the Debtor and later the Receiver.

[5] At the time of occupancy, the Debtor advised that registration and the final closing would take place in approximately three months. However, registration did not take place as anticipated and in 2011, TD Bank, the first mortgagee, appointed a receiver of the Property. TD subsequently assigned its position to Firm Capital Mortgage Fund Inc (“Firm Capital”).

[6] Subsequent to the registration of the TD/Firm Capital mortgage, the debtor entered into a number of “pre-sale” agreements, referenced above, pursuant to which several persons agreed to purchase units in the proposed condominium, to close when the Property was registered as such.

[7] The Unitholders take the position that the Receiver’s proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

[8] The Debtor also entered into a number of leases of units after the registration of the TD/Firm Capital mortgage. Although the records are not clear, the Receiver reports that it appears that the Debtor entered into agreements of purchase and sale with respect to 29 units and leases with respect to 5 units. The balance of 30 units appear to be unsold and not leased.

[9] None of the agreements and leases are registered against the title to the Property.

[10] All of the agreements of purchase and sale contain clauses expressly subordinating the purchasers’ interests thereunder to the Firm Capital mortgage security. The provisions read as follows:

26. Subordination of Agreement

The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all condominium documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision.

[11] Three of the five leases also contain similar subordination clauses. The other two leases contain subordination clauses that only refer to mortgages or charges created after the date of the leases. However, the Receiver has been informed that the tenant of one of the units recently terminated its lease and the other unit is vacant and the former Receiver has advised that it believes the lease was terminated or abandoned.

[12] It appears from the Debtor's records that most of the Unitholders who entered into agreements to purchase units paid deposits to the Debtor which are held in trust pursuant to the provisions of the *Condominium Act*, 1998. The Receiver advises that while those records contain numerous inconsistencies which made it impossible for the Receiver to determine with certainty whose deposit remains in trust, it appears that most of the initial purchase deposits remain in trust.

[13] However, five purchasers apparently paid to the Debtor or its solicitors the balance of the purchase price, notwithstanding that the project had not been registered and further authorized the law firm in question to release the funds from trust and pay them to the holder of the second mortgage registered against title. Those payments total more than \$1.2 million.

[14] The Receiver advises that it does not have the financial resources to complete the Property to the point of registration as a condominium or to market the unsold units. The Receiver is of the view that the revenue currently generated by the Property is not sufficient to cover ongoing operational expenses, let alone the costs of completing construction, marketing and other related costs. Further, Firm Capital is not prepared to advance funds for this purpose, nor is Firm Capital prepared to subordinate its mortgage security to any new lender.

[15] In addition, the Receiver has advised that it will not be in a position to close at least five of the pre-sold units due to the fact that the purchasers of those units paid to the Debtor the full balance of purchase price under their agreements and authorized the Debtor to pay those funds to the second mortgagee instead of being held in trust.

[16] From the standpoint of the Unitholders the main issue on this motion is whether the Receiver should be permitted to terminate the agreements of purchase and sale and effectively vest out the interests of the Unitholders.

[17] Counsel to the Unitholders points out that at the time of the commencement of the receivership, all stakeholders had the expectation that the project would proceed to registration and that the existing agreements of purchase and sale and lease agreements would be honoured.

[18] Counsel to the Unitholders argued that in moving to the appointment of the Receiver, TD had indicated that its goal was to expedite registration and that this was a reasonable goal given that the project was virtually complete and that owners and tenants were operating businesses from their units.

[19] Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act, 1998* (the “Act”) with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

[20] The position put forth by the Unitholders was adopted by counsel to LawPro as insurer for Paltu Kumar Sikder.

[21] In my view, this secondary argument can be disposed of on the basis that neither Firm Capital nor the Receiver is a “declarant” or “owner” of the Property. In my view the activities of Firm Capital and the Receiver are not governed by the provisions of ss. 78 and 79 of the Act. Neither Firm Capital nor the Receiver have statutory obligations to the Unitholders.

[22] With respect to the main issue, counsel to the Receiver submits that as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the *Land Titles Act*.)

[23] In this case, the first mortgage was registered on October 20, 2008. The mortgage is in default. The unit purchase agreements and leases are all dated after that date and are not registered.

[24] Counsel to the Receiver also points out that with respect to the leases, ss. 44 (1)(4) of the *Land Titles Act* provides that any lease “for a period yet to run that does not exceeds three years” is deemed not to be an encumbrance. All of the leases in question are unregistered and run for periods exceeding three months. Accordingly, counsel submits that they are subordinate to the registered first mortgage.

[25] In addition, the purchase agreements and leases contain expressed 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.* (1997), 33 O.R. (3rd) 235 (C.A.))

[26] 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...

[27] I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees.

[28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to “a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence”. (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.

[29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[30] Having reviewed the evidence and hearing submissions, I am satisfied that the recommendation of the Receiver that it be authorized to market the property in accordance with the process recommended in the First Report is reasonable in the circumstances.

[31] With respect to the second issue, namely, whether the Receiver should be authorized to terminate purchase agreements and leases and be entitled to a vesting order that terminates the interest of parties to purchase agreements and leases, it is necessary for the Receiver to take into account equitable considerations of all stakeholders.

[32] The remaining question is whether there are any “equities” in favour of the purchasers and lessees that would justify overriding first mortgagee’s legal priority rights.

[33] Counsel to Firm Capital submits that the equitable considerations with respect to the Unitholders are limited. The interests of the Unitholders fall into four categories:

- i. Those who paid deposits that are still held in trust;

- ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;
- iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;
- iv. Those who claim to have incurred expenses in renovating or improving their units.

[34] With respect to the first category, it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.

[35] The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.

[36] The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.

[37] The fourth category of purchasers claim that they have spent significant sums of money on renovations and improvements to their proposed units, and on equipment. As counsel for Firm Capital points out these purchasers spent this money at their own risk and are subject to the subordination clause in their Sale Agreement.

[38] In considering the equities of the situation, it seems to me that a review of the above categories establishes that the equities do not favour the Unitholders. These Unitholders either have a remedy to receive back their original deposits or, alternatively, they are responsible for any losses over and above that amount. In the result, I have not been persuaded that the positions of the Unitholders/opposing purchasers, as supported by LawPro have merit.

[39] The Receiver's motion is granted and an order shall issue approving its proposed process of marketing and sale, with related relief, as set forth substantially in the form of a draft order attached as Schedule "A" to the notice of motion with revisions to reflect the Receiver's intent as expressed in paragraphs 20 and 21 of the factum submitted by counsel to the Receiver.

Released: August 30, 2012

TAB 13

Ontario Supreme Court
Armada Properties Ltd. v. 700 King Street (1997) Ltd.
Date: 2001-05-07

Heard: May 2, 2001

Judgment: May 7, 2001

Docket: 01-CL-4016

R. English, for Trustee

R. Shour, for 1333203 Ontario Limited

Endorsement. Lax J.:

1 This motion is brought by Deloitte & Touche Inc. in its capacity as Construction Lien Trustee and in its capacity as Trustee in Bankruptcy. It raises the issue whether the Trustee should perform an agreement for the purchase and sale of land where the estate will receive no benefit from the transaction. The facts are unique.

2 700 King Street (1997) Ltd. was incorporated to convert 700 King Street West to mixed residential and commercial condominium use. Richard Crenian was its sole officer and director. He was also president and a 50% owner of Peregrine Hunter, a real estate developer and the project manager for 700 King. Armada Properties Limited was a principal investor and 50% owner of the King Street project.

3 On February 9, 2001, Armada obtained an order appointing Deloitte & Touche Inc. as Trustee and Receiver and Manager of 700 King and of 140085 Ontario Limited, a company which held title to the remaining real property assets of 700 King. On February 19, 2001, 700 King was assigned into bankruptcy and Deloitte & Touche Inc. was also appointed Trustee in Bankruptcy.

4 Yotam Goldschlager was directly or indirectly a purchaser of three residential units and one commercial unit at 700 King. The residential units were purchased for members of his family. The commercial unit, Unit 8, was purchased for his business. With respect to each of these purchases, Goldschlager dealt exclusively with Crenian, who had apparent and actual authority to enter into the agreements of purchase and sale on behalf of 700 King. This motion concerns the purchase of Unit 8.

5 On March 20, 1999, Goldschlager, through a numbered company as purchaser, entered into an Agreement of Purchase and Sale with Peregrine Homes Ltd. and 700 King as vendors. The purchase price provided in the Agreement of Purchase and Sale was \$185,000 and by Amending Agreement dated January 5, 2000 was increased to \$206,082. The uncontradicted evidence of Goldschlager is that initially, he was only prepared to pay \$185,000 for Unit 8 and Crenian was only willing to sell it to him at that price if he paid a deposit of \$100,000. Goldschlager agreed to this. Goldschlager's company provided cheques for \$100,000 in May 1999, \$22,557.74 in June 2000 (in accordance with the Amending Agreement) and \$85,000 (the balance of the purchase price) in December 2000, with the result that the entire purchase price was paid by way of deposit. At the request of Crenian, the cheques were made payable to Peregrine Homes Ltd. In July 2000, Goldschlager moved his business from its former premises to Unit 8 and spent about \$80,000 in improvements and moving costs.

6 The residential units closed on January 5, 2001. The transfer date for Unit 8 was scheduled for January 15, 2001 and postponed to February 7, 2001, but did not take place. The Receivership and Bankruptcy followed shortly after.

7 After its appointment, the Trustee proceeded to close sales of the residential and commercial units that had been sold. When it reviewed the files for Unit 8, it became apparent that all of the purchase monies for this unit had been paid by way of deposit to Peregrine Homes Limited, which was a personal company of Crenian, and had never been received by 700 King. There are no further funds to be delivered to the Construction Lien Trustee or to the Trustee in Bankruptcy upon the closing of the transaction. There is therefore no benefit to the creditors of the bankrupt in completing the transaction. The Trustee now applies for the advice and direction of the court.

8 The Trustee advances two arguments. First, it submits that the manner of payment is an essential term of a contract and that payment to one of two joint vendors in the absence of a written direction relieves the other contracting party from performing. Second, it submits that as the Trustee and the court must protect the assets of the estate for the benefit of the creditors, where the estate will receive no benefit, the court should direct the Trustee to disclaim the contract. In any event, as Trustee in Bankruptcy, it can only convey the bankrupt's interest, which is subject to mortgage and lien claims. Goldschlager would not

accept this title. Although its powers as Construction Lien Trustee permit it to convey clear title, it questions whether it would be appropriate for the Trustee to use its lien powers in this way.

9 In my opinion, these arguments are both answered in the circumstances of this case and the Trustee should be directed to use its lien powers to convey clear title to Goldschlager in accordance with the Agreement of Purchase and Sale and consistent with the Statement of Adjustments that was prepared in anticipation of the scheduled closing.

10 As to the Trustee's first argument, I was provided with no case that stands for this proposition, but assuming this is sound law, it cannot apply in this case. The Trustee concedes that Crenian had actual authority to enter into the Agreement of Purchase and Sale and to direct the manner in which the funds were to be paid. This is precisely what occurred. Crenian determined that the funds should be paid to Peregrine Homes Ltd. and Goldschlager complied with this direction. It makes no difference that there is no written direction for payment. Crenian did not pay the funds to 700 King, but this cannot affect the performance obligations of 700 King under the contract.

11 As to the second argument, the circumstances under which a trustee can disclaim a contract entered into by a bankrupt prior to its bankruptcy have long been the subject of uncertainty: *Re Triangle Lumber & Supply Co.* (1978), 21 O.R. (2d) 221 (Ont. H.C.); *Re Erin Features No. 1 Ltd.* (1991), 8 C.B.R. (3d) 205 (B.C. S.C. [In Chambers]). Assuming a trustee has this right, section 75 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B.3 prevents the Trustee from disclaiming this contract. As was noted by Saunders J. in *Re Triangle, supra*:

A reading of s.53 [now, s.75] would appear to dispose of the problem. An agreement for sale in favour of a bona fide purchaser or mortgagee for valuable consideration is valid and effectual as if no receiving order had been made. It would therefore appear that the Trustee is bound by the agreement and may not disclaim it.

12 In the event that I am wrong and section 75 does not apply, I would not allow the Trustee to disclaim this contract. It is clear that a trustee can only succeed to the rights of a bankrupt and has no higher or greater interest. A trustee cannot terminate property rights that have passed under the contract prior to the bankruptcy: *Re Triangle, supra*; *Re Erin Features No. 1, supra*. The equitable interest under this contract passed prior to the bankruptcy and

Goldschlager could have enforced the transfer of title by way of specific performance. In my opinion, the property was validly conveyed and all that remained was the delivery of a deed.

13 I was referred to the decision in *Re Bakermaster Foods Ltd.* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.) as contrary authority. In that case, if the Trustee had closed the transaction, there would have been a substantial deficit, which could only be made up from the funds in the estate to the prejudice of the unsecured creditors. The Trustee was directed not to close the transaction. In my view, these were exceptional circumstances, which have no application here.

14 The Trustee submitted that Goldschlager was the author of his own misfortune in providing the entire purchase monies as deposit and it is therefore he and not the creditors of 700 King who should bear this loss. In my view, if there is culpability, it does not rest with Goldschlager. He had no relationship with Crenian except as a purchaser of real estate. He has offered an explanation for providing the deposit he did. Although Peregrine Homes Ltd. had no beneficial interest in Unit 8, it was the bankrupt that gave Crenian apparent authority to act as he did. Prior to the bankruptcy, 700 King could not assert as against Goldschlager that Crenian lacked the authority to direct payment of the funds to Peregrine Homes Ltd. As the Trustee stands in the shoes of the bankrupt, it cannot now complain of the very loss to the estate that the bankrupt brought about.

15 Finally, the Trustee is an officer of the court and must act fairly to all parties with an interest in the estate. It would be dishonourable for the Trustee to disclaim this contract. I therefore find that the Trustee is bound by the contract in the same manner and to the same extent as the bankrupt was at the time of the bankruptcy and has no power to disclaim the contract. The Trustee is directed to complete the transaction in its capacity as Construction Lien Trustee. It may discharge the caution registered on title by 1333203 Ontario Limited. The Trustee and the numbered company should have their costs out of the estate. I fix the costs of the numbered company at \$2500.

Order accordingly.

TAB 14

Alberta Court of Queen's Bench
Bank of Montreal v. Probe Exploration Inc.
Date: 2000-05-15

Ms K. Homer, for Applicant, PricewaterhouseCoopers Inc., Receiver/Manager of Probe Exploration Inc.

V.P. Lalonde, D. Kearl, for Respondent, Midcoast Canada Operating Corporation

(Calgary No. 0001-02917)

May 15, 2000.

[1] FRASER J. (orally): — PricewaterhouseCoopers Inc., the Receiver/Manager ("Receiver/Manager") of Probe Exploration Inc. ("Probe"), applies for an order authorizing the Receiver/Manager to immediately terminate or to terminate at a time established in its discretion certain agreements which Probe had entered into with Midcoast Canada Operating Corporation ("Midcoast") in connection with the purchase by Midcoast of Probe's gas processing facility at Calmar, Alberta. Leave will not be granted as applied for by the Receiver/Manager.

[2] Midcoast is a midstream operator; it is in the business of providing natural gas producers with transportation, gathering, processing and marketing facilities. It does not own any petroleum or natural gas reserves in the area of the Calmar facility which it purchased from Probe on March 23, 1999. Midcoast processes all of Probe's sour gas reserves produced in the area plus a small volume of third party reserves.

[3] Midcoast argues that without the processing provided by the Calmar facility all of Probe's sour gas production, as well as its natural gas liquids and crude oil reserves which are associated with its sour gas production in the area, would be unmarketable.

[4] It argues further that without the services of Midcoast Probe's sour gas wells and oil wells with associated sour gas would be shut-in.

[5] The Receiver/Manager argues in response that alternative facilities are available, albeit on the basis that new infrastructure, including a pipeline, would have to be built to use them. All of the Probe's sour gas processed at the Calmar facility is delivered to the facility through Probe's upstream gathering facilities, and all of the gas processed by it leaves the Calmar facility via Probe's downstream transmission line.

[6] Midcoast also argues that the development of any such alternative facilities would take at least a year. If the Calmar facility was not available to it during the year Probe's production would be shut-in during that period at a loss to Probe, as argued by Midcoast, of revenue of approximately \$31,500,000.

[7] Prior to March, 1999, Probe experienced severe financial difficulties, it was substantially indebted to the Bank of Montreal ("the Bank"). The bank was Probe's senior secured creditor.

[8] As a result of financial problems, Probe sold the Calmar facility to Midcoast for \$20 million. Midcoast argues that the purchase was made on terms designed to ensure the long-term viability of the facility. Those terms included the guarantee of minimum deliveries of sour gas, the dedication of gathering facilities, and the granting of a security interest in Probe's production and gathering facilities.

[9] The terms were incorporated into a series of related agreements which will be described below. For the moment, it is sufficient to say that the Receiver/Manager now submits that termination of each of three of the agreements would enhance the value of Probe's interest in certain gas producing lands owned by Probe near the Calmar facility for the benefit of all creditors of Probe.

[10] It is appropriate to note at this point that the bank is its is Probe's first secured creditor, and that the opinion was expressed on cross-examination by a manager of the Receiver/Manager that the bank was unlikely to be paid out from the proceeds of the liquidation of Probe. It would follow that Midcoast as Probe's second secured creditor, and ordinary creditors would not likely be paid anything following the completion of the liquidation of Probe.

[11] The first of the three agreements which the Receiver/Manager wishes leave to terminate is termed a Gas Gathering and Treatment Agreement (the "GGT Agreement"). In that agreement, Probe agreed with Midcoast to dedicate all the gas which Probe produced from its interests and certain formations located near the Calmar facility for processing by Midcoast in the Calmar facility. The essence of the agreement is that Probe is required to deliver specified minimum volumes of gas during each of the first eight years of the agreement for processing at an initial rate of 55 cents per Mcf.

[12] Midcoast has a charge and security interest over all of Probe's interest in the gas produced and the lands from which it is produced as security for the Probe performance of Probe's obligations under the agreement. The security interest is subordinate to the interest of the bank.

[13] The evidence of the Receiver/Manager is its belief based on the current production of Probe from the dedicated land that a purchaser of the lands will be unlikely to meet the volume requirements of gas to be produced in years four to seven of the term of the agreement but will nevertheless be required to pay the aggregate minimum

processing fees for those years. The aggregate processing fees payable in respect of the shortfall of gas would be approximately \$2.2 million which the Receiver/Manager terms a penalty. The amount of the shortfall is based on current production and does not take into account a continuation of the decline in production which has occurred in recent years and which will not cease or increase without significant capital investment by a purchaser. The effect of the decline would be to increase the so-called penalty. The belief of the Receiver/Manager with respect to the effect of the GGT Agreement would appear to me to be reasonable.

[14] The second agreement which the Receiver/Manager wishes to terminate is termed the Area of Interest Agreement (the "AOI Agreement"). In that agreement, Probe agreed to notify Midcoast of, among other things, any gas services it requires, unsolicited third party offers for gas services and natural gas pipelines or facilities it wishes to sell within certain lands, all of which are adjacent to or near the Calmar facility and the lands described in the GGT Agreement.

[15] The AOI Agreement effectively gives to Midcoast a right of first refusal to match any third party offers to deal with Probe with respect to any of the matters covered by the agreement. The belief of the Receiver/Manager is that the AOI Agreement has the effect of reducing the realization value of Probe's interest in the lands covered by the agreement. The belief of the Receiver/Manager with respect to the effect of the agreement also appears to me to be reasonable and logical.

[16] The third agreement which the Receiver/Manager wishes to terminate is the Probe System Gathering Agreement (which I will term the "PSG Agreement"). By that agreement, Probe granted Midcoast the right to use at no charge certain gas gathering facilities upstream from the Calmar facility to transport gas to the facility and to use certain transportation facilities downstream from the facility to enable Midcoast to transport gas from the facility at a fee of 1 cent per MCF. The obligations of Probe are covenants running with the land interest, forming part of Probe's upstream and downstream facilities.

[17] Recent arrangements have been made by Probe for the use of similar facilities at fees from 8 to 12 cents per MCF. The Receiver/Manager is of the belief that termination of the PSG Agreement would increase the value of Probe's interest in the facilities governed by the agreement for the benefit of all of the creditors of Probe.

[18] A fourth argument made between Probe and Midcoast at the time of the sale of the Calmar facility is also relevant to the application of the Receiver/Manager. It is termed the Intercreditor Agreement which provides for the subordination of the security interests of

Midcoast granted under the GGT Agreement and the PSG Agreement to the security interest of the bank and the assets of Probe.

[19] Clause 4 of the Intercreditor Agreement provides that where the bank or an agent of the bank or a private receiver appointed by the bank takes possession of the assets subject to the GGT Agreement or the PSG Agreement, such party shall assume the obligations of Probe under those agreements. The agreement is not stated to apply to a court-appointed Receiver/Manager.

[20] The Receiver/Manager has engaged third party assistance to conduct a sale of the assets of Probe. The sale is being conducted on a liquidation rather than on a going-concern basis. The Receiver/Manager therefore submits that preservation of the goodwill of Probe is not a factor to be considered with respect to this application. I accept that such submission is reasonable.

[21] The Bank and Probe agreed on March 1, 2000 to an order granting judgment to the bank against Probe in the amount of \$108,629,412.07 plus interest and costs. PricewaterhouseCoopers Inc., which had previously been retained by the bank as its agent to review the financial affairs of Probe, was then appointed by the court without notice to Midcoast as the Receiver/Manager of Probe.

[22] On May 2, 2000, the person, who is a manager of the Receiver/Manager, expressed the opinion on a cross-examination on his affidavit that it is highly unlikely that the bank will be paid out from the proceeds of the sale of Probe's assets.

[23] Midcoast argues that the existence of the three agreements which the Receiver/Manager wishes leave to terminate does not detrimentally affect the realization value of Probe's assets. It argues with respect to the GGT agreement that the industry standard processing fee for gas is 90 cents per MCF which is much higher than the fee of 55 cents payable under the GGT Agreement. Midcoast submits that the savings in the processing fee would not be enjoyed by Probe if the agreement is terminated, and that would be a disadvantage to the creditors. While that may be true, the uncontradicted evidence is that the volumes of gas likely to be available will not be such in the first eight years of the agreement to allow Probe or a successor in ownership to benefit from the lower fee to allow it to escape the penalty which appears likely on the evidence to be imposed by the agreement. Any other view would, with respect, appear on the evidence to be speculation.

[24] Midcoast argues that the Probe obligations under the AOI Agreement are not a hindrance in any way to a purchaser of Probe's assets. With respect, that argument is also

difficult to accept. The existence of the right of first refusal means that unless Midcoast is, for whatever reason, publicly known to be out of the market to buy or deal, an unlikely eventuality, so long as Midcoast owns the Calmar facility, a third party purchaser would in bidding to deal with Probe merely be setting the price or terms at which Midcoast could buy or on which it could deal. That fact must discourage any third party from dealing with Probe, let alone detrimentally affecting the value of the Probe asset being bought. With respect, the agreement of Midcoast about the effect of the AOI Agreement is therefore rejected.

[25] Midcoast also argues that the PSG Agreement does not reduce the realization value of Probe's interest in the lands related to the agreement. That argument is also rejected because if a third party is buying the transportation facilities governed by the agreement, it would be prevented from earning the return on them which is set according to normal industry standards. Given that the return would not be available, the value of the facilities must be depressed.

[26] For this and the other reasons as stated, I would accept the contention of the Receiver/Manager that the agreements which it seeks leave to terminate must depress the value of the assets of Probe affected. It remains, however, to consider whether the court should grant leave to terminate the agreements.

[27] The primary argument made by the Receiver/Manager in support of its application is that because the operation being carried out is a liquidation of the assets of Probe, goodwill is not a factor, and the Receiver/Manager should therefore be entitled to terminate the contracts. It cites statements from the text *Bennett on Receivership*, and comments from *Bayhold Financial Corp. v. Clarkson Co.* (1991), 86 D.L.R. (4th) 127 (N.S. C.A.) in support of its arguments. In particular, it cites the following statement from Bennett at page 342:

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any monies that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of the existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor or likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages.

[28] The argument is that because Probe is essentially in litigation it has no goodwill. Termination would therefore not adversely affect the goodwill because Probe has no goodwill because it is in litigation.

[29] The Receiver/Manager also refers to another quotation from a previous edition of Bennett cited in the Bayhold Financial decision. That quotation reads as follows:

As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill and the property. The receiver will not be able upon appointment to close down the debtor's business. He will have to demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business.

[30] The decision in Bayhold Financial also contains at page 137 the following additional statement:

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

[31] The case of *Newdigate Colliery Ltd., Re*, [1912] 1 Ch. 468 (Eng. Ch. Div.) is authority for the following proposition at page 478:

... the security of the mortgagee is on the undertaking and all the property present and future, including the uncalled capital, of this company. So that the property for which the receiver and manager is responsible includes this business and undertaking, and it is his duty to do, and our business to see that he does, everything reasonable and right for the protection of the property as an undertaking for the benefit of all the persons interested in it. The order asked for is an order directing the receiver and manager to disregard the interests of one of his constituents, the mortgagor, in order to benefit another of his constituents, namely, the mortgagee. It seems to me that such an order is necessarily wrong. No precedent has been cited for such an order. I have never heard of such an application before, and it seems to me in principle to be wrong. It is the duty of the judge who is taking control of the assets to deal with those assets with due regard to the interests of everybody concerned, and not to advance the interests of one of the persons concerned at the expense of the other.

[32] Again the argument of the Receiver/Manager is that it does not have a duty to honour contracts because the company has no goodwill which the receiver is obligated to preserve. However, in my view, the receiver and the manager must have an overriding regard to the interests of all of its constituents including Midcoast.

[33] Midcoast argues in response to the argument of the receiver and manager about goodwill that the three agreements which the Receiver/Manager wants terminated were entered into for valid consideration, namely the purchase price of the Calmar facility. To terminate the agreements, would involve the entry by the court into a transaction made

between two parties for the benefit of one but the detriment of the other. It would be unfair to Midcoast for the court to interfere.

[34] Midcoast argues that the Receiver/Manager has a duty to act with respect to the conduct of the receivership for the benefit of all the persons interested in it. In support of this argument, it cites the passage from the *Newdegate* decision which I have quoted. In my view, the grant of leave to terminate the contracts which I have described would prefer the interests of Probe and its primary secured creditor, the Bank, over the interests of another interested party Midcoast, although Midcoast is not a creditor at this time.

[35] If the view of the person who was cross-examined on behalf of the Receiver/Manager is correct, the effect of termination would likely be to relegate it to the status of an ordinary creditor in respect of its claim for damages for the breach of contract or resulting from the termination. At the same time termination would free Probe from the disadvantages and losses imposed by the contracts at the expense of Midcoast.

[36] The receiver and manager is at page 478 of the *Newdigate* decision termed "an equitable mortgagee." Equity would, in my view, require it to deal fairly with all interested parties in the exercise of its duties as Receiver/Manager with respect to the equity of redemptions. To deal with Midcoast in the manner suggested by the receiver and manager would not, in my view, be fair and it should therefore not be allowed to breach its duty to be fair, at least in the circumstances now before the court.

[37] I have in mind that the termination of the agreements would, among other things, deprive Midcoast of rights it bargained to get for the benefit of the Calmar facility. Termination would not appear to impose any similar disadvantage or loss of contractual right to Probe. The unequal treatment of the two parties imposed for the benefit of one of the parties or of the bank as its creditor would not, in my view, be equitable or fair.

[38] The view expressed in the previous paragraph is reinforced by the fact that the Intercreditor Agreement, to which reference has been made above, clearly evidences a mutual intent to have a purchaser from Probe bound by the agreements now sought to be terminated. The fact that the agreement is not stated to apply to a court-appointed Receiver/Manager may well be taken to evidence the assumption that a court-appointed receiver would be seen by all parties to have an obligation of fairness towards Midcoast imposed by the court, if necessary.

[39] For the reasons which I have described, leave is not granted to the Receiver/Manager at this time to terminate the GGT Agreement, the AOI Agreement, or the PSG Agreement now existing between Probe and Midcoast.

[40] I might add that the duties of a Receiver/Manager are not limited, in my view, to the preservation of goodwill of Probe. Such duties must primarily involve the conduct of the business or of the liquidation of the corporation which is the subject of the receivership. The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

[41] The parties may, if they wish, speak to me regarding costs at their convenience.

[42] Ms. Horner, Mr. Lalonde, is there anything further you wish me to deal with?

[43] MR. LALONDE: No, I think we could deal with the costs at another occasion. I could seek instructions.

[44] There is just one factual correction, My Lord. You indicated in your Reasons for Judgment that Midcoast, my client, is not a creditor of Probe at this point in time. It is to the extent of about \$780,000 for arrears.

[45] THE COURT: I'm sorry, I did not have a record of that having been spoken to during the hearing.

[46] MR. LALONDE: It may not have been in the material, but I believe I submitted it to you in oral argument.

[47] THE COURT: Thank you.

[48] MS. HORNER: Thank you, My Lord.

[49] MR. LALONDE: Thank you, My Lord.

Application dismissed.

TAB 15

Alberta Court of Appeal
Bank of Montreal v. Probe Exploration Inc
Date: 2000-10-11

Docket: Calgary Appeal 00-18829

K.M. Horner, C.D. Simard, for Appellant

V.P. Lalonde, D.G. Kearle, for Respondent

McClung J.A. (for the Court):

[1] The judgment of the panel is unanimous and is as follows.

[2] In dismissing this appeal, we simply say Mr. Justice Fraser committed no jurisdictional error in refusing the order that Pricewaterhouse has applied for. We note that in the judge's reasons he confirmed the following.

The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner to be fair and equitable to all. It cannot prefer one party over another.

[3] We will not question the discretion exercised by Mr. Justice Fraser under the facts that were presented to him. Beyond that, we are in full agreement with his response to the proposal to terminate the three agreements involved, to which the Bank of Montreal had earlier assented.

[4] The appeal must be dismissed.

Appeal dismissed.

TAB 16

CITATION: Romspen Investment Corporation v. Woods Property Development Inc., 2011
ONSC 3648
COURT FILE NO.: CV-08-00007543-00CL
DATE: 2011-03-17

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

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED

RE: Romspen Investment Corporation, Applicant

- v. -

Woods Property Development Inc. and TDCI Holdings Inc., Respondents

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Harvin Pitch*, for the Receiver, SF Partners Inc.

David P. Preger, for Romspen Investment Corporation and 2204604 Ontario Inc.

Craig A. Mills, for Home Depot Canada Inc.

HEARD: October 25, November 8 and December 2, 2010

ENDORSEMENT

[1] On this motion SF Partners Inc. (the “Receiver”) seeks approval of an agreement of purchase and sale dated October 13, 2009 between the Receiver and 2204604 Ontario Inc. (the “Purchaser”) (the “Sale Agreement”) regarding the sale of a property known municipally as 50 High Street, in the Town of Collingwood, (the “Property”) and an order in connection with the completion of such sale vesting in the Purchaser all of the assets of Woods Property Development Inc. (“Woods”), the owner of the Property, free of any claims of Home Depot of Canada Inc. (“Home Depot”).

[2] By a cross-motion, Home Depot seeks an order that it is entitled to purchase a portion of the Property defined below as the “Home Depot Lands” pursuant to the Home Depot Agreement (as defined below) or to a lease defined below as the “Ground Lease” or, alternatively, that it is entitled to a lien pursuant to section 37 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34 (the “CLPA”) or in equity that ranks prior to the Romspen Mortgage (as defined

below) and, accordingly, should not be affected by any court approval of the transaction contemplated by the Sale Agreement.

Background

The Parties

[3] Woods is an Ontario corporation that is the owner of the Property.

[4] Romspen Investment Corporation (“Romspen”) is a secured lender to Woods and a sister corporation, TDCI Holdings Inc. (“TDCI”), which is the owner of another property in the Town of Collingwood (the “Raglan Property”). The lending arrangements between Romspen and Woods/TDCI are described below. Wesley Roitman (“Roitman”) is the chief financial officer of Romspen and the person at Romspen principally responsible for the Woods/TDCI loan arrangements.

[5] Holborn Property Investments Inc. (“Holborn”) was a proposed purchaser of the Property under the Holborn Sale Agreement (as defined below). Holborn no longer claims an interest in the Property and is no longer a party to these proceedings. The priority of its interest under the Holborn Sale Agreement was the subject of earlier litigation. The judgment of the Court in that litigation was reported as *Holborn Property Investments Inc. v. Romspen Investment Corp.*, [2008] O.J. No. 5722 (Sup. Ct. J.) (the “Holborn Judgment”).

[6] The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of this Court dated November 25, 2008 (the “Receivership Order”).

[7] The Purchaser is an Ontario corporation that is owned and controlled by Romspen.

[8] Landex Holdings Inc. (“Landex”) is an Ontario corporation that owns property immediately to the south of the Property. Landex has entered into a joint venture with the Purchaser to develop the Property should the Purchaser acquire the Property pursuant to the Sale Agreement.

The Property

[9] The Property consists of approximately 43 acres. An industrial building on the Property is leased to two tenants with whom the Receiver has reached an agreement and who, therefore, do not oppose the motion.

[10] A portion of the industrial building was demolished in 2006. Home Depot constructed a store of approximately 85,000 square feet on a part of the Property that includes the demolished portion of the industrial building (defined below as the Home Depot Lands) at a total cost of approximately \$14.5 million. Construction was completed in January 2007, and a Home Depot store has been operated on that part of the Property since then.

Home Depot's Interest in the Property

[11] On or about May 19, 2005, Home Depot entered into an agreement of purchase and sale with Woods whereby Woods agreed to sell Home Depot 8.67 acres of the Property, which included the acreage on which the new Home Depot store was to be located, (the "Home Depot Lands") for \$3,250,000. Among other terms, the sale is conditional upon receipt of a severance of the Home Depot Lands from the Property under the *Planning Act*, R.S.O. 1990, c. P-13.

[12] On October 17, 2005, Woods entered into a further agreement for the sale of the rest of the Property to Holborn (the "Holborn Sale Agreement"). The Holborn Sale Agreement provided that Home Depot could purchase the Home Depot Lands from Holborn under the Home Depot Agreement for \$3,250,000 when a severance was obtained under the *Planning Act*. It was Woods' expectation that the proceeds of sale of the two transactions with Holborn and Home Depot would repay the indebtedness of Woods and TDCI to Romspen described below and leave a profit for Woods.

The Home Depot Agreement

[13] The agreement between Woods and Home Depot was amended on November 30, 2005 (as so amended, the "Home Depot Agreement"). It is this agreement upon which Home Depot relies in asserting that it has an interest in the Property. As mentioned, in order to complete the sale transaction, a severance of the Home Depot Lands is required. The severance is, in turn, conditional on among other things, demolition of the industrial building on the Property in its entirety and, as described below, a plan of subdivision for the Property.

[14] The Home Depot Agreement contains the following material provisions:

- First, the portion of the industrial building referred to above was to be demolished to permit construction of a Home Depot store.
- Second, Home Depot was obligated to apply for a consent under the *Planning Act* to sever the Property.
- Third, section 4.5 of the Home Depot Agreement states that it shall be effective to create an interest in land only if the provisions of the *Planning Act* have been complied with.
- Fourth, Home Depot shall be entitled to apply to the Town of Collingwood for approval and a building permit to construct a Home Depot store on the Home Depot Lands.
- Fifth, if within 270 days of the date of execution, Home Depot fulfilled all zoning conditions and obtained all necessary approvals for its proposed store including a building permit, Home Depot would take possession of an area slightly larger than the Home Depot Lands pursuant to a ground lease (the "Ground Lease"). As there does not appear to be any significance to this slight difference, in this Endorsement the lands

subject to the Ground Lease are also referred to as the “Home Depot Lands” to avoid unnecessary complexity.

[15] The Home Depot Agreement set out the following terms for the Ground Lease:

- The Ground Lease was to run for a term of 50 years at a rental of \$300,000 per year for the first seven years and thereafter at \$100 per year.
- The Ground Lease would terminate upon receipt of the severance of the Property under the *Planning Act*, at which point the Home Depot Agreement would be completed by Home Depot’s purchase of the Home Depot Lands, and the rental payments already made would be credited against the purchase price.

[16] It was a condition of Home Depot’s obligation to enter into the Ground Lease that Woods would deliver to Home Depot an acknowledgement of Romspen’s agreement to:

- (1) permit the demolition of the existing industrial building to occur without acceleration of the Romspen mortgages described below; and
- (2) provide a partial discharge of the Romspen mortgages upon payment of the purchase price of \$3,250,000 under the Home Depot Agreement, without any restriction that such mortgages shall be in good standing at the time.

[17] Section 7.11 of the Home Depot Agreement permitted Home Depot to register a caution in respect of its rights under the Home Depot Agreement pursuant to section 71(1.1) of the *Land Titles Act* R.S.O., c. L5, as amended (the “Act”). However, Home Depot chose not register the Agreement. It is understood that Home Depot made this decision in order to avoid the payment of land transfer tax. For the purposes of this proceeding, however, the significant fact is that Home Depot bargained for, but did not exercise, a right of registration and not the particular reason it decided to forgo that registration.

The Ground Lease

[18] With the exception of delivery of the acknowledgement, which is described below, Home Depot satisfied the conditions entitling it to take a Ground Lease of the Property on the terms set out above within the time period required under the Home Depot Agreement,. The Ground Lease was signed by Woods and Home Depot on May 4, 2006.

[19] Prior to doing so, on April 19, 2006, solicitors for Home Depot conducted a title search against the Property. Accordingly, Home Depot would have been aware at the time it executed the Ground Lease that the Romspen mortgages on the Property at such time had an aggregate face amount of \$11.1 million.

[20] On May 2, 2006, two days before the Ground Lease was signed, Woods had its mortgage broker Lee Mondrow (“Mondrow”) contact Romspen to obtain the acknowledgment from Romspen contemplated by the Home Depot Agreement. However, Romspen was only willing to provide an acknowledgement that demolition of the industrial building would not accelerate the Romspen mortgages (because such demolition would increase the value of the Property). An acknowledgment to this effect was executed by Romspen on May 5, 2006, one day after the Ground Lease was executed.

[21] Roitman says that Mondrow and Clive Figuera, on behalf of Woods, had been pressing him to provide a broader acknowledgment to Home Depot in respect of Home Depot’s rights under the Home Depot Agreement and that he was unwilling to do so because he did not wish to compromise the priority or other rights of the two Romspen mortgages on the Property at the time. He says further that he would have refused to sign the acknowledgement if it had expressly or impliedly purported to be a postponement or a subordination of Romspen’s rights as mortgagee. Home Depot did not contradict this evidence, which I have therefore taken to be an undisputed fact.

[22] The Ground Lease contains a representation of Woods that the Home Depot Lands are subject to mortgages in favour of Romspen dated August 22, 2004 (for \$8.6 million) and January 26, 2006 (for \$2.5 million). In the absence of a Romspen acknowledgment in the form contemplated by the Home Depot Agreement, the Ground Lease contains a further representation of Woods to the effect that Romspen had agreed:

- (1) to permit the demolition of the portion of the industrial building located on the Home Depot Lands without accelerating the Romspen mortgages on the Property at the time; and
- (2) to give partial discharges of the Property from the Romspen mortgages “with the aggregate consideration for all such partial discharges being an amount not in excess of the balance of the purchase price payable by [Home Depot] under the [Home Depot Agreement] upon the completion of the purchase of the [Home Depot Lands] by [Home Depot] pursuant to the [Home Depot Agreement].”

It is unclear on what basis Woods gave the representation in (2), above, as the Romspen mortgages did not contain partial discharge provisions.

[23] Section 19.6 of the Ground Lease addressed registration of the Ground Lease. It provides that Home Depot shall not register the Ground Lease but that either party may register a notice of the Ground Lease pursuant to section 111(1) of the *Land Titles Act* by way of a short form of notice providing certain stipulated information. Home Depot also decided not to register a notice of the Ground Lease, again apparently to avoid the payment of land transfer tax.

[24] I think it is obvious from all of the circumstances, including the testimony of Sylvain Rivet, a senior real estate manager of Home Depot, the fact that Home Depot was advised by experienced solicitors, Home Depot’s experience in real estate law given its extensive real estate operations, and the title subsearch of its solicitors in April 2006, that Home Depot made a

conscious decision to execute the Ground Lease without obtaining the form of acknowledgment of Romspen contemplated by the Home Depot Agreement, and to forego registration of the Ground Lease, with full knowledge of the potential risks that such actions could entail.

Construction of the Home Depot Store

[25] As mentioned, during 2006, Home Depot commenced construction of a store upon the Home Depot Lands.

[26] In connection with such construction, on or about July 25, 2006, Romspen signed a site plan control agreement dated July 20, 2006 to which Woods, Home Depot and the Town of Collingwood were also parties (the "Site Plan Agreement"). The Site Plan Agreement specifically recites the existence of the Home Depot Agreement, although not the Ground Lease. It also recites the proposed demolition of the portion of the existing industrial building and the proposed construction of the Home Depot store.

[27] Paragraph 32 of the Site Plan Agreement refers to the existence of Romspen charges on the Property in the respective amounts of \$8.6 million and \$2.5 million (being the earlier Romspen mortgages, which, by this time, however, had been replaced by the Romspen Mortgage) and contains an express postponement and subordination by Romspen of its interest in the Property to that of the Town of Collingwood under the Site Plan Agreement (but not to that of Home Depot). This is the only express covenant of Romspen in the Site Plan Agreement, which otherwise contains covenants of Woods and Home Depot regarding the construction of the Home Depot store on the Property.

[28] Home Depot has applied for severance of the Home Depot Lands. However, it is understood that the Town of Collingwood will not consent to a severance until a comprehensive plan of subdivision is filed and approved for the entire Property. No plan of subdivision has been filed by Woods or any other party having a present or future interest in the Property. The Receiver is not proposing to file a plan of subdivision on its own.

Romspen's Interest in the Property

Mortgages Prior to July 6, 2006

[29] At the time of the first agreement between Woods and Home Depot dated May 19, 2005, there were two mortgages registered against the Property in favour of Romspen. The first mortgage dated August 27, 2004 secured a loan in the principal amount of \$8.6 million. The second mortgage dated January 26, 2005 secured a loan in the principal amount of \$1,550,000 made to TDCI that was guaranteed by Woods. This second mortgage was also secured against the Raglan Property.

[30] In September 2005, Romspen loaned an additional \$500,000 to Woods that was secured by a further mortgage on the Property, bringing the total amount secured against the Property to \$10,650,000. None of these mortgages contained a right of partial discharge in favour of Woods to allow it to sell the Home Depot Lands, although the mortgage dated January 26, 2005 provided for a discharge of the Property upon repayment of an amount to be determined by Romspen in its discretion up to the full outstanding amount.

[31] Accordingly, at the time of the Home Depot Agreement dated November 30, 2005, there were three mortgages registered against the Property in favour of Romspen, securing loans totalling \$10.65 million in principal amount.

[32] On January 26, 2006, Romspen refinanced the second and third mortgages on the Property and made a further secured advance. This was effected through the issue of a new second mortgage loan dated January 17, 2006 in the principal amount of \$2.5 million made to TDCI of which Woods was the guarantor. This new second mortgage was also registered against both the Property and the Raglan Property. The new second mortgage did not contain a partial discharge provision.

[33] Accordingly, at the time of execution of the Ground Lease on or about May 4, 2006, there were two mortgages registered against the Property in favour of Romspen securing loans totalling \$11.1 million — the mortgage dated August 27, 2004 and the mortgage dated January 17, 2006. Neither mortgage contained a partial discharge provision.

The \$17 Million Romspen Mortgage

[34] On June 1, 2006, Romspen provided Woods with a commitment letter (the “Commitment Letter”) regarding an advance of further funds to discharge the existing Romspen mortgages against the Property, as well as a further mortgage in the principal amount of \$3.6 million secured against the Raglan Property only, and to finance improvements on the Raglan Property. All such advances were to be secured against both the Property and the Raglan Property.

[35] This transaction was completed on or about July 6, 2006, at which time Romspen advanced a total of approximately \$17 million, of which \$11,338,090.84 was advanced to discharge the three existing Romspen mortgages secured against the Property and to pay realty taxes on High Street. The total financing was secured against the Property and the Raglan Property by a joint mortgage of Woods and TDCI in the principal amount of \$17 million (the “Romspen Mortgage”), which was registered on title on July 6, 2006. Subsequently, the earlier Romspen mortgages were discharged after an appropriate “seasoning period”.

[36] The Romspen Mortgage contained a provision allowing Woods a partial discharge of the Home Depot Lands upon payment of the purchase price under the Home Depot Agreement, provided that the Romspen Mortgage was not in default and that a loan-to-value covenant was satisfied in Romspen’s sole determination after giving effect to the partial discharge.

[37] The Romspen Mortgage also incorporated the following provision from the Commitment Letter, which contemplated land lease payments under the Home Depot Agreement without specifically referring to the Ground Lease:

Monthly principal payments of \$130,000 shall be due and payable on the same day each month. In addition, any land lease payments made by Home Depot pursuant to the Home Depot Agreement (both as defined below) which in aggregate exceed \$250,000 shall be due and payable on account of principal, upon receipt and the

Borrower shall direct Home Depot to make such payments directly to Lender.

Romspen's Knowledge of the Home Depot Agreement and the Ground Lease

Knowledge of the Home Depot Agreement

[38] Roitman acknowledges that Romspen received a copy of the Home Depot Agreement in or about November 2005. Accordingly, it had knowledge from that time of the arrangements contemplated in that Agreement in respect of both the sale of the Home Depot Lands and a possible ground lease of the Home Depot Lands.

Knowledge of the Ground Lease

[39] Home Depot submits that the Court should infer that Romspen had actual knowledge of the existence of the Ground Lease, if not its actual contents, as of the date of execution and delivery of the Romspen Mortgage or, alternatively, as of the date of execution of the Site Plan Agreement. It relies upon the covenant in the Romspen Mortgage (by incorporation of the terms of the Commitment Letter) requiring payment to Romspen of land lease payments in excess of \$250,000 as evidence of such actual knowledge at the time of the Romspen Mortgage. In the alternative, it says that, given the structure of the Home Depot Agreement, Roitman must have known that Woods and Home Depot had executed the Ground Lease when he was presented with the Site Plan Agreement for Romspen's execution.

[40] As this is a motion, the Court cannot make findings of fact by way of inference. The Court must make its determinations on the basis of undisputed facts.

[41] In this case, there is no evidence that Romspen had actual knowledge of the existence of the Ground Lease prior to receiving a copy of the Ground Lease in 2008, much less that such knowledge is an undisputed fact. At best, and as Home Depot states in its factum, "Romspen was aware that an interim land lease might be entered into at a later date". This falls short of actual knowledge of the existence of the Ground Lease prior to 2008.

[42] Even if the Court were able to draw inferences of fact, I do not think that such knowledge could be inferred as of the date of execution of the Romspen Mortgage, even on a balance of probabilities standard, from the facts before the Court. The language of the Romspen Mortgage is hardly unequivocal evidence of knowledge. Moreover, the fact that the Commitment Letter did not refer specifically to the Ground Lease but rather to "any land lease payments made by Home Depot", and the fact that Romspen did not pursue repayment of the Romspen Mortgage due as a result of rental payments under the Ground Lease, are both consistent with an absence of actual knowledge on Romspen's part.

[43] Similarly, I do not think that the Court could infer knowledge of the Ground Lease from Romspen's execution of the Site Plan Agreement. While Romspen may have had suspicions that Home Depot had received a Ground Lease when it received the Site Plan Agreement for execution, Home Depot has not established actual knowledge as of that time. As Romspen also points out, execution of the Ground Lease was inconsistent with several conditions of the Home Depot Agreement as Romspen understood them.

Romspen's Alleged Consent to the Home Depot Agreement and the Ground Lease and to the Construction of the Home Depot Store

[44] Home Depot also argues that Romspen consented to the Home Depot Agreement and the Ground Lease as well as to the construction of the Home Depot store. I will address each of these issues in turn. Again, as this is a motion, Home Depot must establish any alleged consent as an undisputed fact. In my view, it has failed to satisfy this onus.

Alleged Romspen Consent to the Home Depot Agreement and the Ground Lease

[45] Romspen had actual knowledge of the Home Depot Agreement from November 2005. However, such knowledge does not automatically imply or constitute consent to the subordination of Romspen's earlier mortgages to the Home Depot Agreement. After learning of the Home Depot Agreement, Romspen had no obligation to contact Home Depot to inquire as to whether it sought, or assumed that it had received, Romspen's consent to the Agreement. It was entitled to assume that Home Depot would do what it considered necessary to protect itself as a party having a subordinate interest in the Property. That legal position remained unchanged at the time of execution of the Romspen Mortgage notwithstanding that the Romspen Mortgage was executed after the Home Depot Agreement.

[46] Home Depot acknowledges that it never sought any form of consent, subordination and postponement of rights, or non-disturbance agreement from Romspen with respect to the Home Depot Agreement. Nor did Romspen ever agree in favour of Woods or Home Depot to a partial discharge of the Property to permit the sale of the Home Depot Lands. There is, therefore, no evidence that Romspen ever consented, orally or in writing, to the sale of the Home Depot Lands pursuant to the Home Depot Agreement or to the subordination of its interest in the Property, whether under the earlier Romspen mortgages or under the Romspen Mortgage, to the interest of Home Depot under the Home Depot Agreement.

[47] I have concluded above that Romspen did not have actual knowledge of the Ground Lease prior to 2008. Home Depot never sought the consent of Romspen to the Ground Lease. Nor did it ever seek any form of subordination or non-disturbance agreement from Romspen in respect of the Ground Lease. Collectively, these facts exclude any determination that Romspen consented to the Ground Lease or to the subordination of its interest in the Property to the interest of Home Depot under the Ground Lease.

[48] Insofar as it may be argued that Romspen's knowledge of the Home Depot Agreement constituted an implied consent to a lease as described in the Home Depot Agreement, even without actual knowledge of the execution of the Ground Lease, I think the argument must fail for the same reasons as I concluded that knowledge of the Home Depot Agreement did not imply Romspen's consent to that document.

[49] Generally, Home Depot relies on the affidavit of Sylvain Rivet, a senior real estate manager of Home Depot, in which he deposed that it was Home Depot's understanding at all times that Romspen had consented to the Home Depot Agreement and the Ground Lease, as well as to Home Depot's interest in the Home Depot Lands. There is, however, no basis in the

evidence for this understanding. To the extent that Home Depot says that it relied on Woods' representation in the Ground Lease that Romspen had consented to the Home Depot Agreement and the Ground Lease, such reliance was clearly unreasonable. Neither Woods nor Home Depot has provided any evidence of Romspen's advice or other comfort to Woods or Home Depot that supports this representation.

[50] Accordingly, I have proceeded on the basis that Romspen did not consent at any time to either the Home Depot Agreement, the Ground Lease, or to any interest in the Home Depot Lands that Home Depot may have acquired thereunder.

Alleged Romspen Consent to the Construction of the Home Depot Store

[51] There is a separate question regarding whether Romspen consented at some point in time to the construction of the Home Depot store. This issue is relevant to the priority of any lien against the Property in Home Depot's favour in respect of an improvement to the Property as opposed to the priority of the Home Depot Agreement and the Ground Lease in the Property *per se*.

[52] There is no evidence of any such consent, and it cannot be inferred from the existence of the Home Depot Agreement. Nor can it be inferred from the existence of the Ground Lease of which, in any event, I have found Romspen had no knowledge prior to 2008. The remaining possibility is that, in some manner, Romspen's execution of the Site Plan Agreement constitutes its consent, or constitutes evidence of its consent given elsewhere, to the construction of the Home Depot store in a manner that is meaningful for this proceeding.

[53] Home Depot cannot, however, establish as an undisputed fact that Romspen's execution of the Site Plan Agreement either constituted, or evidenced, its consent to such construction. The reasons for this conclusion are set out below in addressing the priority of any lien of Home Depot against the Property in respect of such improvement.

The Proposed Sale of the Property

[54] Woods first defaulted on the Romspen Mortgage in 2007, and payments ceased on the Romspen Mortgage in January 2008, leading to the Receiver's appointment on November 25, 2008. The Receivership Order authorized the Receiver to market the Property.

[55] The Receiver listed the Property for sale with Parallel Realty Inc. ("Parallel") for a listing price of \$450,000 per acre. In an offering fact sheet prepared by Parallel for distribution to prospective purchasers, the Home Depot Agreement was disclosed in the following terms:

The developer has agreed to sell 8.67 acres of the property to Home Depot, which has constructed and opened its 85,500 square foot store. Home Depot is currently leasing its portion of the property until a severance can be applied for...

[56] The Receiver's report lists the efforts of Parallel to market the Property. They include listing the property on MLS and a further listing service, advertising in two editions of the

Report on Business, and responding to inquiries of numerous interested parties. Parallel has followed up on expressions of interest from more than 25 prospective purchasers. Despite such efforts, no offers have been received.

[57] On October 13, 2009, the Receiver and the Purchaser entered into the Sale Agreement. The material terms of the Sale Agreement are:

- (1) a purchase price of \$14.1 million satisfied by a partial reduction of the current indebtedness to Romspen under the Romspen Mortgage (apart from certain cash expenses to be paid, including outstanding realty taxes and the Receiver's fees and borrowings, if any); and
- (2) vacant possession of the Property or arrangements with any remaining tenants on terms satisfactory to the Purchaser in its sole discretion.

[58] As no arrangements have been made with Home Depot, as the lessee under the Ground Lease, the Receiver seeks an order vesting the Property free and clear of the Home Depot Sale Agreement, the Ground Lease and any other lien in favour of Home Depot arising in respect of the construction of the Home Depot store.

Applicable Law

[59] The factors that a Court should consider in determining whether to approve a sale by a Court-appointed receiver were set out by Galligan J.A. in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at para. 16 (C.A.) as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

[60] In the present proceeding, there are two specific issues to be considered:

1. whether the Court should vest the Property in the Purchaser free and clear of the interest of Home Depot in the Property, which is a condition of the completion of the transaction contemplated by the Sale Agreement; and
2. whether the Property has been marketed to prospective purchasers on the same basis as is contemplated in the Sale Agreement.

[61] The first issue relates to the consideration of the interests of the parties. The second relates to the efficiency and integrity of the sales process. I will deal with each in turn.

Should the Court Order a Vesting of the Property Free and Clear of any Claims of Home Depot?

[62] This motion raises four general issues that are addressed below:

1. Does the Court have the authority to grant an order “vesting out” Home Depot’s interest in the Property?
2. Does Romspen have an interest in the Property ranking prior to Home Depot’s interest?
3. Is Romspen’s interest in the Property subordinated to Home Depot’s interest by virtue of a consent?
4. Is Home Depot entitled to a lien against the Property ranking in priority to Romspen’s interest by virtue of the construction of the Home Depot store?

I propose to address each issue in turn. I will then address the Receiver’s request for an order vesting out Home Depot’s interest in the Property setting out my assessment of the equities between the parties.

Does the Court Have the Authority to Grant the Requested Relief?

[63] The first issue is whether the Court has the authority to issue an order granting the requested relief. Home Depot makes two arguments that it does not. It says that a court-appointed receiver is not entitled to evict a tenant merely because it would be advantageous to do so. It also submits that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot’s interest. I will address each issue in turn.

Authority of the Court to Issue A “Vesting Out” Order in Respect of a Leasehold Interest

[64] Home Depot relies on the following cases in support of its position that the Court cannot order the Receiver to sell the Property free and clear of the interest of Home Depot in the Home Depot Lands and, in particular, free and clear of the Ground Lease: *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.*, [2004] B.C.J. No. 46 at paras. 12-14 (S.C.); *Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd. et al.*, [1967] B.C.J. No. 132 at paras. 9-10 (S.C.); and *Winick v. 1305067 Ontario Ltd.* [2008] O.J. No. 695 at para. 15 (Sup. Ct. J.).

[65] These decisions do not articulate an absolute and unqualified rule that the Court lacks the authority to vest out a leasehold interest. Instead, they mandate that a receiver take into consideration the equities of the positions of the various parties involved. The principle is well

summarized by Ground J. in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.* [2006] O.J. No. 3169 at para. 19 (Sup. Ct. J.) as follows:

I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc. v. Kitwanga Lumber Co.* (2005), 251 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

The same conclusion was expressed by Gill J. in *Capital Funds, supra* in his reference to the fiduciary obligation of a court-appointed receiver to all the parties involved in a contest.

[66] Accordingly, I have proceeded on the basis that the Court has the authority to grant the relief requested provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties.

[67] I would note, as well, that the cases relied upon by Home Depot do not provide much assistance with respect to the equitable considerations to be taken into account in the present proceeding inasmuch as the circumstances in those decisions were very different.

[68] *Coast Capital Savings, supra* involved residential tenancies which were not registrable and for which the tenants had prepaid the rental for the year. It is also unclear from the incomplete recitation of the facts whether the mortgagee seeking the relief was likely to be repaid or not; the references of the trial judge to the obligation of a court-appointed receiver to protect the goodwill of a business suggests that there may have been other subsequent encumbrancers with an interest in the preservation of the existing tenancies.

[69] In *Capital Funds*, it was established that the tenant had paid considerable amounts for rent and for renovations to the property in respect of a commercial tenancy.

[70] In *Winick, supra*, Pepall J. considered the issue in the context of the requirement in *Soundair, supra* that the Court address whether there has been unfairness in the working out of the sale process. In that case, the purchaser had agreed to acquire the property subject to the relevant lease. There was therefore no suggestion that the sale price would have been affected by the continuation of the lease. In such circumstances, it would have been unconscionable to order a vesting out of the lease.

[71] As mentioned above, I propose to consider the equitable considerations between the parties after discussion of the remaining issues outlined above, which will themselves involve a consideration of certain equitable considerations.

The Home Depot Lands Were Previously Conveyed

[72] Home Depot also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. In making this submission, it relies on the decisions in *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.* (2005), 203 O.A.C. 220 (C.A.); *Re Terastar Realty Corp.* (2005), 16 C.B.R. (5th) 111 (Ont. Sup. Ct. J.); and *Re 1565397 Ontario Inc.*, [2009] O.J. No. 2596 (Sup. Ct. J.).

[73] The Home Depot argument on this issue is based on the legal consequences of the Home Depot Agreement and the Ground Lease. It submits that the Home Depot Agreement created an equitable interest in the Property in favour of Home Depot that was therefore excluded from the assets subject to the Receivership Order. Similarly, Home Depot has a leasehold interest in the Home Depot Lands under the Ground Lease. Home Depot submits that these interests were excluded from the assets subject to the Receivership Order and cannot be extinguished by a transfer of the Property by the Receiver.

[74] I accept the starting point of Home Depot's analysis. Because the Receiver has been appointed as the receiver of Woods' assets, the effect of the Receivership Order is to transfer possession of the Property to the Receiver, subject to Home Depot's interest in the Property under the Home Depot Agreement and the Ground Lease. Nevertheless, I conclude that Home Depot's submission must fail for two reasons.

[75] First, in respect of the Home Depot Agreement, section 4.5 provides that it is effective to create an interest in land only if the provisions of the *Planning Act* have been complied with. This has not yet occurred. It would therefore appear that Home Depot does not presently have an enforceable equitable interest in the land under the Home Depot Agreement and may never have such an interest.

[76] Second, and in any event, the issue in the present proceedings is not whether Woods granted Home Depot a lease pursuant to the Ground Lease and an equitable interest pursuant to the Home Depot Agreement to the extent it has such an interest notwithstanding section 4.5. That is conceded by Romspen. At issue are the priorities and the equities between Home Depot and Romspen.

[77] In this context, while Home Depot is correct that the Receivership Order did not give the Receiver such authority, its submission ignores the nature of the Court's authority in the present circumstances. The Receiver does not rely on its authority under the Receivership Order in seeking a "vesting out" order. Instead, it relies upon the Court's inherent jurisdiction to order a vesting out of interests in property after a consideration of the equities between the parties.

[78] Accordingly, I do not accept Home Depot's argument that the Receiver lacks the power to convey the Property free of Home Depot's interest because it did not receive the equity in the Home Depot Lands upon its appointment. The Court has the authority to authorize the Receiver to sell the Property free and clear of the interest of Home Depot after a consideration of the equities between the parties. Put another way, the Court may refuse to exercise its equitable jurisdiction to enforce Home Depot's equitable interests if it determines that it is appropriate to refrain from doing so after considering the equities between the parties.

Conclusion Regarding Authority of the Court

[79] Based on the foregoing, I conclude that the Court has the authority to grant the requested relief if, in the circumstances, after reviewing the applicable equitable considerations relating to the respective positions of the parties, it is appropriate to do so.

Does Romspen Have an Interest in the Property Ranking Prior to Home Depot's Interest?

[80] Romspen asserts that its interest in the Romspen Mortgage ranks prior to Home Depot's interest in the Home Depot Lands on two general grounds. First, it submits that the Romspen Mortgage is entitled to priority by virtue of its registration under the *Land Titles Act*, notwithstanding actual notice of the Home Depot Agreement and the Ground Lease, which were executed earlier but never registered under the Act. Second, it argues that it has a subrogated claim under the Romspen Mortgage to the extent of the monies secured under the earlier Romspen mortgages and refinanced by the Romspen Mortgage plus interest thereon at the rates provided under such mortgages.

[81] I propose to consider the two submissions of Romspen in reverse order.

Romspen's Assertion of Priority Based on Subrogation

Romspen's Position

[82] Romspen submits that it has a claim against the Property under the Romspen Mortgage by way of subrogation in respect of the amounts outstanding under the Romspen mortgages as of either November 30, 2005 (the date of the Home Depot Agreement) or April 26, 2006 (the date Romspen uses as the date of execution of the Ground Lease).

[83] On either calculation, the total of the monies outstanding under these mortgages, as of February 1, 2010, appears to substantially exceed the value of the Property. According to Romspen's calculation, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Home Depot Agreement (November 30, 2005) – being the mortgages in the principal amounts of \$8.6 million and \$1.550 million, respectively – was \$17,844,975.38. In addition, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Ground Lease (the date used by Romspen is April 26, 2005) – being the mortgages in the principal amounts of \$8.6 million and \$2.5 million, respectively – was \$18,102,971.09.

[84] Romspen acknowledges that the priority of its claim by way of subrogation is limited to the monies paid at the time of the refinancing of the relevant Romspen mortgages to discharge such mortgages plus interest thereon at the rates applicable under such mortgages. It is my understanding that the calculations set out above have been prepared on this basis and are not challenged by Home Depot.

[85] Romspen's argument is based on the line of cases that establishes that a mortgagee who pays off prior encumbrances is entitled to be subrogated to the payee's priority position relative to other clients: see, for example, *Re Elias Markets Ltd.*, [2005] 34 R.P.R. (4th) 127 at para. 43 (Ont. Sup. Ct.J) per Rady J., aff'd [2006] 47 R.P.R. (4th) 32 (Ont. C.A.). The principle was applied to a first mortgagee who "renews, replaces, refinances, amends or increases his mortgage": see *Midland Mortgage Corp. v. 784401 Ontario Ltd.* (1994), 34 O.R. (3d) 594 at para. 14 (C.A.) per Austin J.A. The doctrine also applies to the extent a mortgagee pays taxes on behalf of a mortgagor: see *Elias Markets, supra*, at para. 50 per Rady J.

[86] Romspen argues that it is entitled to rank prior to Home Depot's interest in the Home Depot Lands to the extent of this subrogated claim based on the equities between the parties. In particular, it relies on the fact that Home Depot had knowledge of the Romspen mortgages on the Property at the time it executed the Home Depot Agreement and the Ground Lease based on their registration against title to the Property. It also relies on the fact that Home Depot did not seek either a non-disturbance or priority agreement from Romspen notwithstanding the priority of the Romspen mortgages at the time. Nor did Home Depot receive any consent or other protection from Romspen. Instead, it relied on incorrect representations from Woods in the Ground Lease when it was executed, without seeking confirmation of the validity of these representations. Romspen notes that Home Depot took these decisions without any representation on the part of Romspen. In addition, Romspen relies on its right to control partial discharges of the Property from its security, of which Home Depot had knowledge by virtue of the registration of Romspen's earlier mortgages.

Home Depot's Position

[87] Home Depot notes that subrogation is a discretionary remedy for which the foundation is fairness. In reliance on J. McGhee, ed. *Snell's Equity* 31st ed. (Toronto: Thomson, 2005) at p. 869, it argues there are three conditions that must be satisfied before the doctrine can operate: (1) the subsequent encumbrancer is unjustly enriched at the lender's expense; (2) such enrichment is unjust; and (3) there are no policy reasons for denying the prior encumbrancer a remedy. It makes four submissions for denying the remedy of subrogation in the present circumstances, which I will address below.

Analysis and Conclusions

Preliminary Issue

[88] Before addressing this issue, it is necessary to consider whether Romspen's subrogated claim should be considered in respect of monies outstanding under the earlier Romspen mortgages at the date of execution of the Home Depot Agreement, the date of execution of the

Ground Lease, or both. The Home Depot Agreement and Ground Lease were both granted after the earlier Romspen mortgages described above but before the Romspen Mortgage. Although the parties have distinguished the rights and interests of Home Depot under the Home Depot Agreement and the Ground Lease, I do not think this distinction is meaningful for the purposes of determining against which mortgages Home Depot's priority based on subrogation is to be considered.

[89] The Ground Lease was an interim measure to bridge the period until a severance was obtained and the transaction contemplated by the Home Depot Agreement could be completed. The possibility of a ground lease having terms substantially similar to the terms of the Ground Lease was contemplated in the Home Depot Agreement. The rental payments under the Ground Lease were a credit against the purchase price under the Home Depot Agreement. In these circumstances, I think that the priority of Romspen's subrogated claim under the Romspen Mortgage should be considered in respect of the monies outstanding under the earlier Romspen mortgages outstanding as of the date of the Home Depot Agreement.

Validity of Romspen's Claim for Priority By Way of Subrogation

[90] On the facts of this case, I do not think that there is any doubt that Romspen has a subrogated claim in the amount of the monies outstanding under the earlier Romspen mortgages at the time of their refinancing by means of the Romspen Mortgage, plus interest at the rates provided under the earlier Romspen mortgages. The principle in *Midland Mortgage, supra* is well established law. There are no facts that exclude the operation of this principle in the present proceeding. The issue for the Court is whether the test for entitlement to the remedy of subrogation is met.

Assessment of the Equitable Considerations

[91] In making their submissions on this issue, Home Depot relies on the test for subrogation set out in *Snell*, described above. Romspen relies on the analysis of unjust enrichment. I am not convinced that there is any significant difference between the two approaches, subject to one consideration discussed in the next paragraph. I will, however, consider each of these approaches in turn.

[92] It should be noted that, in respect of Romspen's claim of priority for its interest in the Property based on subrogation, the interest of Home Depot at issue is its interest under the Home Depot Agreement and the Ground Lease, not the Home Depot store. In the absence of any evidence that Romspen consented to the construction of the Home Depot store in a manner that was intended to affect its legal rights in the Property, the issue of the Home Depot store must be considered in the context of an improvement on the Property. That is addressed later. In this section, the issue is limited to the right of Home Depot to acquire the Home Depot Lands under the Home Depot Agreement and, possibly, to hold a leasehold interest in the Home Depot Lands under the Ground Lease.

[93] The starting point for the analysis of unjust enrichment is whether Home Depot would be enriched if the remedy of subrogation were unavailable to Romspen. I think it is clear that it

would be. The Home Depot Agreement and the Ground Lease were executed after the earlier Romspen mortgages. Therefore, they ranked after such mortgages. If subrogation were not granted, Home Depot's interest in the Property would rank in priority to the interest of Romspen in the Property. Accordingly, in the present circumstances, there would be an enrichment of Home Depot and a corresponding deprivation of Romspen if subrogation were not ordered.

[94] I am also satisfied that there is an absence of a juristic reason for Home Depot's enrichment. In respect of this issue, the following considerations are relevant.

[95] First, insofar as Home Depot seeks to enforce the Home Depot Agreement, it is effectively seeking an order compelling Romspen to discharge the security contained in the earlier Romspen mortgages which has been continued in the Romspen Mortgage. The Court should not relieve Home Depot of the risk that it knowingly assumed by its own actions.

[96] As mentioned, the Romspen mortgage loans were secured against the entire Property and provided Romspen with an absolute control over partial discharges. Even if a severance had been obtained, Home Depot could only have completed the purchase if Romspen had been willing to deliver a partial discharge. Home Depot had full knowledge of that risk. By entering into the Home Depot Agreement without obtaining a non-disturbance or priority agreement with Romspen, Home Depot took the risk that the Home Depot Lands would not be deliverable to it. Home Depot could not have obtained an order of the Court compelling delivery to it of the Home Depot Lands free of the earlier Romspen mortgages. There is no reason why the refinancing of those mortgages should increase its rights in this respect.

[97] Second, the evidence before the Court suggests that the present circumstances were not anticipated by either party. However, at the time of execution of the Home Depot Agreement and the Ground Lease, the priority of the Romspen mortgages registered on title to the Property was absolutely clear. Both parties were sophisticated business entities with access to experienced and knowledgeable legal counsel. Romspen did everything that it could to protect itself against unanticipated circumstances. Home Depot did not.

[98] To protect itself, Home Depot needed to obtain a consent, a priorities agreement, or a non-disturbance agreement directly from Romspen in respect of the Home Depot Agreement, the Ground Lease, or both. It made a business decision not to require Woods to obtain the form of comfort contemplated by the Home Depot Agreement and to rely instead upon representations from Woods – which proved to be incorrect – without seeking any indication from Romspen regarding the validity of those representations.

[99] On the other hand, Romspen chose to protect its security position by retaining absolute control over any partial discharges of the Property under the earlier Romspen mortgages. It was under no obligation to anticipate the situation that subsequently developed. Nor did it have an obligation to advise Home Depot of the risks associated with failure to seek a consent or other comfort from Romspen.

[100] Third, Home Depot argues that there is no evidence that it has derived any value or enrichment from Romspen's refinancing of the earlier Romspen mortgages by means of the

Romspen Mortgage and that, on the other hand, Romspen has derived real value from Home Depot's construction and operation of its store on the Home Depot Lands. For the same reason, Home Depot says that, if its interest is vested out, Romspen will be unjustly enriched by virtue of the construction of the Home Depot store on the Property.

[101] These two amount to a single argument. More importantly, I do not think this argument has any force to the extent that it relates to Home Depot's interest in the Home Depot Lands as opposed to the improvement on those Lands. As mentioned above, the present issue of priorities is a contest between Home Depot's interest in the Home Depot Lands, as a prospective purchaser under the Home Depot Agreement and as a tenant under the Ground Lease, and Romspen's interest in the Property under the Romspen Mortgage by way of subrogation. While there is no evidence that Home Depot derived any value from the refinancing of the earlier Romspen mortgages, there is equally no evidence that Romspen has derived any value from either the Home Depot Agreement or the Ground Lease between Woods and Home Depot.

[102] In particular, there is no suggestion that the Ground Lease provided for a market rental. In the absence of any severance of the Home Depot Lands, the Ground Lease reverts to a 21-year term with a nominal annual rent. Further, if the Home Depot Agreement were enforceable against Romspen, the purchase price payable on closing of the sale of the Home Depot Lands would be significantly reduced by the prior rental payments made to Woods, of which it has not been established that Romspen had knowledge.

[103] Fourth, as a related matter, while it may be implied in Home Depot's submission that most, if not all, of the value of the Property is attributable in the present economic circumstances to the Home Depot Lands, I do not think that this is determinative of the equitable considerations. The fact that the remainder of the Property, apart from the Home Depot Lands, if sold separately may have a value significantly less than that at the time of the Romspen mortgage loans to Woods ignores the reality that at all relevant times both Home Depot and Romspen were dealing with a single property. It also ignores the fact that Romspen did address this risk to the extent it could do so by means of the loan-to-value covenant in the Romspen Mortgage.

[104] Fifth, I do not accept the Home Depot argument that the issue of fairness does not come into play in the present circumstances because Romspen discharged the earlier mortgages with full knowledge of the Home Depot Agreement rather than as a result of a mistake or inadvertence. This argument may have been made on an erroneous assumption that the earlier Romspen mortgages were discharged prior to the execution and delivery of the Romspen Mortgages. If it is not, this argument is objectionable for two reasons. It casts the fairness consideration in the context of subrogation far too narrowly. It also flies in the face of common sense and well established practice, which reflects the practical reality that there should be no reason to maintain on title mortgages that have been refinanced by a later mortgage from the same lender.

[105] Sixth, the present circumstances are not analogous to those in *Armatage Motors Ltd. v. Royal Trust Corporation of Canada Ltd.* (1997), 34 O.R. (3d) 599 (C.A.) in which injury to the party against whom subrogation was sought was a relevant consideration. *Armatage Motors* is a

curious case in which the Court of Appeal appears to have denied subrogation on the basis that the first mortgagee had other assets against which it could recover the monies owed to it that were not also secured in favour of the second mortgagee, as well as the second mortgagee's reliance on the abstract of title. In the present proceedings, there is no evidence before the Court that Romspen will recover the outstanding loan amount from the remainder of the security under the Romspen Mortgage should subrogation not be granted. Insofar as there is any issue of reliance on the title to the Property, the present facts also favour Romspen.

[106] Lastly, I do not accept Home Depot's submission that the doctrine of subrogation has no application in the context of a vesting order motion brought by a court-appointed receiver. Home Depot has offered no reason in principle why subrogation should not operate. I do not see any reason for excluding the operation of subrogation as an equitable consideration in determining whether to vest out a subsequent encumbrancer's interest.

[107] On the basis of the foregoing, I conclude that Romspen is entitled to assert a subrogated claim against the Property in priority to that of Home Depot based on the principles of unjust enrichment. If it were necessary to consider the application of the principles in *Snell's Equity* upon which Home Depot relies, I would reach the same conclusion for the following reasons.

[108] Turning to the test set out in *Snell's Equity*, satisfaction of the first requirement has already been addressed above. Absent subrogation, Home Depot will be enriched at Romspen's expense.

[109] Similarly, for the reasons set out above pertaining to the absence of a juristic reason for such enrichment, I also conclude that such enrichment is unjust.

[110] Lastly, I think that the third prong of the test in *Snell*, if in fact it is separate from the issue of a juristic reason for such enrichment, is also satisfied for the following reason. Provided that the issue of the Home Depot store is excluded from this analysis and dealt with below, as I believe is appropriate, there is no remaining policy reason for denying Romspen the remedy of subrogation. Romspen retained control over the discharge of all or any part of the Property from its security. Romspen did not benefit in any respect from the execution or performance of the Home Depot Agreement or the Ground Lease. The loss suffered by Home Depot — being the loss of the rental payments under the Ground Lease totaling \$3,210,000 — was directly attributable to Home Depot's own actions in assuming a foreseeable risk.

Conclusion

[111] Based on the foregoing, I conclude that Romspen's subrogated interest in the Property in respect of amounts outstanding under the earlier Romspen mortgages at the time of the execution of the Home Depot Agreement ranks prior to Home Depot's interest in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Romspen's Assertion of Priority Based on the Romspen Mortgage

[112] Romspen's alternative claim is that the Romspen Mortgage has priority over both the Home Depot Agreement and the Ground Lease by virtue of the absence of registration of these documents.

Preliminary Comments

[113] Before addressing this submission, I wish to make two observations.

[114] First, given the determination above in respect of Romspen's subrogation claim, it is likely that, as a practical matter, it is unnecessary to address this issue. It would appear that the amount of Romspen's subrogated claim is, by itself, substantially in excess of the current value of the Property. I have addressed this issue, however, in case this assumption proves to be incorrect in marketing the Property.

[115] Second, the focus of this claim differs in one important respect from that of Romspen's subrogated claim. The subrogated claim is based on the priority of the earlier Romspen mortgages by virtue of their registration at the time of execution of the Home Depot Agreement and the absence of any subsequent consent or other agreement in favour of Home Depot affecting such priority. The claim in respect of the Romspen Mortgage is based principally on the ouster of the doctrine of actual notice in respect of the Home Depot Agreement and the Ground Lease by operation of the registration provisions under the *Land Titles Act* relating to charges.

Positions of the Parties

[116] Romspen argues that the Romspen Mortgage, as a registered charge against title to the Property, ranks prior to the Home Depot Agreement and the Ground Lease by virtue of section 93(3) of the *Land Titles Act* notwithstanding actual notice of the Home Depot Agreement at the time of registration of the Romspen Mortgage. Section 93(3) reads as follows:

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

[117] Home Depot argues that section 93(3) of the *Land Titles Act* does not displace the operation of the doctrine of actual notice in Ontario and that, by virtue of Romspen's actual knowledge of the Home Depot Agreement at the time of execution of the Romspen Mortgage, the Romspen Mortgage is subordinated to this instrument.

[118] Home Depot submits that it is entitled to rely on the doctrine of actual notice by virtue of the principle articulated by the Supreme Court in *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915. It argues that wording comparable to that in the Alberta legislation referred

to by Spence J. in *United Trust* is required in order to exclude the operation of actual notice in Ontario. It says that the wording of section 93(3) is insufficient for this purpose.

[119] In making this submission, Home Depot also relies on the more recent decisions of Mesbur J. in *1420111 Ontario Inc. v. Paramount Pictures (Canada) Inc.*, [2001] O.J. No. 4461 (Sup. Ct. J.), as well as the Court of Appeal in *Manias v. Norwich Financial Inc.*, [2008] O.J. No. 2612 (C.A.) and *Romspen Investment Corp. v. 2126921 Ontario Inc.*, [2010] O.J. No. 5405 (C.A.).

Analysis and Conclusions

[120] I propose to consider the following two issues in respect of the issue of the priority of the Romspen Mortgage relative to the Home Depot Agreement and the Ground Lease:

- (1) does section 93(3) of the *Land Titles Act* oust the operation of the doctrine of actual notice in the present circumstances? and
- (2) if not, is the Romspen Mortgage subordinated to the Home Depot Agreement and the Ground Lease by operation of the doctrine of actual notice?

Does Section 93(3) Oust the Doctrine of Actual Notice?

[121] There is no dispute that Romspen had actual notice of the Home Depot Agreement at the time of execution and registration of the Romspen Mortgage. Accordingly, the issue in this section is whether the doctrine of actual notice could operate to subordinate the Romspen Mortgage to the interest of Home Depot under the Home Depot Agreement in accordance with the principle in *United Trust, supra*. The issue does not arise in respect of the Ground Lease given the determination above that Romspen did not have actual notice of the Ground Lease at the time of execution of the Romspen Mortgage.

[122] The operation of section 93(3) of the *Land Titles Act* was previously addressed in the Holborn Judgment in the context of a contest between a registered mortgage and another unregistered agreement of purchase and sale. For the reasons set out therein, I concluded that section 93(3) operates to oust the doctrine of actual notice in Ontario in respect of a registered charge notwithstanding the chargee's actual notice of an unregistered agreement of purchase and sale.

[123] Subsection 93(3) specifically addresses the operation of actual notice in the phrase "free from any unregistered interest in the land". In my view, this wording is sufficiently explicit to satisfy the test in *United Trust*. There is nothing in that decision that requires language substantially similar to the wording in the Alberta legislation to exclude the operation of the doctrine of actual notice. I am not persuaded that the conclusion reached in the Holborn Judgment was in error.

[124] I do not think it is necessary to restate the reasons for my conclusion on this issue in this Endorsement. For present purposes, I adopt the reasons in the Holborn Judgment on the

operation of section 93(3), with the exception of the alternative reasons of effective subordination, given the absence of any covenant against registration in the present proceedings. Subject to the qualification that section 93(3) has been read subject to section 155, which deals with the invalidity of the registration of fraudulent instruments and is not at issue in this proceeding, I conclude that section 93(3) provides a mortgagee with an absolute defence to a claim based on actual notice.

[125] I wish, however, to set out several additional observations regarding this issue in response to Home Depot's submissions.

[126] First, in reaching this conclusion, I have also considered the absence of any alternative interpretation of the language of section 93(3). Home Depot's position is that section 93(3) does not operate where a receiver seeks to vest out an equitable interest. It seeks to avoid the priority issue by identifying a different fact situation. It did not, however, provide a meaningful alternative interpretation of section 93(3) that demonstrates a purpose for that provision that does not address the doctrine of actual notice. In the absence of an alternative interpretation of section 93(3), the Court must conclude that the provisions of section 93(3) are directed to the present situation.

[127] In addition, I have the following observations regarding the extent to which the additional decisions cited by Home Depot on this motion can be taken as authority for the proposition that the wording of section 93(3) does not exclude the operation of the doctrine of actual notice.

[128] First, section 93(3) was not cited in the decisions of either the Court of Appeal in *Manias, supra* or Mesbur J. in *Paramount Pictures, supra*. Second, *Manias* addresses an altogether different situation of a contest of priorities among registered charges, where a mistake was made in the order of registration. That issue did not invoke section 93(3). Third, *Paramount Pictures* addresses a contest between a mortgagee and a tenant in which the tenant wished to resile from its lease, rather than a situation in which a mortgagee sought to vest out a tenant's interest. This dispute therefore also does not involve section 93(3).

[129] Fourth, in *Romspen Investment Corporation v. 2126912 Ontario Inc.*, [2010] O.J. No. 639 (Sup. Ct. J.), Tucker J. held that section 93(3) did not apply where a party sought to rely on that provision to take advantage of a registration error in respect of a prior mortgage in order to obtain a better position than had been bargained for. Subsequent to the hearing in the present proceeding, the Court of Appeal upheld this decision in *Romspen Investment Corporation v. 2126912 Ontario Inc.*, [2010] O.J. No. 5404 (C.A.) by way of an appeal book endorsement.

[130] The relevant portion of the appeal book endorsement on the substantive issue reads as follows:

We are satisfied that the application judge's finding that the appellants had actual notice of the intended priority of the Romspen mortgage necessarily included a finding that the Romspen mortgage was an equitable mortgage in respect of the parking lot. That being so, contrary to the analysis in *Holborne [sic] Property v. Romspen* (2008), 77 R.P.R. (4th) 262, the application judge was correct in holding

that section 93(3) of the *Land Titles Act* did not preclude Romspen's equitable mortgage from having priority over the appellants' registered mortgage. (See *United Trust v. Dominion Stores et al.*, [1977] 2 S.C.R. 915 at pp. 956 and 957). To that extent, the appeal must fail.

[131] I do not think the decision in *Romspen Investment Corporation v. Orvitz* applies to the present circumstances for the following reasons.

[132] First, I do not think that the Court of Appeal intended to state, as a general principle, that the doctrine of actual notice continued to operate in all circumstances in Ontario notwithstanding the enactment of section 93(3). The issue of the ambit of section 93(3) was not addressed by Tucker J. The Court of Appeal was also silent on the issue.

[133] Second, as Tucker J. expressly noted at para. 25 of her judgment, the facts in this decision are profoundly different from those in the Holborn Judgment. She noted "[t]his is not a case where priorities are in issue; the second mortgagee always knew it was to be a second". I see nothing in the decisions of Tucker J. or of the Court of Appeal that addresses, let alone excludes, the operation of section 93(3) in substantive priority contests.

[134] Third, as a related matter, it is not necessary to exclude the operation of section 93(3) in order to reach the result ordered in *Orvitz*. It appears that the solicitor's error in *Orvitz* was a failure to include a legal description – that was included in the second mortgage – of a second parcel of land intended to be charged. As Tucker J. recognized in her judgment, *Orvitz* is essentially an unjust enrichment case based on an implied contractual subordination agreement among the parties, rather than a case of actual notice. It would be unconscionable to allow the second mortgage to retain its priority even if, in the first instance, section 93(3) operated. Moreover, the implication from *Manias* is that section 93(3) does not operate in a priority dispute between charges. Essentially, that is the situation in *Orvitz* – a contest between two mortgagees where one mortgagee seeks rectification of his instrument to reflect the intended security as between the mortgagor and mortgagee in circumstances in which rectification would be ordered notwithstanding its impact on the second mortgagee because of the intended priorities as between the two mortgages.

[135] In summary, while I accept that the wording of the endorsement of the Court of Appeal may be read in different ways, I think the intention is clear and the circumstance are entirely different from those in the present case or in the Holborn Judgment.

[136] Based on the foregoing, I conclude that, while Romspen had actual knowledge of the Home Depot Agreement, the Romspen Mortgage ranks prior to the Home Depot Agreement based on the operation of section 93(3) of the *Land Titles Act*.

The Operation of the Doctrine of Actual Notice

[137] In the event that the doctrine of actual notice is held to operate in the present circumstances, however, I also do not think that it would be applied to subordinate the Romspen Mortgage to either the Ground Lease or the Home Depot Agreement.

[138] The Court has previously concluded that Romspen did not have actual knowledge of the Ground Lease at the time that it executed the Romspen Mortgage. This excludes the operation of the doctrine of actual notice in respect of the Ground Lease.

[139] With respect to the Home Depot Agreement, the doctrine of actual notice is an equitable doctrine. Its application is not automatic. If it were held that the doctrine of actual knowledge operated with respect to the Home Depot Agreement, the Court must still consider the equities between the parties.

[140] In this case, in my opinion, the considerations discussed above in the context of Romspen's claim for priority by way of subrogation are equally applicable to the issue of the operation of the doctrine of actual knowledge. On this basis, I would conclude that the equities between the parties did not favour the application of the doctrine of actual notice to subordinate the Romspen Mortgage to the Home Depot Agreement.

Conclusion Regarding Priority of Romspen's Interest in the Property

[141] Based on the foregoing, I conclude that Romspen's interest in the Property under the Romspen Mortgage ranks prior to Home Depot's interests in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Is Romspen's Interest in the Property Subordinated to Home Depot's Interest By Virtue of a Consent?

[142] As a matter of law, if a lease is executed by a mortgagor after the mortgage has been granted, the mortgagee will be bound by the terms of the lease if it is made with his express or implied consent: see *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.* (1998), 41 O.R. (3d) 321 at paras. 54-57 (C.A.). The same principle can operate in respect of an agreement to purchase land.

[143] Romspen's claim for subrogation is based on the prior registration of the earlier Romspen mortgages at the time of execution of the Home Depot Agreement. This claim could, however, be defeated by evidence that it consented to the Home Depot Agreement or the Ground Lease at some point thereafter.

[144] Similarly, Romspen's claim of priority in respect of its interest under the Romspen Mortgage could also be defeated by evidence of such consent at some point after execution and registration of the Romspen Mortgage notwithstanding an initial priority position for the reasons set forth above.

[145] The issue in this section is purely factual — did Romspen consent to the Home Depot Agreement or the Ground Lease? This matter has been addressed above, where I concluded that Home Depot has failed to establish as an undisputed fact that Romspen consented to either the Home Depot Agreement or the Ground Lease such that the Romspen Mortgage is subordinated to either or both of these instruments.

[146] I would add only the observation that the issue of actual notice arises in circumstances such as the present precisely because knowledge does not automatically constitute consent. Accordingly, the significance, if any, of Romspen's knowledge of the existence of the Home Depot Agreement at the time of the Romspen Mortgage is properly addressed, not as a matter of consent, but as a matter of actual notice.

Is Home Depot Entitled to a Lien Against the Property Ranking in Priority to Romspen's Interest by Virtue of the Construction of the Home Depot Store?

[147] Based on the foregoing, Romspen has an interest in the Property that ranks prior to Home Depot's interest under the Home Depot Agreement and the Ground Lease on two grounds: (1) by way of subrogation to the extent of the monies refinanced under the Romspen Mortgage plus interest; and (2) by operation of section 93(3) of the *Land Titles Act* to the extent of all monies secured under the Romspen Mortgage.

[148] In these circumstances, Home Depot claims a lien against the Property under section 37(1) of the CLPA or, alternatively, in equity, in either case in the amount by which the value of the Property has been increased by the construction of the Home Depot store. It should be noted that the claim for lien is asserted against the owner of the Property. To the extent a lien claimant is successful, there is a further issue regarding the priority of any such lien relative to Romspen's interest in the Property. I will first address the validity of Home Depot's lien claims before considering the issue of priority.

The Conveyancing and Law of Property Act

[149] Section 37(1) of the CLPA provides as follows:

Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

Home Depot seeks a lien under this provision in the amount of the value by which the Property has been improved as a result of the construction of the Home Depot store on the Home Depot Lands.

[150] As set out in *McGuire v. Warren* (2006) 46 R.P.R. (4th) 113 at para. 7 (Ont. Sup. Ct. J.) per Wood J., before granting relief under section 37(1) of the CLPA, the Court must apply a three-part test:

... First, it must be satisfied that the person making the improvements genuinely believed that he or she owned the land. Secondly, it must be satisfied that the

improvements made are of a “lasting” nature. Finally, if the first two parts are met, the court must weigh the equities between the owner of the encroached upon lands and the person who has made the improvements, to determine whether it is appropriate to either grant a lien on the lands for the value of the improvements or to transfer the lands to the person who made the improvements for appropriate compensation.

[151] There is no question that Home Depot has made improvements of a lasting value to the Property. The issue is whether Home Depot has satisfied the requirement that it have a sufficient ownership interest in the Property.

[152] The Receiver and Romspen make three submissions with respect to the first part of the test.

[153] Firstly, they refer to para. 12 of *McGuire*, in which Wood J. observed that section 37(1) was enacted at a time when serious inadequacies or deficiencies in conveyancing practice resulted in disputed property boundaries. They argue the present case does not result from such factors, suggesting that the provision is therefore unavailable. However, I do not think that the purpose of section 37(1) is limited to addressing issues arising from historical conveyancing practice.

[154] Second, Romspen argues that demonstration of a genuine belief that the claimant owns the relevant land requires demonstration of not only an honest belief but also a reasonable basis for that belief: *Derro v. Dube*, [1948] O.W.N. 287 at paras. 3-4 (H.C.J.) per McRuer C.J.H.C.; and *Halton Hills (Town) v. Row Estate*, [1993] O.J. No. 1222 (O.C.J. (Gen. Div.)) per MacKenzie J. It argues that Home Depot did not have such a belief at the time it erected its store on the Property.

[155] I do not think it can reasonably be suggested that, as between Home Depot and Woods, Home Depot did not believe that it had an interest in the Property that was sufficient for the purposes of claiming relief under section 37(1). It had spent \$14.5 million in improvements on the Property. The only reasonable inference is that it did so in the belief that, at a minimum, it had a right to remain on the Property for the remainder of the term of the Ground Lease.

[156] Third, Romspen argues that, irrespective of that belief, Home Depot does not have a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37(1). It argues that a purchaser under an unexecuted agreement of purchase and sale, while an equitable owner of the property, does not have a sufficient ownership interest to obtain relief under section 37(1). It relies on *Geldhof v. Bakai* (1982), 139 D.L.R. (3d) 527 at para. 8 (Ont. H.C.J.) per Callaghan J. Insofar as it is suggested that this is a general principle of law, I think it is incorrect notwithstanding that this was the result in *Geldhof v. Bakai*. It is clear that Callaghan J. based his decision on a finding of fact in the particular circumstances of that case, including specific advice that neither plaintiff believed that they would own the land in question until the date of the closing of the agreement of purchase and sale entered into with the defendants.

[157] However, on the facts of the present case, I conclude that Home Depot does not have a sufficient ownership interest under the Home Depot Agreement or the Ground Lease to seek relief under section 37(1) for the following reasons.

[158] As mentioned, at best, Home Depot has an unregistered equitable agreement to purchase the Home Depot Lands. Moreover, that is subject to an important qualification. Section 4.5 of the Home Depot Agreement provides that the Agreement shall only be effective to create an interest in land if the provisions of the *Planning Act* have been complied with. That cannot occur until severance of the Home Depot Lands has occurred. Given the combination of these two factors, I think the Court must conclude that Home Depot does not have a sufficient interest in land under the Home Depot Agreement to assert a claim under section 37(1).

[159] I have some sympathy for the argument that Home Depot's leasehold interest under the Ground Lease, which is effective currently, is a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37. Section 3.3(a) of the Ground Lease contains a covenant for quiet possession from Woods. The Ground Lease has a fixed term of 50 years and rental payments fixed for the entire period. In short, Home Depot has security of tenure as between itself and Woods. Such a long-term lease is often a substitute for ownership of the freehold interest. However, the language of section 37(1) appears to require a belief that the lien claimant is an owner of the relevant property. The Court has not been provided with any case law that supports the proposition that a leasehold interest in a property is a sufficient interest to obtain relief under section 37(1). Moreover, there is some authority to the contrary in *Metzger Estate v. Gardner*, [2000] O.J. No. 2280 (Sup. Ct. J.).

[160] On the basis of the foregoing, I therefore conclude that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA.

Claim for Equitable Lien

[161] As mentioned, in the alternative, Home Depot claims an equitable lien in the Property equal to the amount by which the value of the Property has been enhanced by the construction of the Home Depot store. It relies on a line of cases in which equitable relief has been granted to parties who make improvements to a property at a time when they mistakenly believe they will be able to acquire the property: see, for example, *Montreuil v. Ontario Asphalt Co. and Caldwell Sand and Gravel Co.* (1922), 63 S.C.R. 401 at p. 429 per Anglin J.; *Isabelle v. Lahaie*, [2007] O.J. No. 4981 (Sup. Ct. J); and *Hatoum v. Hatoum*, [1988] O.J. No. 1216 at p. 6-8 (H.C.J.) per Southey J., aff'd [1990] O.J. No. 1669 (C.A.).

[162] I do not think that this principle is limited in operation to circumstances in which a claimant has an honest belief in his or her right to acquire the subject property. It is framed more broadly in *Chalmers v. Pardoe*, [1963] All E.R. 552 (P.C.) as follows:

There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the

owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.

[163] On this issue, the equities clearly favour Home Depot over Woods. There is no apparent equitable consideration in favour of Woods. Home Depot had a right to purchase the Home Depot Lands as well as a leasehold interest under the Ground Lease having a term of at least 21 years. It appears that, at the time that it constructed the Home Depot store, there was no indication of the onset of Woods' financial difficulties, which later prevented completion of the sale transaction. In addition, the Home Depot store was constructed in accordance with arrangements that were specifically agreed to by Woods. Further, Woods did not appear on this motion and does not oppose a lien in favour of Home Depot. The Receiver effectively does not oppose this relief either as it is more concerned with the issue of the priority of such lien relative to the Romspen mortgages.

[164] Based on the breadth of this principle, as well as the equitable considerations set out above, I think Home Depot would satisfy the test for an equitable lien based on its honest belief that, pursuant to the Ground Lease, it had a valid leasehold interest in the Property having a term of at least 21 years.

[165] Accordingly, to the extent that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA, I am of the opinion that it has satisfied the requirements of an equitable lien in the Property against the interest of Woods in the amount by which the value of the Property has been enhanced by the construction of the Home Depot store.

The Priority Issue

[166] The real issue in this proceeding is not, however, whether Home Depot is entitled to a lien against the Property but whether such lien should rank in priority to Romspen's interest under the Romspen Mortgage. This issue appears to be a matter of first impression.

[167] The Receiver and Romspen argue that equity cannot permit the priority of Romspen's interest in the Property to be reversed by equitable lien rights on the principle that, where the equities are equal between competing claims in a property, legal title prevails: see *Toronto-Dominion Bank v. Faulkner* (1990), 74 O.R. (2d) 92 at para. 18 (C.A.). However, this submission begs the question of whether the equities between Home Depot and Romspen are equal.

[168] Home Depot points to a number of factors that it says should be taken into consideration by the Court. Home Depot's principal argument is that, in its view, Romspen allowed the construction of the Home Depot store on the Home Depot Lands and now seeks to take advantage of that improvement without compensation, which it characterizes as a windfall gain. It also argues that the Court should infer Romspen's consent to the construction of the Home Depot store from its execution of the Site Plan Agreement. Lastly, it says that if Romspen is successful, the Home Depot employees will lose their employment.

[169] I have considerable sympathy for Home Depot's position notwithstanding the fact that they have contributed in a significant way to the present situation by deciding not to register the Home Depot Agreement or the Ground Lease. The reality is that, if the order is granted, Romspen will obtain the benefit of an improvement that it did not originally anticipate insofar as the parties did not expect, at the time the Home Depot store was constructed, that Woods would go into default on the Romspen Mortgage prior to completion of the sale of the Home Depot Lands.

[170] However, I have concluded that Romspen's interest in the Property should have priority over Home Depot's equitable lien for the following reasons.

[171] First, the mere fact that Romspen will obtain the value of the Home Depot store is not, by itself, sufficient to determine the issue of the priority of Home Depot's lien. To succeed in this claim, Home Depot must do more than demonstrate that it has improved the Property and that Romspen, as the mortgagee, will benefit if it is denied a prior equitable lien in respect of the improvement. It must establish either a consent of Romspen to the construction of the Home Depot store in circumstances indicating that the issue of priority was understood to be involved or another equitable consideration that justifies imposition of a prior lien in the absence of such consent.

[172] In my opinion, Home Depot has failed to identify any other equitable consideration that justifies imposition of a prior lien in the absence of Romspen's consent to the construction of the store. Home Depot suggests that the Court should consider the possibility that its employees will lose their jobs. This is always an important consideration for courts in a receivership context. However, there is simply no basis in the evidence before me that would support such a conclusion. There are a number of possible outcomes to the present situation depending upon the business decisions of the parties after the release of this Endorsement.

[173] Accordingly, the issue turns on whether Romspen consented to the construction of the Home Depot store on the Home Depot Lands in circumstances that it understood, or should reasonably have understood, that Home Depot would have a prior lien over such Lands to the extent of the value of the improvement. I conclude that Home Depot has failed to demonstrate any such consent of Romspen for the following reasons.

[174] First, there is no evidence that Romspen ever consented directly to the construction of the Home Depot store. There is no evidence that Home Depot ever approached Romspen for such a consent. Nor is there any evidence of any communication between the parties that Romspen should reasonably have considered constituted a request for such a consent or required a response to protect its security position. Accordingly, there is no evidence that supports Home Depot's suggestion that Romspen "allowed" the construction of the Home Depot store in some manner.

[175] Second, it is not suggested that the existence of the Home Depot Agreement implied a consent to the construction of the Home Depot store. Insofar as Home Depot suggests that the execution of the Ground Lease implies such a consent, I reject the submission for two reasons.

Home Depot was not a party to the Ground Lease and gave no assurances in respect of Woods' representations therein. In addition, I have concluded that Home Depot did not have actual knowledge of, and did not consent to, the Ground Lease. There is also no basis for implying consent to the construction of the Home Depot store from Romspen's execution of the Romspen Mortgage.

[176] The issue therefore turns principally on whether Romspen's execution of the Site Plan Agreement somehow changes this result — that is, whether it constitutes consent to the construction of the Home Depot store or evidence of Romspen's consent given elsewhere to such construction. I do not think it does for four reasons.

[177] First, there is nothing in the Site Plan Agreement that constitutes the express or implicit consent of Romspen to the construction of the Home Depot store. There is also nothing in the Site Plan Agreement that expressly contemplated that Home Depot would require or seek Romspen's consent to the construction of the Home Depot store. Romspen was entitled to assume from the absence of any contractual relationship between it and Woods, as well as the limited scope of the Site Plan Agreement, that Home Depot would approach it separately if it required a consent or other protection from Romspen in respect of the construction of the store on the Property.

[178] Moreover, the Site Plan Agreement specifically referred to the earlier Romspen mortgages, which were registered against the Property and which maintained Romspen's control over the Property by the mechanism of Romspen's control over partial discharges of its security. The express subordination set out in the Site Plan Agreement related only to the rights of the Town of Collingwood. While rights of subordination of an interest in the Property are not the same as consent to the construction of the Home Depot store, the absence of any provision in the Site Plan Agreement dealing with Home Depot's rights in respect of the Property in the event of construction of the store is significant. If the Site Plan Agreement had been intended to grant Home Depot rights in respect of Romspen, it had to do so explicitly.

[179] Second, more generally, there is no sense in which it can be said that Home Depot "allowed" the construction of the Home Depot store by executing the Site Plan Agreement. As mentioned, the only purpose of its execution of the Site Plan Agreement was to subordinate its interest in the Property to the interest of the Town of Collingwood. The Site Plan Agreement did not set out a timetable for the construction of the Home Depot store. Romspen could not know of Home Depot's intentions in this regard unless Home Depot chose to advise it. There is no evidence that Home Depot ever communicated its intention to construct the Home Depot store to Romspen.

[180] Third, the circumstances in July 2006 were not such that Romspen's execution of the Site Plan Agreement can be taken as necessarily implying that Romspen turned its mind to the issue of the priority of any lien in favour of Home Depot in the Property that might arise after construction of the store and, by implication, agreed to subordinate Romspen's interest to any such lien. As mentioned above, the Romspen Mortgage was in good standing on July 25, 2006.

There was no reason to expect that Woods would be unable to obtain a partial discharge of the Home Depot Lands, in which case the priority issue would not arise.

[181] Fourth, Home Depot has failed to identify any circumstances at the time of execution of the Site Plan Agreement that would have imposed an obligation on Romspen to take positive action to protect its position even if it suspected from the request to sign the Site Plan Agreement that Home Depot intended to construct the Home Depot store on the Home Depot Lands.

[182] At all times, Home Depot's contractual relationships were restricted to Woods. The only exception was the Romspen acknowledgement, which addressed only the demolition of a portion of the industrial building on the Property. Home Depot was not required to notify Romspen of the commencement of construction of the Home Depot store or to seek its consent to such construction. Conversely, Romspen was not obligated to inquire as to Home Depot's intentions and to advise Home Depot that it did not consent to the construction of the Home Depot store insofar as it would give rise to a lien in priority to the Romspen Mortgage.

[183] Ultimately, Home Depot's position is that Romspen ought to have known from the fact of the demolition of the portion of the industrial building and from the Site Plan Agreement that it was proposing to build the Home Depot store on the Home Depot Lands and that Romspen had an obligation to advise Home Depot that it did not consent to such construction. There is no evidence that Romspen actually knew of Home Depot's intentions prior to commencement of construction beyond knowing that it was possible that Home Depot might construct a store on the Property. I do not think that Romspen could reasonably have known of Home Depot's intention to commence construction immediately from the demolition and the Site Plan Agreement alone. It certainly could not have known that Home Depot intended to commence construction without obtaining any consent or assurance from Romspen to protect its position in the event of realization proceedings by Romspen. In any event, however, neither actual nor constructive knowledge imposed any obligation on Romspen to approach Home Depot to protect its security position in the circumstances of unilateral action by Home Depot. There was no contractual relationship between the parties. There was no prior representation from Romspen to Home Depot. I know of no legal principle that would impose such an obligation in the circumstances of this case in the absence of any express communication from Home Depot to Romspen that could ground a claim based on reliance.

[184] Accordingly, I conclude that the Romspen Mortgage has priority over any equitable lien in favour of Home Depot arising as a result of the construction of the Home Depot store on the Property.

[185] In addition to the equitable considerations addressed above, I would add, if it were necessary to address this issue, that I see no basis for excluding the operation of section 93(3) of the *Land Titles Act* in respect of an equitable lien. There is nothing in the language of section 93(3) that provides that the principles of equity are intended to override the operation of this provision of the *Land Titles Act*. Indeed, an unregistered equitable lien would appear to be the very type of interest to which section 93(3) is directed.

Conclusion Regarding the Equities Between the Parties Relative to the Receiver's Request for an Order Vesting Out the Interest of Home Depot in the Property

[186] The foregoing issues, while they involve a consideration of the equities between the parties in relation to specific issues, are not determinative of the question of whether the Receiver should be granted an order approving the sale of the Property on a basis that vests out the interest of Home Depot. That requires a consideration of the equities between the parties based on the determinations made above and any other applicable considerations.

[187] Based on the foregoing, the Court must consider the equities between the parties in the context of findings that

- (1) Romspen's interest in the Property ranks ahead of that of Home Depot to the extent of the monies secured under the Romspen Mortgage or, alternatively, to the extent of the monies secured under the earlier Romspen mortgages in existence at the date of the Home Depot Agreement, plus interest at the rates provided for under those mortgages;
- (2) Home Depot's equitable lien against the Property arising as a result of the construction of the Home Depot store does not rank prior to the interest of Romspen in the Property; and
- (3) Home Depot is unable to establish as an undisputed fact that Romspen consented to the Home Depot Agreement, the Ground Lease or the construction of the Home Depot store in a manner that was intended to affect its rights in the Property.

[188] I conclude that the Receiver should be granted an order permitting the sale of the Property free of the interest of Home Depot for the following reasons.

[189] The equitable considerations addressed in the context of the determinations of the priorities of the respective interests of Romspen and of Home Depot in the Property are also applicable for the present assessment. In particular, Romspen bargained with Woods for the right to control the discharge of any portion of the Property from its security. Registration of the earlier Romspen mortgages, and of the Romspen Mortgage, was notice to Home Depot of the existence of such right. In addition, Romspen did not in any way provide assurance or comfort to Home Depot with respect to the priority of its interest in the Property or the protection of its interest in the event of realization proceedings.

[190] The only other consideration to be addressed by the Court is, therefore, the value of the Property. As suggested in *1565397 Ontario Inc. (Re)*, [2009] O.J. No. 2596 (Sup. Ct. J.), while a court can sell property free of a contract entered into between a debtor and a third party, the Court cannot do so in circumstances where the effect is to extinguish an interest in property except in limited circumstances. Those circumstances appear to be limited to those in which the third party has no equity in the subject property given the value of the property and prior encumbrances.

[191] While the circumstances in the present proceedings are more complex than other decisions in which this principle has been applied, I think that the facts before the Court establish that there is no equity in Home Depot's interest in the Property.

[192] The Sale Agreement contemplates a sale price of \$14.1 million. This is substantially below the amount secured under the Romspen Mortgage, which is at least \$17,844,975.38 plus interest since February 1, 2010. On this basis, there is no equity value in Home Depot's subordinate interests in the Property. Given the existing priorities, Home Depot's interest would only have value if the Receiver received an offer for the Property that fully satisfied the monies owing to Romspen.

[193] Based on the foregoing analysis of the applicable equitable considerations as between Romspen and Home Depot, I conclude that the equities favour Romspen and, accordingly, that the Receiver is entitled to an order permitting the sale of the Property on a basis that vests out the Home Depot interests in the Property under the Home Depot Agreement and the Ground Lease.

Should the Court Approve the Sale Agreement?

[194] The remaining issue is whether the Court should also approve the Sale Agreement at this time.

[195] As mentioned, the Receiver's report sets out in detail the exposure of the Property to the market. In the usual circumstance, the nature and extent of such activities would be sufficient to satisfy the Court that the proposed sale price for the Property represented the fair market value of the Property.

[196] There are, however, two unusual features of the present circumstances.

[197] First, the Receiver's effort to market the Property took place principally in the first six months of 2009. While there are legitimate reasons for the delay in bringing on this motion, the stock market and residential real estate market have nevertheless improved significantly since then. There is, therefore, a possibility that the real estate market in Collingwood has improved in a like manner since then. The Court must be concerned that the sale price under the Sale Agreement may not represent the current fair market value of the Property.

[198] Second, and more importantly, the Receiver marketed the Property on the basis that a purchaser was bound to sell the Home Depot Lands to Home Depot in accordance with the Home Depot Agreement. It is possible that the Property would be attractive to other potential purchasers as a result of the determination in this Endorsement that the Receiver has the authority to sell the Property free of any claim by Home Depot. This consideration is relevant to the question as to whether the sale price under the Sale Agreement represents the current fair market value of the Property.

[199] Further, the Receiver itself suggests that Home Depot is financially able to acquire the Romspen Mortgage and develop the Property itself if this motion is decided against it and it wishes to avoid the loss of its investment in the Home Depot store. I do not suggest that any

such action is probable. However, it does raise the possibility that, as a result of the determination in this proceeding, Home Depot may itself wish to participate in the sales process in some manner.

[200] Given these circumstances, the Court is of the view that it cannot consider approval of the Sale Agreement until the Receiver has conducted a further sales process in respect of the Property on the basis that a purchaser would be entitled to acquire the Property free and clear of any lien or claim of Home Depot. Rather than address the nature of and length of any such sales process, the Court is of the view that it should leave such details to the Receiver subject, of course, to the Receiver's right to seek the advice and directions of the Court at any time.

Further Order

[201] At the request of the Receiver, an appraisal of the Property obtained by the Receiver from High Point Danbury Realty Advisors Corporation is hereby sealed pending completion of the sale of the Property or further order of this Court.

Costs

[202] If the parties are unable to agree on costs of this motion, they shall have thirty days to make written submissions to the Court through the Commercial List Office, not to exceed seven pages in length.

Wilton-Siegel J.

Date: March 17, 2011

TAB 17

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: In the matter of the Receivership of 1565397 Ontario Inc., a company duly incorporated in Ontario with a head office in the Town of Maple, in the Province of Ontario

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Harvey G. Chaiton*, for A. Farber & Partners Inc., court-appointed Interim Receiver and Receiver and Manager of 1565397 Ontario Inc.

Brandon Jaffe, for John Robert Learmonth

Michael W. Carlson, for Marlucor Investments Inc.

DATE HEARD: March 25 and April 9, 2009

ENDORSEMENT

[1] The court-appointed receiver A. Farber & Partners Inc. (the “applicant” or the “receiver”) of 1565397 Ontario Inc. (“156” or the “debtor”) seeks the approval of the Court by way of advice and directions to disclaim an undertaking dated April 23, 2003 (the “Undertaking”) given on the closing of the purchase of a property by the debtor. For the following reasons, the relief is denied.

Background

Circumstances of Delivery of the Undertaking

[2] By an agreement of purchase and sale dated May 26, 2002 (the “Sale Agreement”), the respondent Marculor Investments Inc. (“Marculor”) agreed to sell a 107 acre parcel of land located in West Gwillimbury (the “Property”) to 2010149 Ontario Inc. (“201”).

[3] Schedule “A” to the Sale Agreement contained the following provisions:

2.(a) The aggregate purchase price for the Property, in the sum of One Million, Twenty-Five Thousand (\$1,025,000.00) Dollars, as set out in this Agreement shall be paid or satisfied as follows: [...]

(b) The parties acknowledge and agree that the purchase price has been determined on the basis of the Property comprising 26 lots according to Draft Plan of Subdivision 43T-93015 (which lays out a total of 28 lots, it being agreed that Lots 14 and 16 on the said plan are not included in this transaction). ...

7. The Vendor covenants and agrees to deliver to the Purchaser on or before closing, the following:

(a) A transfer of the 26 lots comprising the Property in registerable form whereby title thereto in fee simple, subject to the exceptions herein provided, is conveyed to the Purchaser. In the event that the plan of subdivision of the Property is not registered by the closing date, the Purchaser shall hold Lots 14 and 16 on the Draft Plan of Subdivision in trust following closing and shall transfer Lot 14 to the Vendor and/or the Vendor's assigns, and shall transfer Lot 16 to Mr. Learmonth as prescribed in the Draft Plan of Subdivision 43T-93015, on demand without cost upon registration of the plan of subdivision.

[4] At closing, the deed for the Property was delivered to 156 upon the direction of 201. Although it would appear that 201 and 156 were under common ownership, the parties have been unable to locate any formal assignment of the Sale Agreement to 156. Because Marculor did not register a plan of subdivision prior to the closing of the transaction, 156 delivered the Undertaking to the respondents at closing. I have proceeded on the basis that the rights of the respondents are derived from the Undertaking alone and that the respondents are not also alleging that the covenant in section 7(a) of the Sale Agreement is enforceable.

[5] The Undertaking reads as follows:

IN CONSIDERATION of and notwithstanding the closing of the above transaction, the undersigned hereby undertakes as follows:

1. [...]

2. To hold Lots 14 and 16 on the Draft Plan of Subdivision in trust following the closing of this transaction and upon registration of the Plan of Subdivision undertakes to transfer Lot 14 to the Vendor and/or the Vendor's assigns and transfer Lot 16 to Mr. Learmonth as prescribed on the Draft Plan of Subdivision 43T-9315, on demand without cost in accordance with the Agreement of Purchase and Sale dated May 26, 2002, save and except for any Land Transfer Tax or any of the direct costs of the transferees.

[6] Accordingly, pursuant to the Sale Agreement and the Undertaking, the respondent Marculor attempted to reserve Lot 14 for itself and Lot 16 for the respondent John Learmonth ("Learmonth"). Lot 14 is approximately 65 acres in area; Lot 16 is approximately 1.5 acres in area and includes Learmonth's residence.

Subsequent History of the Property

[7] Pursuant to a commitment letter dated May 12, 2006, CareVest Capital Inc. (“CareVest”) loaned approximately \$3.4 million to 156 secured by a mortgage against the Property. CareVest had knowledge of the Undertaking prior to advancing any of these funds to 156. This is reflected in, among other things, letters dated July 29, 2008 to each of the respondents from CareVest’s legal counsel in which the “prior interest” of the respondents in Lots 14 and 16 was recognized notwithstanding the fact that notices of the interests of the respondents pursuant to the Undertaking were not registered on title to the Property until 2008. For the reasons set out below, I think this statement should be understood to mean that the security constituted by the CareVest mortgage does not extend to the respondents’ interests in the Property.

[8] On December 7, 2007, the applicant was appointed by the Court as the receiver of 156 for the purpose of selling the Property by order of this Court (the “Receivership Order”). 156 had not registered a plan of subdivision by that date. The Receivership Order included powers in favour of the receiver to apply for registration of the draft plan of subdivision, to cease to perform any contracts of 156, and to apply for any vesting order necessary to convey the Property to a purchaser free and clear of any liens or encumbrances affecting the Property.

[9] The applicant has satisfied all conditions to registration of the plan of subdivision, apart from entering into an agreement with a telecommunications supplier. The form of this latter agreement has been settled. However, the applicant does not intend to sign the agreement until after the Court has addressed the issue on this application. The applicant does not otherwise foresee any other obstacle to registration of the plan of subdivision and intends to do so after this application is concluded.

Prior History of the Property

[10] In 1989, Learmonth sold the Property to a predecessor in title to Marculor, Charlesmark Investment Corporation (“Charlesmark”), pursuant to an agreement dated April 14, 1989 (the “Charlesmark Sale Agreement”). None of the parties can locate a copy of the Charlesmark Agreement. However, Learmonth’s solicitor registered notice of the Charlesmark Sale Agreement in the land registry office on April 27, 1989. This registration was removed from title, without notice to Learmonth, when the Property was put into the land titles system in 1999.

[11] Charlesmark and Learmonth also entered into an agreement dated April 14, 1989, which contained the following provision (the “Charlesmark Undertaking”):

Charlesmark Investment Corporation shall hereby undertake that upon the final approval of registration of the Plan of Subdivision for the proposed residential development of the Lands to convey to John Robert Learmonth, or his successors of [sic] assigns one (1) lot on the said plan of subdivision containing the existing one and one-half storey aluminium clad farm house and being approximately 1.5 acres in size at no cost to him.

I have proceeded on the basis that the Charlesmark Undertaking has been superceded by the Undertaking and therefore its continuing significance is limited to evidence of Marculor's knowledge of the interest of Learmonth in the Property.

[12] Learmonth and Charlesmark also entered into a lease dated April 14, 1989 by which Learmonth leased the home and 1.5 acre parcel described in the Charlesmark Undertaking on a month-to-month tenancy at a rent of one dollar per month (the "Charlesmark Lease"). The Charlesmark Lease was stated to terminate upon the conveyance of the lot contemplated by the deed pursuant to which Learmonth transferred the Property to Charlesmark.

[13] On October 1, 1993, Charlesmark transferred the Property to Marlucor. Marlucor does not deny knowledge of the Charlesmark Sale Agreement or the Charlesmark Lease.

Issues

[14] The following issues are addressed on this motion:

1. does the Undertaking create a trust in favour of Marculor and Learmonth (collectively, the "respondents")?
2. does the Undertaking grant Marculor and Learmonth an interest in land?
3. does the applicant have the power to disclaim the Undertaking and/or sell the Property free of any interest of the respondents?
4. if the applicant has such power, do the equities favour granting approval to the applicant to disclaim the Undertaking and/or sell the Property free of any interest of the respondents?

Analysis and Conclusions

Does the Undertaking Create a Trust?

[15] The respondents argue that the Sale Agreement, as supplemented by the Undertaking, created a trust of Lots 14 and 16 in favour of the respondents as of the date of closing of the sale of the Property. On this basis, they argue that the interests of the respondents in the Property did not vest in the applicant pursuant to the Receivership Order. I am not satisfied, however, that the Undertaking constituted, or evidenced, the creation of a trust in favour of the respondents as of its date of execution, whether in Lots 14 and 16 or otherwise.

[16] Although courts will enforce a contract for the conveyance of future property by an order for specific performance, a trust of future property cannot be constituted. Lots 14 and 16 do not exist and will only come into existence, if ever, on the registration of the draft plan of subdivision. Accordingly, the Undertaking cannot constitute a trust of Lots 14 and 16 prior to registration of the draft plan of subdivision notwithstanding the language of the Undertaking

which purports to establish a trust of Lots 14 and 16 at the time of its delivery. Instead, I think the proper interpretation of the Undertaking is that 156, as the settlor, has executed a binding declaration of trust in respect of a trust that is only effective as of the date it is “fed” by the coming into existence of Lots 14 and 16.

[17] It is also questionable whether the inchoate property interests of the respondents described below are sufficiently certain as to subject matter to constitute a trust as of the date of execution of the Undertaking. In any event, however, the Undertaking does not evidence an intention to hold in trust an interest in the Property that is other than the fee in Lots 14 and 16.

[18] For the same reason, it is not possible to construe the subject matter of the trust at the present time to be the covenant contained in the Undertaking insofar as it constitutes a declaration of an intention to create a trust. That obligation is expressed in the Undertaking by reference to holding in trust Lots 14 and 16, which do not yet exist, rather than to holding such interests in the Property as arise prior to registration of the draft plan of subdivision and thereafter holding in trust Lots 14 and 16. Therefore, the covenant in the Undertaking does not establish a trust at the present time.

[19] Accordingly, I conclude that the Undertaking does not create a trust of the respondents’ interests in the Property prior to registration of the draft plan of subdivision.

Does the Undertaking Create Interests in Land?

[20] The following features of the Undertaking are relevant for this issue:

1. The Undertaking consists of a unilateral covenant on the part of 156 to hold Lots 14 and 16 in trust “following the closing of [the] transaction” together with a subsidiary covenant to convey the lots to the respondents upon their creation, which covenant would, in any event, be implied as a right of the beneficiaries of the trust;
2. While the Undertaking does not expressly say so, it is also clear that lots 14 and 16 are to be conveyed to the respondents free of any mortgage or lien incurred by 156;
3. The respondents are intended at all times to have interests only in respect of the portions of the Property that are to become Lots 14 and 16, rather than an undivided interest in the entire Property;
4. Insofar as the Undertaking can be construed as evidencing a contractual agreement between the parties respecting the transfer of Lots 14 and 16 to the respondents, the respondents have performed their obligations under such agreement by completing the sale of the Property; and

5. The Undertaking does not provide the respondents with any means of causing registration of the draft plan of subdivision. The conduct of the necessary work for such registration, and the timing of such registration, is left entirely in the discretion of 156.

Analysis and Conclusions

[21] I conclude that the Undertaking creates interests of the respondents in Lots 14 and 16 that are properly characterized as interests in land on the following reasoning.

[22] *Black's Law Dictionary*, 8th ed. (St. Paul, Minn: West Publishing Co., 2004) defines an inchoate interest as “a proprietary interest that has not yet vested.” This appears to capture the nature of the rights granted the respondents under the Undertaking. The Undertaking is an unconditional obligation to vest Lots 14 and 16 in trust upon the occurrence of a specified event. The fact that the lots have not yet been created does not prevent an interest in the Property arising prior to their creation as an “inchoate interest” in land. This conclusion is reinforced by the following considerations.

[23] When considered collectively, the elements of the Undertaking described above indicate an intention to grant rights in the Property effective as of the date of delivery of the Undertaking rather than at a future date. The Undertaking purports, to the extent possible as of its date of delivery, to grant the respondents interests in two particular lots to be excluded from the Property in the future on registration of the draft plan of subdivision. There is no issue regarding the enforceability of the Undertaking as at the date of its delivery. The subject-matter of the Undertaking are rights specifically described by reference to that draft plan of subdivision. The Undertaking has effect unconditionally. Furthermore, the respondents have satisfied their obligations in respect of their interests in Lots 14 and 16 by completing the sale of the Property to 156. There are no further actions on their part required to obtain Lots 14 and 16 when they are created. Similarly, 156 has done all that is necessary to grant an interest in the Property upon the registration of the plan of subdivision by agreeing that it will hold Lots 14 and 16 in trust upon their creation without further action or condition.

[24] The respondent's inchoate interests in the Property have a similarity to an interest in land created pursuant to a restrictive covenant. However, they differ from a restrictive covenant in that the interests exist in an inchoate form until such time as registration occurs at which time they mature to encompass the right to deal with Lots 14 and 16 as the beneficial owners thereof. However, the fact that the respondents do not have the full rights of beneficial owners as of the date of delivery of the Undertaking does not mean that the respondents did not acquire any interests in the Property when the Undertaking was delivered.

[25] I think this conclusion is consistent with the authorities cited to the Court on this motion to the extent they address the issue. The applicant relies principally on four decisions: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818, aff'd *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005 BCCA 154; *Pope & Talbot Ltd. (Re)*, 2008 BCSC 1000, *CareVest Capital Inc. v. CB Development Ltd.*, 2007 BCSC 1146 and *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897. It

argues that the respondents do not have any interest in land because the Undertaking is an executory contract and/or is a contract for the sale of the land for which a court will not grant specific performance. They rely upon the fact that the respondents cannot compel the applicant to register the plan of subdivision because the undertaking does not contain a covenant to register the draft plan of subdivision and that, in any event, a court will not compel a receiver to undertake further work, or to obtain financing, to complete a contract for the sale of land.

[26] These are factually complicated decisions from which, in the case of the *bcIMC* and *CareVest* decisions, it is also difficult to extract the legal basis for the conclusions reached although in each case the practical result is compelling. However, I do not think these decisions are of any assistance in determining whether the respondents have an interest in the Property for four reasons: (1) the decisions do not actually address the issue in the terms suggested by the applicant; (2) there is no reason to conclude that specific performance – the unavailability of which was a significant factor in the decisions – is unavailable to the respondents in this case; (3) the issue of priority relative to secured lenders that is at the heart of the *CareVest* and *bcIMC* decisions does not arise in the present circumstances; and (4) the Undertaking differs from the applicable contracts in *CareVest* and *bcIMC* insofar as the latter are treated as executory. I will address each in turn.

[27] First, as I read these decisions, they do not actually stand for the proposition proposed by the applicant — that a party cannot obtain an interest in a lot in an unregistered plan of subdivision until it is created by registration of the plan because a court will not grant specific performance to require completion of the remaining work required to bring the lot into existence.

[28] In each of *New Skeena* and *Pope & Talbot*, Brenner C.J.S.C. held that the interests involved did not constitute an interest in land for reasons that are of no relevance to the issue in this proceeding. These decisions therefore do not address the issue in this proceeding.

[29] In *CareVest*, Pitfield J. refused to exclude the possibility that the purchasers might have an “unregistered equitable charge against the project” ranking ahead of the second mortgage. His refusal to award specific performance was, therefore, not determinative of the issue of whether the purchasers had an interest in land.

[30] In *bcIMC*, the court gave effect to the express contractual provisions in the purchase agreements that negated any interest in land arising thereunder. Such provisions are common in condominium purchase transactions and reflect at least a reasonable concern that a purchaser would have an interest in land absent such an agreement. In addition, apart from one sentence suggesting that the purchasers had no equitable interest in the projects because they were not yet registered, the court in *bcIMC* avoided the issue by holding, as the principal alternative conclusion, that if the purchasers had an equitable interest in the projects, the receiver had, or should be given, the power to disclaim the purchase contracts. This alternative conclusion was, in turn, based, not on the absence of any equitable interest in the projects, but rather on the absence of any equity in any interests in the property that the purchasers might have pursuant to the contracts. In the case of each of the disclaimed contracts, the purchasers were subordinated to the petitioner mortgagee and had no right of partial discharge of the petitioner’s mortgage. In

these circumstances, there was a basis for a “vesting out” order and no basis for an order for specific performance for the reasons expressed in *CareVest*. A vesting order in these circumstances is not inconsistent with the conclusion in this Endorsement for the reasons set out below.

[31] In summary, therefore, insofar as *CareVest* and *bcIMC* address the issue of the existence of an interest in land, they do not decide the issue by reference to the availability of specific performance. Both these decisions treat the lack of availability of specific performance as a basis for authorizing a receiver to sell the relevant property free of equitable interests asserted by the purchasers rather than as determinative of the validity of the purchasers’ claims. They do not proceed from a determination that specific performance is not available to a determination that the purchaser has no equitable interest. Instead, they proceed on the basis that the lack of availability of specific performance is a basis for ordering a sale of the relevant property free of a purchasers’ claims even if the purchaser may be found to have an equitable interest.

[32] Second, while it is axiomatic that a party can only have an equitable interest in land if a court is prepared to order equitable relief, I am not persuaded that the applicant is correct in its assertion that this principle can be applied to the present circumstances in the manner suggested by it.

[33] I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. However, these circumstances are not present in this proceeding.

[34] The respondents are not bringing a motion for specific performance of the Undertaking as in *CareVest* and *bcIMC*. There is no need to do so. Instead, the receiver has, on its own volition, completed all the necessary work to register the draft plan of subdivision and intends to do so. It has undertaken this course of action based on its own assessment of the best means of maximizing the value of the Property, whether or not Lots 14 and 16 are included. In these circumstances, the issue of the availability of specific performance does not arise. The actions of the receiver in registering the draft plan of subdivision will trigger the Undertaking vesting Lots 14 and 16 in trust.

[35] As a related matter, the applicant’s decision to register the draft plan is a relevant consideration in assessing the equities relative to the receiver’s exercise of any right it might have to “vest out” the respondents’ rights. This is addressed below.

[36] The applicant says that the Court should disregard the fact that it has chosen to undertake this work and consider the issue of the respondents’ interests in the Property as of the date of the appointment of the applicant as the receiver of 156. I think this merely begs the question. The issue of whether the respondents had an interest in the Property would only have been presented at that time if the receiver had proposed selling the Property. This would have required the respondents to bring a motion for specific performance. If, however, it had proposed at that time to register the draft plan of subdivision, I do not see how the circumstances would have been any

different from those presented today. In short, as long as 156 or the applicant was, or is, proposing to register the draft plan of subdivision, the respondents do not need the Court's assistance by way of an order for specific performance to enforce their interests in the Property. Moreover, specific performance will be available upon registration of the draft plan of subdivision, whenever that occurs, to enforce the trust contemplated by the Undertaking. In these circumstances, I think it is unnecessary for the Court to consider the availability of specific performance in the determination of whether the respondents have interests in the Property.

[37] Third, the interests in the Property asserted by the respondents are fundamentally different from the interests in land addressed in *CareVest* and *bcIMC* upon which the applicant relies, except in one respect addressed below that contradicts the applicant's position.

[38] In each case, the court was prepared to consider the possibility that the purchasers had an equitable interest in the properties. However, it was also clear that, in each case, further construction activity was required in order to realize any value in the property which, in turn, required considerable additional financing secured against the entire project including the purchasers' units. The purchasers, therefore, had no equity in their proposed condominium units unless they ranked in priority to the existing mortgage financing on the projects. The court was prepared to consider that possibility in *CareVest*, resulting in an order for sale with a subsequent hearing on the priority issue. It did not consider that to be a possibility in *bcIMC*, resulting in an order for sale based on the absence of any equity of the purchasers in the property.

[39] In the present circumstances, however, the Undertaking provides that the interests of the respondents are carved out of the interest of 156 and are entirely separate. The Sale Agreement expressly provides that the transaction did not include Lots 14 and 16 and that Lots 14 and 16 are not part of the Property to be retained by 156. Accordingly, as mentioned, the Undertaking must be taken to provide that 156 was obligated to discharge any mortgage financing on the Property upon vesting of Lots 14 and 16 in trust. There is no suggestion in the record that either of the mortgagees (including *CareVest*) understood the Undertaking to operate differently vis-à-vis 156. There is, therefore, no priority issue to be determined regarding the respondents' interests in the Property. Nor is there any dispute that there is substantial equity in the respondents' interests in the Property.

[40] Fourth, while it is not express, I agree with the applicant that an important consideration in *bcIMC* and *CareVest* is the fact that the contracts are executory in the sense that each party had obligations that remained to be performed. I would add that it was also the case that, even if the purchasers had performed their obligations under their respective contracts to pay the remaining purchase price, their performance would have been insufficient to fund the construction necessary to bring the condominium units into existence.

[41] By contrast, in the present proceeding, the contract was not executory in that sense. Neither Marculor nor Learmonth was required to perform any further obligations to obtain their interests in Lots 14 and 16. This element is a relevant equitable consideration that is addressed below. However, I also think it distinguishes the cases relied upon by the applicant from the

present circumstances and reinforces the conclusion that the respondents acquired interests in the Property pursuant to the Undertaking.

[42] In summary, therefore, the principles in these decisions do not prevent the Undertaking from creating interests in land in favour of the respondents and, in certain respects, support that conclusion.

Is the Interest in Land Void Under the Planning Act?

[43] The applicant argues that, if the Undertaking creates interests in land, such interests are void under clause 50(3)(b) of the *Planning Act*, R.S.O. 1990, c. P.13 (the “Act”) and are not saved by subsection 50(21) of that Act. These provisions read as follows:

(3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

...

(b) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision; ...

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

[44] Conversely, the respondents submit that the Undertaking does not violate the Act for two reasons: (1) the interests in land conferred thereby are not prohibited by paragraph 50(3)(b); and (2) in any event, any defect under section 50(3) is remedied by section 50(21). I will address each in turn.

Application of Paragraph 50(3)(b)

[45] The applicant says that the Undertaking constitutes an option to purchase land that violates the *Planning Act*. Given the nature of the respondents' interest in Lots 14 and 16, I do not think it is accurate to characterize their interest as an option to purchase. However, whatever the characterization, the case law makes it clear that the prohibition in clause 50(3)(b) does not affect the retention of an interest in land unless that interest confers a right of disposal of the land that is not dependent on the action or inaction of a third party: see *Re Redmond et al. and Rothschild*, [1971] 1 O.R. 436-441 (C.A.) at 441; *Pattison et al. v. Sceviour et al.* (1983), 43 O.R. (2d) 229 (H.C.J.); and *Ratnanather v. Kosalka et al.* (1995), 24 O.R. (3d) 326 (Gen. Div.).

[46] The applicant relies on the decision in *Morgan Trust Co. of Canada v. Falloncrest Financial Corp.* (2006), 218 O.A.C. 71 (C.A.) in which the Court of Appeal held that an option to purchase land violated section 50(3) of the Act. However, in that case, the option could be exercised on the earlier to occur of three events, one of which was the mere expiration of 20 years from the date of the option agreement. Such an option is in clear violation of the Act because the optionee retained an interest in land that could be conveyed, at the latest, at the end of the 20-year period.

[47] In the present circumstances, while the respondents do retain inchoate interests in the Property that are assignable, such interests do not constitute a "fee" in Lots 14 or 16. Until registration of the draft plan of subdivision, the "inchoate" interests of the respondents constitute a lesser interest in land for purposes of section 50(3). Nor do such interests constitute an interest in land abutting the Property. Such a relationship can only arise at the time of creation of Lots 14 and 16. Similarly, the respondents do not have the power to mortgage or dispose of Lots 14 and 16 prior to registration of the draft plan of subdivision. The Undertaking does not permit the respondents to convey Lots 14 and 16 at any time prior to registration. Until that time, the respondents can convey no more than the inchoate interests in such lots described above. Nor, as mentioned, is there a positive obligation on 156 to register the plan of subdivision or any right in favour of the respondents to cause such registration. Therefore, until registration occurs as a result of a decision by 156, which might never happen, the respondents also cannot be said to have retained a "power or right to grant, assign or exercise a power of appointment" in respect of Lots 14 and 16.

[48] The circumstances in the present proceeding are indistinguishable from those in *Marcrob Estates Ltd. v. Servedio* (1976), 1 R.P.R. 344 at 345 (H. Ct.), aff'd (1977), 1 R.P.R. 344 at 352 (C.A.), in which Cromarty J. concluded that the predecessor of subsection 50(3)(b) was not invoked on the following basis:

There is no evidence that Marcrob was the owner of any lands abutting those conveyed to Rosa and Vincenzo Crocitto. If it is the defendants' argument that by putting an option to purchase into the agreement of sale, he was attempting to retain the fee in the "back lands" it appears to me that it conveyed all of its lands subject only to the right to purchase a portion of them if and when the Planning Act was complied with in accordance with the terms of the agreement.

[49] A similar decision was reached in *Ratnanather v. Kosalka*, (1995), 24 O.R. (3d) 326 (Gen. Div.), which applied *Marcrob* and which addressed the application of the predecessor to subsection 50(3)(b) to a transfer of an entire parcel of land under a plan of subdivision for the value of part of the parcel coupled with an option to buy back the unpaid part of the parcel within a fixed period of time. In that case, Langdon J. concluded:

To retain an "interest" in part of the land is not necessarily to retain the fee or the power of disposition. ... *Miller v. Ameri-cana Motel Ltd.*, [1983] 1 S.C.R. 229, 143 D.L.R. (3d) 1, held that the granting of an option vests in the option-holder an equitable interest in the optioned lands. This means that the disposing power is no longer held by the grantor of the option. But does this mean that the opposite is true, i.e., that the power to dispose has been transferred to the option-holder to such an extent that he has the "fee"? The option-holder's interest is assignable. However, before he exercises the option and acquires full legal title he cannot dispose of or mortgage the optioned part. The option-holder has an equitable interest but cannot be said to have the power to dispose of the land. He can block disposal by the title-holder for the life of the option (or 21 years) but, absent approval under the Planning Act, cannot himself dispose of the property. With Planning Act approval, his power to dispose offends no policy.

The definition of "fee" for the purposes of the Planning Act has evolved with a view to a functional, rather than a technical approach, to the Act and to the regulation of specific land transfers: see Sidney Troister, *The Law of Subdivision Control in Ontario*, 2nd ed. (1994). A functional approach examines whether the purposes of the Act have been frustrated by the transaction.

While this transaction was structured to avoid the Planning Act restrictions on the retention of abutting land, it did so by compliance, i.e., by a transfer of the whole. The risk of getting back less than the whole was borne by the contracting party. The Act does not forbid risk-taking. The purpose of the Act is to prevent the subdivision of land without planning approval. No parcel of land was subdivided. The sellers retained an interest in part of the parcel but not one equal to a power to dispose. The option and its exercise would never create more than one parcel if approval were not forthcoming. I conclude that the seller did not retain the fee in abutting lands within the meaning of the Planning Act. This conclusion accords with the result of the decision of the Court of Appeal in *Marcrob*.

[50] I am of the opinion that these principles are equally applicable in the present circumstances.

Application of Section 50(21)

[51] Given the foregoing conclusion, it is unnecessary to consider the further issue of whether, if the Undertaking were characterized as an interest in land to which section 50(3) applied (whether as an option to purchase or otherwise), 50(21) operates to remedy any defect under

section 50(3) given the particular terms of the Undertaking. I am of the opinion, however, that it does so in the unique circumstances of this proceeding on the following reasoning.

[52] At all times, the parties expressly envisaged compliance with the Act in the form of registration of the draft plan of subdivision as a condition of 156's obligation to hold Lots 14 and 16 in trust of the respondents. The Undertaking therefore provides that Lots 14 and 16 will only vest in trust in favour of the respondents in circumstances in which the Act will necessarily have been complied with. Such an interest in land satisfies the objective of the Act of preventing subdivision of land without planning approval. Moreover, the terms of the Undertaking comply substantively with the provisions of section 50(21) if the provision is interpreted to require a conditionality to the arrangements that has the result that the Undertaking is only effective to vest Lots 14 and 16 in trust upon actions of 156 that include compliance with the Act. I am of the opinion that these circumstances are sufficient to satisfy the saving clause in section 50(21).

[53] Such an interpretation is consistent with other decisions on this issue. In particular, in *Ratnanather*, Langdon J. addressed a provision that apparently stated simply that the option to purchase was "subject to severance".

I find no merit whatever in the Kosalkas' argument that the wording of this second option was somehow insufficient to fulfil the requirements of s. 50(21) of the Planning Act in that it did not constitute "an express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with". The purpose of s-s. (21) is to validate and facilitate agreements which otherwise would be made ineffective by the language of the infamous s. 50(3)(b). No precise formula of words is needed to invoke s-s. (21). The expression "severance" meaning a subdivision of a parcel of land authorized under the Planning Act is so common and pervasive in the real estate industry in Ontario as to need no further explanation. The requirements of s-s. (21) would be fulfilled if nothing more had appeared in the agreement than "subject to (a) severance".

[54] The applicant relies on the statement of LaForme J.A. in *Morgan Trust* at para. 20, which could be read to provide that, absent inclusion of explicit reference to compliance with s. 50 in the relevant agreement, no reservation of a right of disposition will be saved by section 50(21). However, as mentioned, the option to purchase in *Morgan Trust* could not be saved under section 50(21) as it did not, by its terms, restrict the exercise of the option to purchase to circumstances in which the Act would necessarily have been complied with. As such, it does not address the specific issue raised in this case. Nor did the relevant agreements in any of the other decisions relied upon by LaForme J.A. in reaching his conclusion: see *Dical Investments Ltd. v. Morrison* (1990), 75 O.R. (2d) 417 at 425 (C.A.); *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427; and *Murray Elias Ltd. v. Walsam Investments Ltd.* [1964] 2 O.R. 381 (H.C.J.), aff'd [1965] 2 O.R. 672 n (C.A.).

[55] The principle articulated in each of *Nepean*, *Dical Investments* and *Morgan Trust* is that an implied covenant to make an agreement for the sale of land effective on compliance with the

Planning Act does not satisfy the requirement in section 50(21) for an express condition. Accepting that this principle remains the law in Ontario, I do not think that it can properly be applied in the present circumstances for the reason that there is no such agreement, as such, to be complied with. Instead, there is a commitment to vest Lots 14 and 16 only upon the occurrence of an event – registration of the draft plan of subdivision – which constitutes compliance with the *Planning Act*. In the present circumstances, inclusion in the Undertaking of a term of the nature contemplated in *Nepean, Dical Investments* and *Morgan Trust* that the vesting in trust of Lots 14 and 16 is only to be effective upon compliance with the *Planning Act* would be unnecessary and any such term would clearly be redundant – the trust can only exist if there has been such compliance.

[56] Accordingly, if it were held that the respondents' interests in the Property were caught by section 50(3), I conclude that they remained enforceable interests in the Property by virtue of section 50(21).

Conclusion

[57] Based on the foregoing, I conclude that the respondents have enforceable interests in the Property pursuant to the Undertaking.

Authority of the Receiver to Disclaim and/or Obtain a Vesting Order in Respect of the Respondents' Interest in the Property

[58] The applicant argues that, even if the respondents have a property interest in the Property pursuant to the Undertaking, the receiver may disclaim the Undertaking and sell the Property free and clear of the respondents' interests. I propose to discuss three elements of this position.

Can the Receiver Disclaim the Undertaking?

[59] The applicant says that it can disclaim the Undertaking even if it creates an interest in land. I understand disclaimer in this sense to be limited to repudiation of the Undertaking leaving the respondents with a right to claim damages for breach of contract against 156 for failure to perform the Undertaking.

[60] I do not think the applicant's position is correct. I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment of an interest in the Property would be the transfer of such interest to 156. Such action amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors of 156.

[61] In addition, as a related matter, insofar as the Undertaking can be construed as an agreement for the sale of land as the applicant suggests, it has been fully performed by the respondents. Any breach, or more properly anticipatory breach by the applicant, at this time, cannot convert an interest in land into an unsecured claim.

[62] Moreover, the case law cited to the Court by the applicant does not support such a right. As mentioned above, the decisions in *New Skeena* and *Pope & Talbot* are not relevant as, in each case, the court held that the relevant parties did not hold an interest in land. In *CareVest*, Pitfield J. proceeded on the basis that it was possible that the strata contract purchasers had an equitable interest in the property and expressly dismissed the receiver's application for the power to disclaim the relevant contracts. In *bcIMC*, the court proceeded on the alternative grounds that (1) the purchasers had no interest in land; and (2) that, if the purchasers had an interest in land, it could be "vested out" based on the absence of any equity in such interest, rather than that the contract could be disclaimed.

Can the Receiver “Vest Out” the Undertaking?

[63] The applicant also argues that the receiver is entitled to “vest out” the interests of the respondents in the Property, by which it means selling the Property free of the interests of the respondents in the Property pursuant to the Undertaking. The applicant makes two alternative submissions regarding a receiver’s power to “vest out” a proprietary interest.

[64] The more aggressive position of the receiver is that the Court can authorize the receiver to sell free of the respondents’ interests in the Property leaving the respondents with an unsecured claim for damages against the Receiver. This is no different from the concept of disclaimer addressed above. For the reasons stated above, I do not accept that the Court or the receiver has such power in respect of an interest in land except perhaps in circumstances in which it is clear that there is no equity in the interest being “vested out”.

[65] The less aggressive position is that the Court has the authority to authorize the receiver to sell the Property free of the respondents’ interests with a subsequent hearing to be held to determine the value of the respondents’ interests. It finds support for such right in the *CareVest* and *bcIMC* decisions. The remainder of this section addresses the authority of the Court to authorize the receiver to “vest out” the respondents’ interests in the Property in this sense.

[66] I would note first that there is a significant difference between the present circumstances and the circumstances in the decisions upon which the applicant relies. The applicant is seeking authority to sell the interests in the Property of both the debtor, in this case 156, and the respondents. It contemplates a subsequent hearing to determine the allocation of the purchase price between the two interests, it being acknowledged that the interests of the respondents have real value. In *CareVest* and *bcIMC*, the receiver sought authority to sell a property free and clear of an equitable right in such property asserted by a third party. The purpose of the subsequent hearing ordered in *CareVest*, and considered in *bcIMC*, was to determine whether such equitable right existed rather than to determine the value of such right, which was either quantified or quantifiable on the sale of the property.

[67] Whether or not the Court has the authority alleged by the applicant generally, I do not think the Court has the authority to order a sale of the respondents’ interests in the Property on the basis proposed by the applicant for the following four reasons.

[68] First, it follows from the conclusion that the Undertaking created property interests in the Property in favour of the respondents, that 156 granted, and therefore no longer retained, such interests. Such interests in the Property reside in the respondents whose property is not subject to the receivership. In this respect, the present circumstances are similar to those in *Re Terastar Realty Corp.* (2005), 16 C.B.R. (5th) 111 (Ont. Sup. Ct.) and analogous to those in *2022177 Ontario Inc. v. Toronto Hanna Properties Limited* (2005), 203 O.A.C. 220 (C.A.) (in which, however, density rights were found not to be proprietary rights). As the receiver of 156, the applicant has taken possession of the property of the debtor only. It cannot have taken possession of, or otherwise have any interest in, the respondents’ interests in the Property, regardless of the terms of the Receivership Order because the Order extends only to the assets of

156. As such, the applicant has no authority under the Receivership Order to sell the interests of the respondents. Nor does the Court have the authority to grant such an order in the absence of the appointment of a receiver over the respondents' property and assets.

[69] Second, this is not a circumstance in which the receiver is seeking approval to sell a mortgagor's equity of redemption on the basis that either there is no equity in the property or that the mortgagor has no ability to service the mortgage. There is no suggestion that the respondents have any obligation to CareVest in respect of the CareVest mortgage. In addition, as mentioned, because the respondents' interests in the Property are separate from the interest of 156 and given the terms of the Undertaking, there is no question that there is value in the interests of the respondents.

[70] Third, as mentioned, the present circumstances differ from those in *bcIMC* and *CareVest* in that the issue is not a priorities dispute between creditors in respect of a quantified, or quantifiable, claim. In these decisions, the court treated the purchasers' interests in the relevant projects as derived from the equity of the project owners and therefore as subordinated to the interests of the mortgagees (subject to the priority issue raised in *CareVest* which is irrelevant for the present proceeding). In addition, the court treated the claims of the purchasers as an equitable charge that could be discharged on sale of the relevant property pursuant to an express or implied power of sale.

[71] It is not possible to treat the respondents' interests in the Property in this manner for four reasons. First, for the reasons stated above, the interests of the respondents exist as of the present time otherwise than by way of an equitable charge against the property of 156 derived from the equity of redemption of 156. Second, it is questionable whether the CareVest mortgage extends to such interests given the intention that Lots 14 and 16 are intended to be conveyed to the respondents upon their creation free of any mortgages or liens incurred by 156. Third, even if it does, CareVest has acknowledged that the respondents' interests in the Property rank in priority to its mortgage. Lastly, the value of the respondents' claims are neither quantified nor quantifiable upon a sale of the Property.

[72] Finally, as a related matter, the absence of any principle or basis for allocating the proceeds of sale of the Property between the interest of 156 and the interests of the respondents reflects the conceptual defect in the applicant's position. Even prior to registration of the draft plan of subdivision, the interests of the respondents in Lots 14 and 16 are entirely separate and distinct from the interest of 156 in the Property.

[73] In reaching the conclusion that the receiver does not have the power to "vest out" the respondents' interests in the Property, I have also concluded, for the reasons set out below, that the four decisions cited above do not support the applicant's position that the Court has the authority to order such a sale.

[74] As mentioned, the decisions of Brenner C.J.S.C. in *New Skeena* and *Pope & Talbot* proceed on the basis that there was no *in rem* or proprietary interest in land involved so the issue did not arise. In fact, the approach of Brenner C.J.S.C. in these decisions implies that he would

have reached a contrary result in each case if he had found that the applicants held an *in rem* or proprietary right, which reinforces the conclusion that a court does not have the authority to authorize a “vesting out” of an interest in land. I do not read the appellate decision in *New Skeena* as proceeding on a different basis because the British Columbia Court of Appeal upheld this determination of Brenner C.J.S.C. before concluding that the vesting order language in the receivership order was sufficient authority in favour of the receiver to allow it to disclaim the relevant contracts. I would add that I do not think that vesting language in a receivership order can, by itself, be determinative. It depends for its effectiveness upon the authority of the court to approve “vesting out” transactions in any particular circumstance.

[75] In *bcIMC*, the principal basis of the decision is that the strata contract purchasers did not have an interest in land by virtue of express contractual provisions. The alternative conclusion that the receiver should be given the power to sell the projects free of the purchasers’ equitable interests under their purchase contracts was based on the absence of any equity in such equitable interests because partial discharges of the relevant lots were not available. While the court also referred to other specific equitable considerations in considering each of the contracts individually, this is the common thread that runs through the decision in respect of each of the purchase contracts. While the Court has the authority to order such a “vesting out” of property interests having no residual equity in order to permit a sale of property subject to security (or, as in *CareVest*, a refinancing of such a property), as mentioned above, these circumstances are not present in this proceeding.

[76] Insofar as *CareVest* may suggest that the purchasers had an interest in land that could be “vested out”, it is clear that the Court did not address the contractual provisions in the strata purchase contracts and did not make an express finding that the purchasers had an interest in land. There are also two features of the property interest asserted by the purchasers in the *CareVest* decision that are not present in this proceeding that have been mentioned above. First, the court treated the purchasers’ potential interest as an equitable charge to secure the excess of the sale price over the contract price. Second, as a related matter, the court proceeded on the basis that a sale of the Property was warranted because there was no remaining equity in the project. In the present circumstances, the interests of the respondents in the Property are separate and distinct from the interest of 156, rather than derived from 156’s equity in the Property in the manner of the strata purchase contracts in *CareVest* and *bcIMC*, and have real value.

[77] For these reasons, I also do not find any of the decisions cited by the applicant to be of any assistance on the authority of the receiver to sell the Property free and clear of the interests of the respondents.

Do the Equities Favour a Disclaiming of the Undertaking and/or Vesting Out of the Property Free of Claims Under the Undertaking?

[78] If I have erred in concluding that the Court does not have the power to authorize the receiver to disclaim the Undertaking and “vest out” the respondents’ interests in the Property granted pursuant to the Undertaking, the receiver is nevertheless subject to the requirement that it

must exercise proper discretion in making a decision to do so. As an officer of the Court, it must have regard to equitable considerations.

[79] In my view, the equitable considerations in this case argue against permitting a receiver to sell the Property free of the respondents' interests in the Property pursuant to the Undertaking. Accordingly, to the extent that the issue in these proceedings turns on whether the Court should exercise its discretion, I would decline to make such an order having regard to the five equitable considerations set out below.

[80] First, the respondents have valuable interests in property, rather than a mere contractual interest that can be terminated in respect of future obligations. As mentioned, the effect of the requested relief would be to transfer the value of the respondents' interests in the Property to 156 for no compensation.

[81] Second, as a related matter and as mentioned above, the respondents have fully performed the obligations that were the pre-condition to the creation of their rights, and given consideration for the Undertaking, by closing the transaction contemplated by the Sale Agreement. This is not an instance of termination of an executory contract in the sense of a contract in which both parties have obligations under the contract that remain to be performed.

[82] Third, unlike the circumstances in *Morgan Trust*, there is no issue of notice of the Undertaking and, therefore, no issue of unjust enrichment. Each of 156 and CareVest has been aware of the Undertaking from the time of their initial involvement with the Property. In particular, CareVest had knowledge of the Undertaking when it made its loans to 156. It therefore knew that compliance with the Undertaking was a cost of any realization proceedings if it concluded that registration of the draft plan of subdivision prior to the sale of the Property would increase its recovery.

[83] Fourth, the fact that there is no goodwill of 156 to preserve is not, by itself, an equitable consideration in favour of "vesting out" the Undertaking given the nature of the respondents' interests in the Property. Similarly, the fact that the receiver will receive no proceeds of sale from Lots 14 and 16 is not a valid consideration given the intention of the parties as set out in the Undertaking and the absence of any further covenant to be performed by the respondents to obtain the benefit of the Undertaking.

[84] Fifth, as mentioned, the applicant intends to register the draft plan of subdivision. There is no question that the intention of the parties was that Lots 14 and 16 were not to be included in the Property ultimately retained by 156 after such registration. Similarly, there is no question that the intention of the parties was that 156 was to convey Lots 14 and 16 to the respondents free of any mortgage or lien securing any obligations of 156, including any financing required to fund the costs of registration of the draft plan of subdivision. There is no basis in the record for a conclusion that either of such features of the Undertaking were to terminate in the event of the insolvency of 156.

[85] More generally, the applicant is, in effect, seeking to have it both ways. It has chosen to complete the action triggering the Undertaking but claims an entitlement to disclaim its

obligation to do so. In the present circumstances, in which the receiver intends to register the plan of subdivision, the remedy of specific performance would, therefore, absent special circumstances, be available to the respondents if the receiver does not also honour the Undertaking. The receiver can only seek the power to disclaim the Undertaking in such circumstances if it can demonstrate that the respondents' interests in the Property have no value. It cannot do so.

Conclusion

[86] Based on the foregoing, the applicant's requested declaration that it is entitled to disclaim the Undertaking and sell the Property free of the interests of the respondents therein pursuant to the Undertaking is denied.

[87] The parties are at liberty to schedule a hearing on the remainder of the application at a 9:30 a.m. conference to be scheduled by counsel.

Costs

[88] 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 party's submission 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.

DATE: June 23, 2009

H.J. Wilton-Siegel J.

TAB 18

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Thiyagarajah v. Mattamy Homes](#) | 2018 ONSC 5089, 2018 CarswellOnt 14790, 296 A.C.W.S. (3d) 420 | (Ont. S.C.J., Sep 4, 2018)

2000 CarswellOnt 3990
Ontario Superior Court of Justice

McGrath v. B.G. Schickedanz Homes Inc.

2000 CarswellOnt 3990, [2000] O.J. No. 4161, 100 A.C.W.S. (3d) 918, 11 C.P.C. (5th) 235, 56 O.R. (3d) 34

Dorita McGrath, Plaintiff and B.G. Schickedanz Homes Inc., Defendant

Cameron J.

Heard: September 14, 2000

Judgment: October 18, 2000

Docket: 00-CV-195227

Counsel: *Thomas W. Ward*, for Plaintiff.

Jarvis K. Postnikoff, for Defendant.

Subject: Civil Practice and Procedure; Property; Contracts

Related Abridgment Classifications

Real property

II Registration of real property

II.5 Certificate of pending litigation (lis pendens)

II.5.f Vacating certificate

II.5.f.iv Specific performance not available

Real property

II Registration of real property

II.5 Certificate of pending litigation (lis pendens)

II.5.f Vacating certificate

II.5.f.vi Miscellaneous

Headnote

Real property --- Certificate of pending litigation (lis pendens) — Vacating the certificate — Specific performance not available
Purchaser agreed to purchase from vendor condominium unit under construction — Clause 17 of agreement provided for postponement of any claim by purchaser to mortgages and access agreements arranged by vendor — Amendments were made for modifications to unit, including additional bathroom — Purchaser installed skylights — Vendor failed to give purchaser occupancy on designated date, and parties signed amendment by which vendor agreed to pay purchaser \$100 per day from newly determined date until unit was available for possession — Installation of skylights was determined to be contrary to building code — Vendor demanded payment from purchaser to restore unit to original condition — Vendor terminated agreement with purchaser by reason of purchaser's default in installing skylights and plumbing for additional bathroom — Purchaser brought action for specific performance and damages — Purchaser successfully brought ex parte motion for certificate of pending litigation ("CPL") — Vendor brought motion for discharge of CPL — Motion dismissed — Purchaser purchased unit for purpose of residing in it and made substantial investment in modifications which could have made property unique to purchaser — Alternative claim for damages did not mean that purchaser should be deprived of specific performance if she was so entitled — In view of purchaser's right to payment until possession, she may have had legitimate claim for damages in addition to specific

performance — Vendor's legitimate interests would likely be protected by clause 17 of agreement — Purchaser's rights to unit pending resolution of action would be protected by CPL.

Real property --- Certificate of pending litigation (lis pendens) — Vacating the certificate — General

Purchaser agreed to purchase from vendor condominium unit under construction — Amendment provided for additional bathroom — Other unsigned amendments were made for gas fireplaces and central vacuuming — Purchaser installed skylights — Installation of skylights was contrary to building code — Vendor demanded payment from purchaser to restore unit to original condition — Vendor terminated agreement with purchaser by reason of purchaser's default in installing skylights and plumbing for additional bathroom — Purchaser brought action for specific performance and damages — Purchaser successfully brought ex parte motion for certificate of pending litigation ("CPL") — Vendor brought motion to set aside ex parte order granting CPL — Motion dismissed — No material evidence was withheld by purchaser, and if it was, such failure was not made with intention of misleading court — Sufficient disclosure was given on ex parte motion — Evidence of uniqueness of unit existed — Evidence in purchaser's original affidavit in support of ex parte motion established that unit would be different from 51 other units in project and that those differences were obtained by purchaser — In view of consent given to purchaser by vendor for alterations, and absence of written agreement to other agreed amendments, parties embarked on course of action where signed written amendments were not necessary.

Table of Authorities

Cases considered by *Cameron J.*:

Allan Candy Ltd. v. CIBC Mortgage Corp., 1994 CarswellOnt 3634 (Ont. Gen. Div.) — applied

Greenbaum v. 619908 Ontario Ltd. (1986), 11 C.P.C. (2d) 26 (Ont. H.C.) — applied

Konjevic v. Horvat Properties Ltd. (1998), 112 O.A.C. 269, 19 R.P.R. (3d) 24, 40 O.R. (3d) 633, 22 C.P.C. (4th) 230 (Ont. C.A.) — applied

Reznik v. Coolmur Properties Ltd. (1982), 25 R.P.R. 43 (Ont. H.C.) — considered

Semelhago v. Paramadevan, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — applied

Swallow v. Midlands Corp. (1993), 14 O.R. (3d) 687 (Ont. Master) — applied

Tropiano v. Stonevalley Estates Inc. (1997), 36 O.R. (3d) 92 (Ont. Gen. Div.) — distinguished

572383 Ontario Inc. v. Dhunna (1987), 24 C.P.C. (2d) 287 (Ont. Master) — applied

830356 Ontario Inc. v. 156170 Canada Ltd. (March 14, 1995), Doc. 89556/95 (Ont. Gen. Div.) — applied

904060 Ontario Ltd. v. 529566 Ontario Ltd., 89 O.T.C. 112, 1999 CarswellOnt 378 (Ont. Gen. Div.) — applied

1072456 Ontario Ltd. v. Ernst & Young Inc. (1997), 10 C.P.C. (4th) 351, 31 O.T.C. 176 (Ont. Master) — applied

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 103 — referred to

s. 103(1) — referred to

s. 103(6) — referred to

Planning Act, R.S.O. 1990, c. P.13

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 4.06(2) — referred to

R. 25.11 — referred to

R. 37.14(1)(a) — referred to

R. 39.01(4) — referred to

R. 39.01(6) — referred to

R. 42.02 — referred to

MOTION by vendor of condominium unit to set aside order granting certificate of pending litigation on behalf of purchaser; MOTION by vendor for discharge of certificate of pending litigation.

Cameron J.:

Motions

1 These are motions by the defendant B.G. Schickedanz Homes Inc. ("Schickedanz") to:

(a) Set aside under Rules 37.14(1)(a) and 39.01(6) the *ex parte* order by Mr. Justice Nordheimer on August 9, 2000 granting a certificate of pending litigation ("CPL") against a condominium unit in a project under construction (the "Unit") which the plaintiff had agreed to purchase, on the grounds:

- (i) The plaintiff ("Ms. McGrath") failed to make full and fair disclosure of all material facts in her affidavit dated August 4, 2000 filed in support of her *ex parte* motion ("the Original Affidavit");
- (ii) Certain paragraphs in the Original Affidavit contain hearsay which is not admissible under Rules 4.06(2) and 39.01(4), unqualified opinions and reference to settlement discussions; and
- (iii) Absence of evidence of uniqueness of the Unit.

(b) Discharge the CPL under s.103(6) of the *Courts of Justice Act* and Rule 42.02 on the grounds:

- (i) Inadmissible evidence was used to obtain the *ex parte* CPL;
- (ii) Ms. McGrath claimed damages as an alternative to an interest in land;
- (iii) The agreement of purchase and sale between Ms. McGrath and Schickedanz respecting the Unit (the "Agreement") contains a covenant by Ms. McGrath not to register the CPL; and
- (iv) The Unit is not sufficiently unique to support a claim for specific performance.

(c) Strike out under Rule 25.11 paragraphs in the Original Affidavit which:

- (i) Contain hearsay and do not comply with Rules 4.06(2) and 39.01(4);
- (ii) Disclose settlement discussions; and
- (iii) Constitute unqualified opinions.

Facts

2 Under the Agreement, dated February 14, 1999, Ms. McGrath agreed to purchase, and Schickedanz agreed to sell, the Unit, then under construction, for \$160,000. The Unit was an architect designed 1400 square foot two-storey apartment with a loft built on top of two bungalow units, one of fifty-two similar units in a project of two hundred and eight units in the former City of York in northwest Toronto. The purchase price included a parking space in an underground garage. An amendment, made on signing the Agreement, provided for an additional four-piece bathroom and an additional closet in the master bedroom and deletion of a walk-in closet.

3 The Agreement provided for deposits totalling \$8,000 by May 12, 2000, with \$500 allocable to the parking space.

4 Under the Agreement, the rescission date was March 2, 1999 and the purchase and sale was to close November 30, 1999.

5 An amendment to the Agreement dated August 6, 1999 provided for a second parking space and a further non-refundable deposit of \$8,000. The copy attached to the Original Affidavit was signed by Ms. McGrath but not by Schickedanz. The copy in Schickedanz's motion record was signed by Schickedanz.

6 An amendment dated October 10, 1999, and apparently amended by Ms. McGrath on January 6, 2000, unsigned by Schickedanz, provided for a central vacuum (\$401.25), gas supply for two future fireplaces (\$299.60) and extension of drain and water lines to the loft for future three-piece bathroom (\$695.00). These items were installed although the January 6 amendment appears to have deleted the gas supply lines.

7 The Original Affidavit refers to payment of \$6,000 for two gas fireplaces but there is no amendment referring to them. Mr. Fernandes acknowledged they were installed. I note this admission notwithstanding deletion of the gas supply on January 6, 2000.

8 The Original Affidavit of Ms. McGrath supporting her *ex parte* motion to obtain a CPL exhibited the Agreement but not the 65 pages of Disclosure Statement and Condominium By-Laws, Rules, Management Agreement, Budget Statements, and Declaration ("Condominium Documents") referred to in the Agreement which showed the Declarant to be B.G. Schickedanz Central Inc. ("Central").

9 Closing of the purchase and sale was conditional on registration of the Condominium Documents and compliance with the *Planning Act*.

10 Ms. McGrath was obliged to take possession of the Unit on substantial completion of the Unit and pay an occupancy fee until closing, which would follow registration of the Condominium Documents.

11 Clause 16 of the Agreement provided:

No Registration

16. The Purchaser covenants and agrees not to register this Agreement or any certificate or notice of this Agreement or a caution or any other document evidencing this Agreement against title to the Dwelling Unit or Parking Unit(s) without having first obtained the written consent of the Vendor to such registration, which consent may be arbitrarily and unreasonably withheld. In addition, the Purchaser further covenants and agrees not to give, register, or permit to be registered any encumbrance against the Dwelling Unit and/or Parking Unit(s), and the Purchaser covenants and agrees not to list for sale, advertise for sale, entertain any offers to sell, nor assign his interest under this Agreement, or in the Dwelling Unit and/or the Parking Unit(s) nor directly or indirectly permit any third party to list or advertise the Dwelling Unit and/or Parking Unit(s) for sale at any time until after their respective Title Closings have taken place, without the written consent of the Vendor, which consent may be arbitrarily and unreasonably withheld. Should the Purchaser be in default of his obligations under this paragraph, the Vendor may as agent and Attorney of the Purchaser, cause the removal of notice of this Agreement, caution or other document evidencing this Agreement, from title to the Dwelling Unit and/or Parking Unit(s). The Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor as his agent and attorney in fact and in law to cause the removal of notice of this Agreement, any caution, or any other document whatsoever from title to either or both the Dwelling Unit and Parking Unit(s).

12 Clause 17 of the Agreement contained an agreement by the purchaser that:

This Agreement (and all of the purchaser's rights hereunder and all monies paid hereunder) is subordinate to and postponed to any mortgages arranged by the Vendor, and any advances thereunder . . . and to any easement . . . to provide services and access to the relevant Condominium, and to any lands or property adjacent thereto and owned by the Vendor . . . Purchaser hereby irrevocably . . . appoints the Vendor as his agent and attorney . . . to execute any consent or other documents required by the Vendor to give effect to this paragraph.

13 In paragraph 13 of the Agreement Ms. McGrath, as purchaser of the Unit, agreed to comply with the provisions of the proposed Condominium Documents, including the Declaration, following the scheduled Occupancy Closing.

14 Occupancy was never called for by Schickedanz and never occurred before Schickedanz terminated the Agreement.

15 The 65 pages of unindexed Condominium Documents require approval by the board of directors to changes in the common elements. However the Condominium Documents do not take effect until their registration on title.

16 On June 15 or 16, 2000, Mr. Fernandes told Ms. McGrath that all amendments to the Agreement must be approved by him and that no one else could approve amendments on behalf of Schickedanz.

17 Schickedanz has no employees and there is no evidence of its assets or other businesses besides selling condominium units for Central.

18 A Schedule to the Agreement of Standard Features in the units in the project contains warranties on structure, workmanship and materials, apparently in accordance with the Ontario New Home Warranties Programme ("ONHWP") and provides that enrollment in ONHWP is paid for by the purchaser on closing.

The Skylights

19 Ms. McGrath was told that skylights were an available extra or upgrade "where possible".

20 On April 15, 2000 Mr. Dan Farrell, Customer Service Manager of Schickedanz who also does site construction superintendence, was told by Ms. McGrath that she was purchasing skylights from an independent supplier to install in the Unit. Ms. McGrath says she obtained Mr. Farrell's oral permission to install the skylights. Mr. Farrell denies giving such permission. When the skylights were available, Ms. McGrath says she obtained Mr. Farrell's oral approval again to install the skylights and her contractor installed them. Another employee of Schickedanz, Mr. Buck, was advised by Mr. Farrell that he had Mr. Farrell's permission to install the skylights. Mr. Farrell never objected to the installation of the skylights and never advised Ms. McGrath that he did not have the authority to grant permission. Indeed, Schickedanz's sales office clerk advised Ms. McGrath to speak to Mr. Farrell for such consent. The skylights were installed on April 26, 2000. On June 15, 2000 Mr. Fernandes acknowledged their installation and advised Ms. McGrath that approvals for changes must be obtained from him.

21 I am satisfied that Schickedanz agreed to the installation of the skylights and held Mr. Farrell out as authorized to give such consent.

The Loft Bathroom

22 On October 10, 1999 Ms. McGrath signed an amendment to the Agreement respecting certain additional modifications noted above. These proposed modifications included extension of water supply and drainpipes to the loft for a future three-piece washroom in the loft. The document recited that \$1,396.35 was paid with the amendment. The amendment was not signed by Schickedanz. Mr. McGrath's cheque dated October 10, 1999 for \$1,396.35 accompanied the proposed amendment. Mr. Farrell mistakenly thought Schickedanz had agreed to the washroom and instructed Schickedanz's contractor to effect the changes covered by the "amendment", including the necessary water and drainpipe extensions for the loft bathroom. Schickedanz's workforce subsequently lifted a corner tub into the loft. Ms. McGrath says Mr. Fernandes was aware of piping extension and installation of the tub and did not object. Mr. Fernandes denies any such knowledge or consent. The cheque has not cleared Mr. McGrath's account, which Ms. McGrath did not mention in her Original Affidavit. There is no suggestion Schickedanz presented the cheque for payment.

Fireplaces

23 Schickedanz orally agreed to install two gas fireplaces, in addition to the gas lines for them covered by the unsigned "amendment". Mr. Fernandes says Ms. McGrath paid \$6,000 for the fireplaces but still owes \$1,340 for some related extras.

Occupancy Date

24 The original occupancy date was clearly extended to May 26, 2000 but the amendment to the Agreement effecting the change was not in evidence. Schickedanz failed to give Ms. McGrath occupancy on May 26, 2000. At a meeting on June 16, 2000 the parties signed an amendment to the Agreement extending the Occupancy Date to June 28, 2000. Under the amendment Schickedanz agreed to pay Ms. McGrath \$100 per day from June 16, 2000 until the Unit was available for possession.

Order to Comply and Termination

25 The installation of the skylights was contrary to the Ontario Building Code. The City of Toronto issued to Central an Order to Comply dated June 20, 2000 in respect of the skylights and the loft bathroom.

26 On June 21, 2000 Schickedanz demanded payment from Ms. McGrath of \$5,340 to restore the Unit to its original condition and remove the Order to Comply by July 5, 2000.

27 On July 6, 2000 Schickedanz declared the Agreement terminated by reason of Ms. McGrath's default in installing the skylights and the loft plumbing and tub.

28 On July 7, 2000 Ms. McGrath replied denying the Agreement could be terminated and asserting that the City would approve the skylights. Schickedanz's architect filed new plans permitting the City of Toronto to revoke the Order to Comply respecting the skylights. A building permit for the skylights will be issued on the architect affixing his stamp to the drawings filed with the application for the building permit.

29 Schickedanz blocked in the loft piping. The Order to Comply was withdrawn.

30 Following settlement attempts, on August 2, 2000 Schickedanz reaffirmed its position that the Agreement was terminated and advised Ms. McGrath that it would treat Ms. McGrath's deposit as forfeited, attempt to resell the Unit and claim damages. Schickedanz demanded removal of the loft tub.

31 Ms. McGrath responded with this action and the *ex parte* motion for the CPL. In the action she claims specific performance, damages and a CPL.

32 Virtually all the units in the development have been sold but there is at least one unit of the same model now for sale.

Analysis

CPL

33 Section 103 of the *CJA* provides:

(1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and [registered on title]

(6) The court may make an order discharging a certificate;

(a) Where the party at whose instance it was issued,

(i) Claims a sum of money in place of or as an alternative to the interest in the land claimed;

(ii) Does not have a reasonable claim to the interest in the land claimed; or

(iii) Does not prosecute the proceeding with reasonable diligence;

(b) Where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) On any other grounds that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

A CPL is an injunction preventing an owner from dealing with the land pending the determination of the claims of the plaintiff: See *Allan Candy Ltd. v. CIBC Mortgage Corp.*, [1994] O.J. No. 1300 (Ont. Gen. Div.) per Crane J.

Motion to set Aside

Disclosure Requirements

34 *Ex parte* motions are a very serious matter. They can have a devastating effect on an absent responding party. The court relies upon the applicant for full and frank disclosure of all the relevant facts in the supporting affidavit material as required by Rule 39.01(6). There is a heavy onus on counsel to make sure all the relevant facts are before the court: See *830356 Ontario Inc. v. 156170 Canada Ltd.* (March 14, 1995), Doc. 89556/95 (Ont. Gen. Div.) per Chadwick J. Great injustice may be done if the requirement of honesty and candour is not strictly enforced: See *Swallow v. Midlands Corp.* (1993), 14 O.R. (3d) 687 (Ont. Master) per Master Peppiat at p. 694.

35 The Agreement was an exhibit to Ms. McGrath's Original Affidavit but the affidavit failed to refer to paragraph 16 in the Agreement headed in capital letters "No Registration" contained in the 11-page Agreement, to which were attached schedules respecting Standard Features, floor plans and locations and amendments.

36 A judge of this court preparing for a motion brought *ex parte* cannot be expected to read and analyze long and complex agreements and lengthy correspondence searching out positions which might be taken by the absent party. Judges do feel compelled to prepare an *ex parte* matter with particular care, to the extent time permits, in an effort to prevent abuse of the absent party's rights. The urgency of some matters often prevents preparation with the care the situation may require. The judge will question counsel on matters which, in the judge's limited perception of the matter, require further clarification to ensure the applicant is acting *bona fide* and to prevent abuse of the absent party's rights. However in the final analysis it is the responsibility of the party seeking the extraordinary relief to ensure that the rights of the absent party are fairly addressed by ensuring full and frank disclosure of the principal issues and the material facts respecting them.

37 In this case I am satisfied from the endorsement of Mr. Justice Nordheimer that counsel fulfilled his duty to the court to address the issue of paragraph 16 of the Agreement and to raise the defendant's allegations of termination of the Agreement by reason of the plaintiff's alleged breaches of the Agreement.

Lack of Evidence of Uniqueness

38 Schickedanz complains that Ms. McGrath's affidavit failed to provide any evidence as to the unique character of the Unit and that Mr. Justice Nordheimer was wrong to assume that merely because an interest in land was claimed by a purchaser under an agreement that a CPL should be granted. The defendant argued that the entitlement to specific performance is an important element in determining the entitlement to a CPL: *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (Ont. Master) per Master Donkin. The defendant further argues that specific performance is not granted as a matter of course, and damages will not be considered an inadequate remedy, unless the real property which is the subject of the proceeding can be shown to be unique. In these days of the mass production of apartments of similar design in large buildings and houses of similar design in large subdivisions, a single unit or house among many of the same design cannot be said to have a peculiar or special value or to be irreplaceable: See *Semelhago v. Paramadevan* (1996), 136 D.L.R. (4th) 1 (S.C.C.); *Konjevic v. Horvat Properties Ltd.* (1998), 40 O.R. (3d) 633 (Ont. C.A.).

39 However the historical remedy of specific performance for loss of a bargain to purchase real property has not been negated. I agree with the statement by Low J. in *904060 Ontario Ltd. v. 529566 Ontario Ltd.*, [1999] O.J. No. 355 (Ont. Gen. Div.) at para 14:

The presumption of uniqueness has not yet been replaced by a presumption of replaceability, and that what the Supreme Court did in *Semelhago* was to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser.

40 In the context of the requirement for disclosure on an *ex parte* motion, the applicant for a CPL must give some evidence of uniqueness to support a claim for specific performance. This information is material to the issue of entitlement to a CPL.

41 The Unit was not comparable to the purchase of the custom-built house on a ravine lot considered in *Tropiano v. Stonevalley Estates Inc.* (1997), 36 O.R. (3d) 92 (Ont. Gen. Div.) nor land purchased for expansion of the use of the purchaser's adjoining property considered in *1072456 Ontario Ltd. v. Ernst & Young Inc.* (1997), 10 C.P.C. (4th) 351 (Ont. Master), per Master Clark.

42 Ms. McGrath did give some evidence of uniqueness in paragraph 5 of her Original Affidavit:

. . . I have made changes to the property, including the installation of two skylights . . . and I have also installed wiring for a stereo system throughout the property.

43 The signed amendments attached to the Agreement exhibited to the Original Affidavit refer to removal of a walk-in closet in the master bedroom and installation of a smaller closet and a four-piece bathroom en suite.

44 The Original Affidavit refers to written amendments, not signed by Schickedanz, to have the defendant rough-in a central vacuum system, provision for a rough-in of gas pipes for future fireplaces, provision of piping for a loft bathroom and a tub in that bathroom. The latter two items were implemented by Schickedanz's workforce.

45 There was some evidence in the Original Affidavit which established that the Unit would be different from the 51 other units of a similar basic design in the Project and that these differences were obtained by Ms. McGrath. Accordingly there was evidence of uniqueness.

Improper Evidence

46 Schickedanz complains that Ms. McGrath's Original Affidavit is based on unqualified opinions and hearsay, contrary to Rules 4.06(2) and 39.01(4) and asks that this court expunge paragraphs 8, 12, 13, 14, 16, 17 and 18 of the Original Affidavit.

47 Any defects in paragraph 8 are not apparent and were not referred to in argument.

48 Schickedanz complains that Ms. McGrath's Original Affidavit improperly disclosed settlement discussions in paragraphs 12, 13 and 14. I have not been persuaded of any detriment to Schickedanz because of the disclosure. On the contrary, paragraph 12 and part of paragraph 13 put squarely before Mr. Justice Nordheimer the positions of the parties in this dispute and the need for urgency in obtaining the CPL. I would expunge paragraph 14 as being part of the "without prejudice" negotiation.

49 Schickedanz complains of Ms. McGrath's "opinion" in paragraph 16 respecting her interpretation of clause 16 of the Agreement. It is clear that Ms. McGrath is not an expert in interpreting contracts. No judge would be misled by this "opinion". I regard it as a statement of how she, as a party to the Agreement, understood the clause. It certainly brings to the court's attention on an *ex parte* motion an issue on which Schickedanz may rely in defending the plaintiff's claim and it is clearly relevant and material to the issue of Ms. McGrath's entitlement to a CPL.

50 Schickedanz complains that Ms. McGrath's Original Affidavit gave double hearsay evidence in paragraph 17 respecting Schickedanz's financial status which she obtained from her husband without giving the source of his information. I would delete the first sentence of paragraph 17. The balance of the paragraph is a statement of her concern that a judgment for damages may

not be collectable. In as much as the Declarant, Central, is a different entity from Schickedanz, and there is no obligation to hold the deposit in trust pending closing, I find some evidence to support this concern.

51 Schickedanz complains that Ms. McGrath offered opinions which she was not qualified to render. In paragraph 18 Ms. McGrath speculated that the market value of the Unit had increased and that she expected that any claim for damages may not be collectable. It was clear from the Original Affidavit that Ms. McGrath was a secretary and not a qualified appraiser. No judge reading the affidavit would have been misled by this assertion. The statement of expectation is a fact and also a possibility. I decline to expunge it.

52 Schickedanz complains that despite knowing the names of Schickedanz's employees in the sales office and at the site, Ms. McGrath failed to give their names in her Original Affidavit. I agree that such particulars are desirable. They add credibility to the affidavit. However they are not material and their absence did not prejudice Schickedanz.

53 Schickedanz complains that Ms. McGrath's Original Affidavit failed to point out that under Schickedanz's published list of available extras attached to the Agreement skylights could only be installed "where possible" and Ms. McGrath offered no evidence to support the conclusion that their installation was possible. In the absence of the meaning of "where possible" and considering Mr. Farrell's oral agreement and the subsequent City of Toronto building permit allowing the skylights, I consider the omitted facts immaterial.

54 Schickedanz complains that Ms. McGrath's Original Affidavit referred to amendments to the Agreement which had not been signed by Schickedanz. The signed copy of the amendment respecting the second parking space in Mr. Fernandes' affidavit on this motion suggests Ms. McGrath did not always receive copies of amendments signed by Schickedanz. In view of Mr. Farrell's oral consent to the skylights, Mr. Fernandes' acknowledgment that Schickedanz's trades installed the tub and the absence of evidence of written agreement to other agreed amendments such as the gas fireplaces, the parties had clearly embarked on a course of action where signed written amendments were not necessary. Schickedanz was lax in enforcing the requirement for signed written amendments. It cannot now require, in the context of this motion, that the absence of signed written amendments be disclosed.

55 Schickedanz complains that Ms. McGrath's Original Affidavit failed to disclose that certain payments for extras had not been made. These issues would be relevant to the issues of termination and damages but was not material to the issue of entitlement to a CPL. Mr. Justice Nordheimer clearly appreciated Schickedanz's position that breach of the contract by Ms. McGrath justified termination by Schickedanz.

56 Schickedanz complains that the name of the Owner of the project, Central, was not disclosed. The name of the vendor, Schickedanz, was disclosed. I am not persuaded that the name of the true owner is material to obtaining a CPL. Schickedanz held itself out as having the authority of the owner to sell. The names of Schickedanz and the owner, Central, are so similar as to be evidence that Schickedanz was for all purposes of the sale the agent of Central and Central is bound by the Agreement made by its agent.

57 Schickedanz complains that Ms. McGrath failed to disclose in the Original Affidavit that her husband's cheque for \$1,396.35 dated October 10, 1999, in respect of extras in a signed amendment of that date, had not cleared her husband's account. This issue is irrelevant to a CPL. There is no evidence to suggest that the absence of clearance of the cheque is for any reason other than Schickedanz's failure to present the cheque. There is no evidence that it was not honoured because of some default by Mr. McGrath or Ms. McGrath.

58 Schickedanz complains that the Original Affidavit failed to raise the absence of approval by the condominium board of directors to the installation of the skylights, as would be required in the Condominium Documents on change of a common element. I am satisfied that with respect to a building still under construction and before registration of the Condominium Documents, this provision is inapplicable. There is no evidence that Central would have obtained such approval once the building permit was obtained by Schickedanz's architect. At that point Central owned the shares of the condominium corporation and

controlled the election of the board of directors. Further this issue is not material to the obtaining of a CPL. It may be relevant to the issue of damages.

59 I am not persuaded that any material evidence was withheld, and if it was, such failure was not made with the intention of misleading the court.

60 I expunge paragraph 14 and the first sentence of paragraph 17.

61 I dismiss the motion to set aside the CPL. There was sufficient disclosure on the *ex parte* motion.

Motion to Discharge

Interest in Land

62 Under the Agreement, Ms. McGrath was entitled, and obliged, to occupy the Unit from the date of substantial completion until the closing date for the purchase of the Unit. On the closing date the parties were obliged to close and title would pass to Ms. McGrath. Schickedanz argued that Ms. McGrath had no right to an interest in land. The argument, as this court understood it, rested on an alleged lack of uniqueness of the Unit and on the agreement by Ms. McGrath in the Agreement not to register a lien against the title to the Unit. In effect, Schickedanz argues that the Agreement was only a personal agreement between the parties and did not give rise to an interest in land.

Contract Prohibition Against CPL

63 The purchaser's undertaking, in clause 16 of the Agreement, not to register a lien in respect of the Agreement is an inherently reasonable clause. It is intended to prevent a purchaser of one of many units in a project from registering notice of the purchase and assertion of a lien which would impair the vendor's ability to obtain construction financing or access agreements. It is also intended to prevent resale prior to closing where a lien right could arise. The vendor Schickedanz has chosen to treat Ms. McGrath's alleged breaches of the Agreement as conduct constituting repudiation of the Agreement entitling Schickedanz to accept that repudiation, and terminate the agreement, thus entitling Schickedanz to resell the Unit.

64 Schickedanz cannot unilaterally terminate the agreement, or accept termination, and yet continue to rely on a clause inserted for its benefit which is detrimental to the purchaser's rights. There is nothing in the Agreement which allows the clause to survive termination.

65 Schickedanz has referred me to *Reznik v. Coolmur Properties Ltd.* (1982), 25 R.P.R. 43 (Ont. H.C.), per Steele J. where a similar clause was at issue when the purchaser sought a CPL. In that case the purchaser sought to terminate the agreement and obtain a return of his deposit. The ONHWP applied to that case and covered return of the purchaser's deposit if it was wrongly retained by the vendor.

66 Schickedanz is covered under the ONWHP and the evidence of Mr. Fernandes suggests that purchasers' deposits are insured for \$20,000, an amount less than the total of Ms. McGrath's investment for deposits and extras.

67 However, in this case it is the vendor Schickedanz which seeks the protection of a clause in a contract which it chose to terminate. It cannot have its cake and eat it too.

68 Clause 17 of the Agreement contains a postponement of any claim by Ms. McGrath to mortgages and access agreements arranged by Schickedanz. The harm alleged by Schickedanz in registration of the CPL may be non-existent because of the postponement.

69 I prefer to consider the exercise of my discretion as permitted by the *CJA* s. 103 and as exercised by Sutherland J. in *Greenbaum v. 619908 Ontario Ltd.* (1986), 11 C.P.C. (2d) 26 (Ont. H.C.) at 46 .

Discharge of CPL

70 The onus is on a defendant to persuade the court that the CPL should be discharged: *1072456 Ontario Ltd. v. Ernst & Young Inc.* (1997), 10 C.P.C. (4th) 351 (Ont. Master) at 358. The judge should examine the whole of the evidence as it stands after cross-examination, without deciding disputed issues of fact and credibility, and consider whether the plaintiff's case constitutes a reasonable claim to the interest in land claimed: *Ibid.* at 359.

71 In exercising its discretion to discharge or vacate a CPL the court should consider all the circumstances including:

- 1) Whether the plaintiff is a shell corporation;
- 2) Whether the land is unique;
- 3) The intent of the parties in acquiring the land;
- 4) Whether there is an alternative claim for damages;
- 5) The ease or difficulty in calculating damages;
- 6) Whether damages would be a satisfactory remedy;
- 7) The presence or absence of another willing purchaser;
- 8) The harm done to the plaintiff if the certificate is allowed to remain; or to the plaintiff if the certificate is removed, with or without security.

See *572383 Ontario Inc. v. Dhuma*, above, and cases cited therein at p. 291.

72 Mr. Fernandes refused to answer questions on cross-examination respecting the assets, liabilities or financial condition of Schickedanz. He also testified that all the sales staff are employees of Central and that Schickedanz has no employees. I am not persuaded that Schickedanz is any more than a shell corporation. There is a very real possibility that Schickedanz is without assets and was set up to protect Central's assets from liabilities arising out of sale agreements.

73 I am satisfied that Ms. McGrath purchased the Unit for the purpose of residing in it with her husband. She made a substantial investment in modifications to the standard plan for the Unit, including two gas fireplaces for \$6,000, indoor vacuum, \$3,000 for the skylights, stereo wiring, en suite bathroom in the master bedroom, modified cupboard and other features in accordance with the options listed on Schedule B to the Agreement.

74 These changes could have made the property unique to Ms. McGrath. I exclude any consideration of the loft bathroom in this issue of uniqueness as it is not permitted by the applicable building by-law or legislation.

75 There is an alternative claim for damages. However I do not see why this should deprive Ms. McGrath of specific performance if she is entitled to specific performance. In view of her right to payment until possession she may have a legitimate claim for damages in addition to, and not as an alternative to, specific performance. It is not clear that the claim for damages is limited to the same loss as that for which specific performance is sought.

76 I have no evidence or argument respecting calculation of damages.

77 There is no evidence of the existence of another willing purchaser. There is evidence of the availability of other units with a similar floor plan but there is no suggestion that any of them have any of the custom features obtained for the Unit by Ms. McGrath.

78 In balancing the harm to Ms. McGrath if she does not obtain the CPL against the harm to Schickedanz if the CPL is permitted to remain, I am satisfied Schickedanz's legitimate interests are probably protected by the terms of clause 17 of the Agreement while the CPL will protect Ms. McGrath's rights to the Unit pending resolution of the action. In any event,

Schickedanz's termination of the Agreement triggered registration of the CPL. Schickedanz must live with the consequences of that position.

Conclusion

79 I dismiss the motion to discharge the lien.

80 Costs may be spoken to.

Motions dismissed.

TAB 19

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:)	
)	
TEXTRON FINANCIAL CANADA LIMITED	)	E. Patrick Shea, for the Applicant Textron
	)	Financial Canada Limited
	)	Applicant
- and -)	
)	
BETA LIMITEE/BETA BRANDS LIMITED)	
	)	Respondent
- and -)	
)	
BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242	)	Michael Klug - solicitor for the moving party,
	)	the Bakery, Confectionery, Tobacco Workers
	)	and Grain Millers International Union, Local
	)	242
- and -)	
)	
MINTZ & PARTNERS LIMITED	)	Jeffrey J. Simpson - solicitor for Mintz &
	)	Partners Limited
- and -)	
)	
BREMNER INC.	)	Ellen Swan – solicitor for Bremner Inc.
)	
	)	HEARD: March 29, 2007

LEITCH R.S.J.:

[1] The Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242G (“Local 242”) applies pursuant to section 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 215 (the “*BIA*”) and the January 3, 2007 Order of this Court for an order granting leave to commence or continue certain labour and/or employment law proceedings, described in more detail below, against Beta Brands Limited, Mintz & Partners Limited and other parties.

[2] Textron Financial Canada Limited (“Textron”) and Mintz & Parties Limited (the “Receiver”) oppose the granting of leave as against the Receiver. There is no opposition to proceedings continuing against Beta Brands Limited (“Beta Brands”).

[3] Local 242 represents approximately 250 employees or former employees of Beta Brands. A collective agreement was in place effective from May 8, 2006 to May 7, 2009. The circumstances of the members of Local 242 are sympathetic and compelling. They have not been paid termination pay, severance pay or vacation pay since December 29, 2006. There is no issue that these payments are obligations of Beta Brands and presumably were not made because it was insolvent. I recognize that the value of this pay is significant, especially for employees with a long record of service with Beta Brands.

[4] Local 242 takes the position on this application that the Receiver is also liable for these payments. In addition, Local 242 asserts that the Receiver is bound by the collective agreement and is responsible for violations of that agreement.

[5] This application requires an assessment of the evidence presented to determine whether Local 242 should be granted leave to make the “related employer” and “successor employer” arguments and to address the alleged labour relations violations in another forum. This court does not have the authority to determine these issues that are within the exclusive jurisdiction of the Ontario Labour Relations Board (the “OLRB”) and/or a labour arbitrator. The OLRB and/or a labour arbitrator have exclusive jurisdiction over the subject matter of applications made and the applications proposed to be made to the OLRB, as well as the grievances.

[6] Additionally, Local 242 seeks to vary the receivership order as described in more detail below.

A. BACKGROUND FACTS

[7] Textron is described in the materials filed on this motion as Beta Brands’ primary secured creditor.

[8] The Receiver was appointed interim receiver and receiver of all assets, undertaking and property of Beta Brands on January 3, 2007 (the “receivership order”). The receivership order institutes a stay of proceedings against the Receiver and Beta Brands and limits the Receiver’s liability. The terms of the receivership order are set out in more detail below. This order has not been appealed or varied and remains in full force and effect.

[9] Pursuant to the application of Textron, the sale of substantially all of the assets of Beta Brands’ bakery division and certain finished goods inventory to Bremner Inc. was approved by Lax J. on January 5, 2007. On that same day, the employment of all members of Local 242 was terminated by written notice on the letterhead of Beta Brands.

The relevant terms of the receivership order and the *BIA*

[10] Paragraphs 7, 8 and 9 of the receivership order institute a stay of proceedings and limit the Receiver’s liability. These paragraphs require leave of this court for proceedings against Beta Brands and the Receiver by providing as follows:

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

[11] Paragraph 13 of the receivership order relates to the employees of Beta Brands and provides that their employment status with Beta Brands would remain until they were terminated by the Receiver on behalf of Beta Brands as follows:

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

[12] The receivership order originally proposed by Textron was different from the Model Receivership Order form developed by the Commercial User's Committee. The Model

Receivership Order was premised on the appointed receiver operating the debtor's business. However, Beta Brands had ceased to carry on business prior to the Receiver's appointment and the Receiver took the position it had no plans to operate the Beta Brands' business. Thus, Textron sought a modified order. Local 242 objected. In order to compromise, the following paragraphs were added to the receivership order:

31. THIS COURT ORDERS that nothing in this Order or the granting of powers or authorities to the Receiver herein shall be relied upon by the Debtor's employees on any application to obtain relief against the Receiver from any court or tribunal of competent jurisdiction.

32. THIS COURT ORDERS that nothing herein shall be construed as affecting any legal proceedings before any court or tribunal dealing with Local 242G's members' and/or Local 242G's rights under labour and/or employment law, subject to the obtaining of leave in advance from this Court.

[13] These added paragraphs are the subject of Local 242's motion to vary the receivership order.

[14] Section 215 of the *BIA* requires leave of this court to pursue an action as "against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act." Thus, section 215 of the *BIA* does not require leave as against other parties. Textron and the Receiver agree with that position.

B. DETAILS OF THE RELIEF SOUGHT BY LOCAL 242

[15] Local 242 seeks leave of the court to lift the stay in respect of four proceedings. Two of the proceedings – a successor/related employer application filed with the OLRB on January 2, 2007 and a proposed application under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "*LRA*") – name Beta Brands and other entities but not the Receiver.

[16] The successor/related employer application filed on January 2, 2007, now held in abeyance, alleges that Beta Brands, Beta Brands U.S.A. Ltd., Sun Capital Partners Inc. and/or Sun Beta LLC are a "single employer" pursuant to section 1(4) of the *LRA*. In addition, Local 242 alleges that there was a "sale of business" in March 2004 from Beta Brands to Sun Beta LLC and/or Sun Capital Partners Inc., pursuant to section 69 of the *LRA*.¹

[17] The proposed application under the *LRA* is pursuant to section 96 of that *Act* and alleges bargaining for the collective agreement was in bad faith, contrary to section 17 of the *LRA*. Local 242 alleges that Beta Brands, Beta U.S.A. Limited, Sun Capital Partners Inc. and/or Sun Beta L.L.C., as employers, violated the duty to bargain in good faith by failing to disclose to

¹ For clarity I note that counsel for Local 242 advised that the affidavit upon which the January 3, 2007 order was issued by Lax J. stated that Sun Beta LLC. was the sole shareholder of Beta Brands. Subsequently, counsel for Local 242 was advised that Beta Brands (Barbados) Holding SRL is the sole shareholder of Beta Brands).

Local 242 decisions to close or massively restructure the business (See *Westinghouse Canada Limited*, [1980] O.L.R.B. Rep. April 577 at para. 39). It is Local 242's position that these decisions had been made before collective bargaining concluded in May 2006.

[18] Another proceeding names Beta Brands, the Receiver and others. It is a grievance filed on January 19, 2007, now held in abeyance, alleging violations of the collective agreement and the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"). The grievance application alleges that Beta Brands, Sun Beta LLC, the Receiver, Beta Brands (U.S.A.) Ltd., Sun Capital Partners Inc., Bremner Inc. and/or Cangro Foods Inc. violated the collective agreement and the *ESA*. Local 242 alleges that its members have been denied their legislative and/or contractual rights to severance pay, termination pay, vacation pay, benefits on lay-off and advance notice of lay-off. They further allege that the employees were the subject of an illegal lockout.

[19] Local 242 alleges that the manner in which the various named companies have structured their affairs has effectively denied its members of their entitlement to basic minimum employment standards.

[20] Local 242 also submits that the Receiver was the active employer of Local 242 members beginning on January 3, 2007, following the receivership order. Local 242 suggests that its members were entitled to severance pay and, pursuant to section 67(3) of the *ESA*, had the right to elect either to be paid the severance pay or to retain employee status and the right to be recalled. Since the employees did not waive their recall rights and since the Receiver exercised total control over the premises and what has remained of the business since January 3, 2007, Local 242 suggests that union members are still employees of the Receiver.

[21] Further, Local 242 alleges that, after the court-approved sale, the Receiver and/or Bremner Inc. hired employees to perform work in the plant. If it is determined that either party is bound by the collective agreement pursuant to "related employer" provisions (section 1(4) *LRA* and section 4 *ESA*) and/or "successor employer" provisions (section 69 *LRA* and section 9 *ESA*), Local 242 suggests that work performed by these employees would fall within the collective agreement.

[22] The fourth proceeding names the Receiver, Bremner Inc. and/or Cangro Foods Inc. and is pursuant to sections 1(4) and 69 of the *LRA* and sections 4 and 9 of the *ESA*.

[23] Local 242 also seeks to delete paragraph 31 of the January 3, 2007 order of Lax J. to remove restrictions that it asserts might prevent the OLRB and/or the labour arbitrator from considering all relevant aspects of the matters over which it has exclusive jurisdiction.

C. THE APPLICATION FOR LEAVE AS AGAINST THE DEBTOR BETA BRANDS

[24] Pursuant to paragraph 8 of the receivership order, Local 242 seeks leave to commence or continue proceedings where Beta Brands is a necessary party.

[25] In *General Motors Corp. v. Tiercon Industries Inc.*, [2005] O.J. No. 3750 at para. 18 (Super. Ct.), Hoy J. stated:

Where relief from a stay is sought in an insolvency context, whether from an order issued pursuant to the *Courts of Justice Act* or the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, the Court should consider a balancing of the interests of all affected parties: *Toronto Dominion Bank v. Ty (Canada) Inc.*, [2003] O.J. No. 1552, (2003) 42 C.B.R. (4th) 142 (Ont. S.C.J.) at paragraph 22.

[26] The Receiver and Textron do not oppose the lifting of the stay as against the debtor, Beta Brands. There is evidence that suggests that the successor employer and related employer applications, involving parties other than the Receiver, are not frivolous or vexatious and should be considered by the OLRB and/or a labour arbitrator. Beta Brands is a necessary party to these proceedings.

[27] Leave is granted to Local 242 as against Beta Brands to lift the stay of proceedings associated with the application filed with the OLRB on January 2, 2007.

[28] Likewise, leave is granted to Local 242 as against Beta Brands to lift the stay of proceedings associated with the grievance dated January 19, 2007 and leave is granted as against Beta Brands to commence proceedings for an alleged violation of the duty to bargain in good faith by failing to disclose to Local 242 its decision to close or to undergo massive restructuring.

D. THE POSITIONS OF LOCAL 242, THE RECEIVER AND TEXTRON

[29] In its application seeking leave against the Receiver, counsel for Local 242 argues that remnants of the Beta Brands' business were transferred to the Receiver by the January 3, 2007 order of Lax J., and thus the economic activity of Beta Brands did not terminate on December 29, 2006, the last day of work.

[30] It is the position of Local 242 that these claims are not frivolous or vexatious. Rather, they represent a good faith effort by the Union to redress the wholesale denial to its members of their contractual and legislative rights. Local 242 argues that in opposing this leave application the Receiver is seeking immunity from labour laws.

[31] Counsel for the Receiver agreed with and adopted the submissions of counsel for Textron and therefore I will refer to them hereinafter collectively as the Receiver in describing their positions. It is the Receiver's position that it did not carry on Beta Brands' business and it has not hired or terminated any employees of Beta Brands on its own behalf.

[32] The Receiver notes that pursuant to section 14.06(1.2) of the *BIA*, the Receiver is isolated from pre-appointment severance and termination pay liabilities:

14.06(1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

[33] Further, paragraph 16 of the receivership order limits the Receiver's personal liability to liability arising from its gross negligence or wilful misconduct.

[34] The Receiver asserts that Local 242 has not established a *prima facie* case against it and, thus, the motion for leave should be dismissed. The Receiver's position is that the proposed actions are frivolous, vexatious or an abuse of process because there is no possibility that Local 242 will succeed in achieving its ultimate objective of recovering severance, termination and vacation pay from the Receiver in another forum.

E. THE TEST TO BE APPLIED ON THIS APPLICATION FOR LEAVE AGAINST THE RECEIVER

[35] In *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 (“*T.C.T. Logistics*”), the Supreme Court of Canada endorsed the approach in *Mancini (Trustee of) v. Falconi*, [1993] O.J. No. 146 (C.A.) as the appropriate test under s.215 of the *BIA* for granting leave to unions to bring actions against receivers before labour relations boards and summarized the accepted principles from that case as follows:

1. Leave to sue a trustee or receiver should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee or receiver. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

[36] The threshold for granting leave to commence an action against the Receiver under section 215 “is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact.” (*T.C.T. Logistics* at para. 55). In determining whether to grant leave, the Court should not make an assessment based on the merits. Rather, leave should be granted if the evidence arguably supports the cause of action being asserted (*T.C.T. Logistics* at para. 57). The court's gate-keeping function is to protect receivers from frivolous and vexatious actions or claims that disclose no cause of action.

[37] The test for leave from a court-ordered stay is similar to the test for leave under section 215 of the *BIA*. See *Third Generation Realty Ltd. v. Twigg Holdings Ltd.*, 1992 CarswellOnt 473 (Gen. Div.), in which Farley J. stated, “[l]eave to commence proceedings against a Receiver appointed by the court is to be granted, unless it is clear there is no foundation for the claim or the action is frivolous or vexatious.”

[38] In this case, the receivership order instituted a stay of proceedings against the Receiver and limited the Receiver's liability. Application of the above principles establishes that leave under s. 215 should not be granted unless Local 242 submits evidence clearly disclosing that

there is merit to the proposed proceedings. This evidence must establish a factual basis for the proposed claim and that the proposed claim discloses a cause of action.

F. WHAT WILL LOCAL 242 HAVE TO ESTABLISH TO ULTIMATELY SUCCEED IN THE PROCEEDINGS IT SEEKS TO CONTINUE OR COMMENCE AGAINST THE RECEIVER?

[39] Section 1(4) of the *LRA* permits the OLRB to declare that two or more legal entities are “related employers.” The purpose of section 1(4) is to protect bargaining rights from being deliberately or inadvertently eroded by the commercial operations of related employers.

[40] Pursuant to section 1(4) of the *LRA*, the OLRB may declare one or more legal entities to be “one employer for the purposes of this Act” if the entities carry on “associated or related activities or businesses...under common control or direction.” Factors considered in assessing “common control” include:

- Common ownership or financial control
- Common management
- Interrelationship of operations
- Representation to the public as a single integrated enterprise; and
- Centralized control of labour relations

(See: *Walters Lithography Company Limited*, [1971] O.L.R.B. Rep. July 406 and *S.E.I.U., Local 268 v. Canadian Red Cross Society (Ontario Zone)*, 2001 CarswellOnt. 3507 (O.L.R.B. at para. 38))

[41] To establish a *prima facie* case pursuant to section 1(4) of the *LRA*, Local 242 will be required to establish the following:

1. involved related or associated activities; and the Receiver and Beta Brands each carried on a business;
2. the businesses carried on by Beta Brands and the Receiver;
3. the Receiver and Beta Brands were under common control or direction.

[42] Turning next to the remedy sought under the *ESA*, pursuant to section 4, an employer is considered to be a “related employer” where the direct or indirect “intent” or “effect” of more than one legal person carrying on related activities or businesses is to “defeat” employees’ entitlements under the *ESA*. Common control is not required. It is a mandatory provision and not discretionary.

[43] To establish a *prima facie* case against the Receiver under section 4 of the *ESA*, Local 242 must establish evidence that:

- (a) Associated or related activities or business were carried out by Beta Brands and the Receiver; and

- (b) The intent or effect of the Receiver and Beta Brands carrying on associated or related activities or businesses was to directly or indirectly defeat the true intent and purpose of the *ESA*.

(See: *Verdun v. PlateSpin Canada Inc.*, 2005 Can LII 1637 at para. 76 (O.L.R.B.); *Novaquest Finishing Inc.*, 2006 Can LII 1439 (O.L.R.B.))

[44] Two or more entities are “related” or “associated” if “they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals.” “Functional interdependence” is the key issue. See: *Cybernet Communications Inc.*, 2004 Can LII 11659 at para. 18(O.L.R.B.); *Re K. Behnke Investments Ltd.*, [1993] O.E.S.A.D. No. 118.

[45] To establish that the Receiver and Beta Brands carried on associated or related business activities under section 4 of the *ESA*, the Union needs to establish at least some of the following:

- Common ownership
- Common management or control
- Interrelationship or integration of operations
- Existence of a common trade name or logo
- Movement of employees between the entities
- Non-arm’s length transactions between the entities
- Use of common premises
- Transfers of assets between the entities
- A common market or customers served by the entities; and
- Representation to the public as a single integrated enterprise.

(See: *Verdun v. PlateSpin Canada Inc.*, supra, at para. 77; *Novaquest Finishing Inc.*, 2005 CanLII 40283 (O.L.R.B.); *Queensway Roadhouse Limited*, 2004 CanLII 3163 (O.L.R.B.), paras. 30 – 32; *Cybernet Communications Inc.*, 2004 CanLII 11659 (O.L.R.B.), para 17; and *Re K. Behnke Investments Ltd.*, [1993] O.E.S.A.D. No. 118 (Muir), Local 242G’s Book of Authorities Tab 14)

[46] With respect to the issue of whether the Receiver is a “successor employer,” Local 242 relies on section 69 of the *LRA* and section 9 of the *ESA*.

[47] Pursuant to section 69 of the *LRA*, in the event of a sale of a business, the collective agreement continues to be binding on the successor or purchaser, who “stands in the shoes” of the predecessor vendor. Thus, where an employer, who is bound by a collective agreement, sells a business, the purchaser is a successor employer. From a policy perspective, this ensures that work performed by unionized workers is not transferred to a new owner/operator who will employ non-unionized workers.

[48] The terms “sells” and “business” are defined very broadly. Unlike section 1(4) *LRA*, section 69 is not discretionary; an employer automatically becomes bound following any disposition “until the Board otherwise declares.”

[49] For leave under section 215 of the *BIA* to be granted, Local 242 must establish evidence that it is possible that the OLRB will determine that there has been a “sale”, as defined by the relevant legislation, of Beta Brands’ business to the Receiver. At a minimum, Local 242 must present evidence that the Receiver has carried on Beta Brands’ business; there must be evidence that there was a transfer of work from Beta Brands to a business operated by the Receiver.

[50] Section 9 of the *ESA* applies where a purchaser “employs an employee of the seller.” Pursuant to section 9 of the *ESA*, a purchaser of a business or part of a business who hires any of the transferor’s employees will “inherit” or “assume” the employees length of period of service with the transferor.

[51] To establish a *prima facie* case for liability under section 9 of the *ESA*, Local 242 needs to establish:

- (a) a transfer of Beta Brands’ business or part of Beta Brands’ business to the Receiver; and
- (b) that the Receiver hired one or more of Beta Brands’ employees within the 13-week period after January 3, 2007.

ESA, ss. 9(1) and (2)

G. THE EVIDENCE PRESENTED ON THIS APPLICATION

[52] Mr. Norris, an employee of Beta Brands, swore the affidavit filed in support of Local 242’s motion. The essence of his affidavit is that the economic activity of Beta Brands did not terminate on the date the members of Local 242 stopped work and part of their work was transferred to the Receiver.

[53] In his affidavit, Mr. Norris states that the members of Local 242 were temporarily laid off, in accordance with the collective agreement, on December 29, 2006 for a previously scheduled two week temporary shutdown.

[54] At paragraph 38 of his affidavit, Mr. Norris refers to the court-approved sale of a significant portion of the Beta Brands business to Bremner. At paragraph 53 of his affidavit, Mr. Norris states that for a period of two to three weeks following the approval of the sale to Bremner, “there were individuals working in the plant who were moving the product purchased by Bremner on to trucks. I know this from personal observation and have been advised of it by different employees who observed some of this work being done and do believe it. It was work of the sort that Local 242 members performed under the collective agreement.” Thus, he alleges that the collective agreement was breached. He asserts employees on layoff should have been recalled to perform this work and were not.

[55] At paragraph 51 of his affidavit, Mr. Norris states, “the business of Beta Brands was transferred to the complete control of Mintz.”

[56] Local 242 suggests that the affidavit of Mr. Norris provides the evidentiary foundation that work continued after January 3, 2007. It is the position of Local 242 that the hiring of non-union members to perform union work constitutes an unfair labour practice.

[57] Thus, it is Local 242's position that further proceedings in another forum are required to determine whether the Receiver and/or Bremner contracted out union work.

[58] On the other hand, the Receiver relies on the fourth report delivered in response to this motion in which it is stated that "at the time the Receiver was appointed, Beta Brands had ceased to carry on business." Other than the inventory sold to Bremner, there was very little remaining finished goods or raw material inventory when the Receiver took possession. In particular, the Receiver states in paragraph 10 that "the sole role of the Receiver has been to protect, preserve and realize on Beta Brands' assets and property" in accordance with the terms of the orders in place.

[59] The Receiver states in paragraph 14 that it terminated the Beta Brands' employees on behalf of Beta Brands and in strict compliance with the receivership order and that "the Receiver has not hired (or terminated) any of Beta Brands' unionized employees."

[60] Further, in paragraph 30 of the report, it is stated that "the Receiver did not employ anyone to deal with and remove the purchased assets from the premises" in reference to the sale to Bremner and further, in paragraph 32, that "Bremner employed its own people and hired its own agents to carry out the disassembly and removal of the purchased assets. The Receiver did not employ or hire any parties to effect the disassembly or removal."

H. ANALYSIS AND CONCLUSIONS

(i) Leave Against the Receiver

[61] I will deal first with the related/successor employer issues. Those issues are relevant to the proposed OLRB application and to the grievance filed January 19, 2007 because success on the grievance depends on a finding that the Receiver is bound by the collective agreement as a related or successor employer.

[62] If granted leave, Local 242 will argue that some or all of the Receiver, Bremner and Cangro are a "single employer" with Beta Brands and/or that there has been a "sale of business," in whole or part, to one or more of them, from Beta Brands and/or its other related employers or successors.

[63] Local 242 alleges that there was a sale of definable parts of the pre-existing Beta Brands business to Cangro in March 2006 and to Bremner pursuant to the January 5, 2007 court order. Local 242 also alleges that Cangro shares common control over related activities with Sun Capital, Sun Beta, Beta Brands (Barbados), Beta Brands, the Receiver and/or Bremner.

[64] Pursuant to section 1(4) of the *LRA* and section 4 of the *ESA*, Local 242 argues that the Receiver is a "related employer." As noted, this requires evidence that the Receiver carried on

“associated or related activities or business...under common control or direction.” Local 242 suggested that “common control” is established because those in control of the Receiver are also those in control of Beta Brands. Local 242 also suggests that section 4 of the *ESA* may apply where two legal persons acting at “arms length” carry on “related activities.” Local 242 referred to the Norris affidavit for evidence that the Receiver was moving product and submitted that this was similar work to the work being performed prior to receivership.

[65] Local 242 suggests that a “sale” declaration does not depend on the continued employment of the employees of the predecessor or on the continued operation of the business as a “going concern.” Therefore, Local 242 suggests that a business closure does not prevent a successor employer declaration.

[66] With respect to the successor employer issue, Local 242 suggests that the assumption of control over an operation by the Receiver is a key factor in assessing whether a receiver is a successor employer. See *Deloitte & Touche*, [1993] O.L.R.D. No. 458 at para. 34 [*Deloitte & Touche*]. It is the position of Local 242 that the Receiver has exercised total control over the premises and the remaining business since January 3, 2007 – that is, the entire Beta Brands business was transferred to the Receiver.

[67] Local 242 relies on the findings in *H & S Reliance Ltd.*, [1998] O.L.R.D. No. 4087 at paras. 28-29 (“*H & S Reliance*”), where the OLRB found the Receiver to be a successor employer because the Receiver employed some of the predecessor’s employees for two weeks before liquidating the business in the same jobs as they had prior to the receivership.

[68] It is the position of Local 242 that the Receiver was obligated to employ union members in accordance with the collective agreement, and that the Receiver should not be immunized from being declared a successor employer by failing to do so. Section 9 of the *ESA* is advanced in support of this position. Local 242 acknowledges that this section only applies where the purchaser “employs an employee of the seller.” However, it is their view that the section also applies in this case because the Receiver and/or Bremner were obligated to employ some of Local 242 members who retained recall rights under the collective agreement and employment status after “permanent lay-off.”

[69] Counsel for Local 242 could not cite any cases where a Receiver was found to be a successor employer in a situation where the receiver did not employ individuals but should have. However, counsel for Local 242 suggested that this issue should be decided in another forum.

[70] The Receiver submits that there is no evidence of the businesses of the Receiver and Beta Brands being associated or related. The Receiver asserts that Local 242 has not established the existence of “common control or direction” between the Receiver and Beta Brands. Beta Brands was a manufacturer of candy and other products. The Receiver, as an officer of the court, is independent from Beta Brands and performs a receiver function.

[71] Further, it is the Receiver’s position that Local 242 has failed to establish that the relationship between the Receiver and Beta Brands has resulted in Beta Brands’ failure to

comply with its obligations under the *ESA*. The Receiver notes that the relationship between Beta Brands and the Receiver did not even begin until Beta Brands was no longer in business.

[72] With respect to the successor employer issue, it is the position of the Receiver that, in this case, the Receiver did not carry on a business and did not employ individuals. Rather, pursuant to the receivership order, the Receiver merely took possession of assets and is realizing on those assets. This does not constitute a “sale of business” under section 69 of the *LRA*. From a policy perspective, it makes little sense to preserve the collective bargaining relationship where the Receiver has only taken possession of assets.

[73] The Receiver acknowledged that there was an Agreement of Purchase and Sale prior to its court-appointment. Although Local 242 opposed the transaction, the court approved the sale of these assets to Bremner. The union did not appeal this decision. Thereafter, the Receiver complied with the court order, including the requirement that the Receiver provide access to Bremner for removal of the purchased goods. The employees last attended on the premises on December 29, 2006. The Receiver received assets only. It is the Receiver’s position that this is insufficient to constitute the transfer of a business. Further, the Receiver provided access to Bremner to remove the purchased assets, in accordance with the court-approved Access Agreement. The Receiver did not employ anyone to remove the items sold to Bremner nor was it obliged to do so.

[74] The Receiver also points to the receivership order which states that employees of Beta Brands shall remain employees of that entity. The Receiver terminated Beta Brands’ employees on behalf of Beta Brands; such termination was not effected by the Receiver directly because these were not employees of the Receiver.

[75] After considering the evidence, I conclude that the claims asserted by Local 242 fail to meet the requirements under s. 215 of the *BIA* and therefore leave as against the Receiver should not be granted. In coming to this conclusion, I have not made a final assessment of the merits of Local 242’s claim, as this determination falls within the jurisdiction of the OLRB. The focus of this application, as noted by Abella J. at paragraph 59 of *T.C.T. Logistics, supra*, is “whether the evidence provides the required support for the cause of action sought to be asserted.” In essence, the court’s role at this stage is to ensure that, unless the claim is without merit, the gate to a litigated determination remains open.

[76] In fulfilling this court’s gate-keeping function pursuant to section 215 of the *BIA*, I conclude that there is no *prima facie* case upon which Local 242 would have any chance of success as against the Receiver. I reach this conclusion for the following reasons.

[77] Based upon submissions of counsel and the evidence provided, there is no *prima facie* case by which the Receiver could be considered a related employer to Beta Brands under either section 1(4) of the *LRA* or section 4 of the *ESA*. The appointment of the Receiver was designed strictly for the purpose of preserving, protecting and realizing on Beta Brands’ assets. Beta Brands ceased to carry on business prior to the appointment of the Receiver and there is no evidence which suggests that the Receiver has been carrying on a business. I agree with the

Receiver's position that because the business is no longer operating there is no erosion of the union's bargaining rights. Section 1(4) of the *LRA* is not intended to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt; the provision was not intended to extend bargaining rights. See *G.A.U. v. Total Marketing Inc.*, 1983 CarswellOnt 1014 at paras. 4-5 (O.L.R.B.).

[78] In addition, the Receiver is prohibited from being related or associated to Beta Brands by virtue of the Canadian Association of Insolvency and Restructuring Professionals' Rules of Professional Conduct, with which the Receiver is required to comply. In accordance with these Rules, the Receiver is to have no economic interest in Beta Brands or any companies affiliated with Beta Brands. Rather, the Receiver acts as an agent of the court in administering and supervising the debtor's property.

[79] Likewise, there is no *prima facie* case by which the Receiver could be considered a successor employer to Beta Brands under either section 69 of the *LRA* or section 9 of the *ESA*. Bargaining rights attach to the business and follow the transfer of that business to the purchaser of that business. The transfer of possession of physical assets, on its own, does not constitute a transfer of a business. See *Syndicat national des employés de la commission scolaire régionale de l'Outaouais c. U.E.S., local 298*, 1988 CarswellQue 125 at para. 174 (S.C.C.). Rather, the Receiver must have acquired a functional economic vehicle. Such acquisition could not have occurred here since, at the time the Receiver was appointed, Beta Brands had ceased to carry on business.

[80] As noted in *Deloitte & Touche, supra* at para. 34, control over the business as a going concern and the employment relationship is an important factor. In this case, the Receiver did not operate Beta Brands as a going concern business. Although this fact is not determinative (see *Accomodex, supra* at para. 73), I find no evidence that the Beta Brands business, or part thereof, was transferred to the Receiver. As the Receiver has noted, its sole role has been to protect, preserve and realize on Beta Brands' assets and property. It has not taken or filled orders and has not operated Beta Brands as a business.

[81] In *Accomodex, supra* at paras. 66-67, the OLRB reviewed cases dealing with the sale of a "part" of a "business" as follows:

In each of these cases, the Labour Relations Board found that the predecessor had transferred a coherent and severable "part" of its economic organization - managerial, or employee skills, plant, equipment, know-how, or goodwill - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This "new" economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them were preserved. The "part" of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage.

In all of these cases, there was a transfer of a distinct part of the predecessor's configuration of assets or capacity to carry on business, and no material change in the character of the

work performed by the employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, and the skills of the employees; and, but for section 64, the established bargaining and collective bargaining rights would have been lost. This was the mischief to which section 64 is directed, and the Board was satisfied on the evidence in each of these cases that it should be applied.

[82] Here, the Receiver terminated employees on behalf of Beta Brands and in accordance with a court order. Paragraph 13 of the receivership order provides as follows:

THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

[83] I acknowledge that a "successor employer" finding is not dependent on the Receiver employing the Local 242 members. See *Accomodex*, *supra* at para. 61. However, there is no evidence that the Receiver employed anyone to perform any work of former Beta Brands employees.

[84] The evidence suggests that Beta Brands operations ceased at the end of December 2006, prior to the appointment of the Receiver. The Receiver took possession and control of the assets pursuant to the receivership order and for the purpose of liquidation. The Receiver acted in accordance with a court approved "Access Agreement" that was part of the sale agreement with Bremner. The Receiver was required to provide access to the plant to Bremner to remove assets and did so. Bremner employed its own people to disassemble and remove the purchased assets. As the Receiver noted, Local 242 rejected an operations agreement that would have retained the services of union members to disassemble and remove assets. This rejected agreement contained a term whereby the union members could not allege that the Receiver was a successor employer.

[85] After considering these facts, I have concluded that I am not satisfied there is evidence of a "new" economic organization through which the Receiver continued any of the previous operations of Beta Brands and employed workers to carry out those operations. As noted in *Accomodex* at para. 60, "[u]nless there is a continuation of work and jobs, it would make little sense to preserve the collective bargaining relationship or collective agreement."

[86] I reject submissions of counsel for Local 242 that the Receiver was under an obligation to employ Local 242 members and that the Receiver should therefore be considered a successor employer on that basis. The evidence suggests that operations ceased prior to the Receiver's appointment. The Receiver did not employ Local 242 members because it did not commence or continue the business of Beta Brands. There can be no obligation to employ Local 242 members under these circumstances. Thus, there is no *prima facie* case whereby the Receiver could be found to be a successor employer by failing to employ Local 242 members.

[87] Therefore, Local 242's motion requesting leave to commence or continue proceedings against the Receiver as a successor employer or related employer under sections 1(4) and 69 of the *LRA* and sections 4 and 9 of the *ESA* is dismissed.

[88] Since I have denied leave to proceed against the Receiver as a successor employer or related employer, the Receiver cannot be bound to the collective agreement. As a result, Local 242 has no basis on which to proceed with its grievances against the Receiver. Therefore, leave to commence or continue grievance proceedings against the Receiver is dismissed.

(ii) Variation of Lax J.'s Order

[89] Paragraph 29 of the receivership order permits an application to the Superior Court of Justice to vary or amend that order. I agree with the Receiver that the jurisdiction to vary an order must be exercised sparingly and that variance provisions are intended to apply in situations where parties impacted by an order are not provided with notice of the making of the order. A motion to vary is not a substitute for an appeal where the time for appeal has passed.

[90] Local 242 seeks to vary the receivership order by deleting paragraph 31 on the basis that paragraph 31 of the receivership order is inconsistent with paragraph 32 and that paragraph 31 is not consistent with *T.C.T. Logistics*, supra. Local 242 asserts that the variance would remove any restriction in that order that could be construed as preventing the OLRB, in connection with an application by employees, from considering the court's grant of control over the business to the Receiver.

[91] I am not satisfied that Local 242 has provided any valid reasons to vary the order of Lax J. I do not find the inconsistencies asserted by Local 242 exist. In my view the receivership order reflects the Receiver's intentions to be a custodian only. The paragraphs included in the order ensure that, subject to obtaining leave, Local 242 can seek to have the Receiver declared a related or successor employer based on the Receiver's actual actions. Paragraph 31 was drafted to prevent the union from arguing that the Receiver was a successor employer simply by virtue of the powers granted to the Receiver in the Appointment Order.

[92] Accordingly, the motion to vary paragraph 31 of the January 3, 2007 order of Lax J. is dismissed.

I. SUMMARY

[93] Local 242 does not require leave of this court to pursue the claims in proceedings described herein against parties other than Beta Brands and the Receiver.

[94] I grant leave to Local 242, as against the debtor, Beta Brands, to lift the stay of proceedings associated with: the application filed with the OLRB on January 2, 2007; the grievance dated January 19, 2007; and a proposed grievance relating to an alleged violation of the duty to bargain in good faith by failing to disclose to Local 242 of its decision to close or to undergo massive restructuring.

[95] I dismiss Local 242's motion requesting leave to commence or continue: grievance proceedings against the Receiver, and proceedings against the Receiver as a successor employer or related employer under sections 1(4) and 69 of the *LRA* and sections 4 and 9 of the *ESA*.

[96] Local 242's motion to vary paragraph 31 of the January 3, 2007 order of Lax J. is dismissed.

"Regional Senior Justice Lynne C. Leitch"
Regional Senior Justice Lynne C. Leitch

Released: July 31, 2007.

Court File No.: 06-CL-6820
Date: July 31, 2007.

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

TEXTRON FINANCIAL CANADA LIMITED

Applicant

- and -

BETA LIMITEE/BETA BRANDS LIMITED

Respondent

- and -

**BAKERY, CONFECTIONERY, TOBACCO WORKERS AND
GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242**

- and -

MINTZ & PARTNERS LIMITED

- and -

BREMNER INC.

REASONS FOR JUDGMENT

LEITCH R.S.J.

Released: July 31, 2007.

TAB 20

Court of Queen's Bench of Alberta

Citation: Re Garritty (Proposal), 2006 ABQB 238

Date: 20060328

Docket: 03 111606; 03 111519

Registry: Edmonton

In the Court of Queen's Bench of Alberta
Judicial District of Edmonton

Action No. 03 111606

Estate No. 03 111606

In Bankruptcy

In the Matter of The Proposal of
Gordon Gerard Garritty

And

In the Court of Queen's Bench of Alberta
Judicial District of Edmonton

Action No. 03 111519

Estate No. 03 111519

In Bankruptcy

In the Matter of The Proposal of
Peter William MacDonald

Corrected judgment: A corrigendum was issued on April 26, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski**

I. Nature of the Application

[1] A contingent creditor applies to rescind Orders of the Registrar approving two *Bankruptcy and Insolvency Act (BIA)*¹ proposals made to unsecured creditors. Through no fault of its own, the creditor did not have notice of the proposals until well after the creditors' meetings. It was not until the day before issuance of the Order approving one of the proposals had been granted and the other proposal was en route to court for approval that the creditor became aware of the proceedings. The creditor also asks for a direction that the trustee in bankruptcy administering the Proposals call a new meeting of creditors, accept its claim and register its vote on the proposals.

[2] The applications are made pursuant to s. 187(5) of the *BIA*. Preliminary concerns about standing, jurisdiction, and process have been raised.

II. Background

A. General

[3] Gordon Garritty and Peter MacDonald (collectively the Debtors) filed Notices of Intention to make proposals to their unsecured creditors in the spring of 2005 (Proposals). Garritty and MacDonald were directors and officers of two now bankrupt companies, Residential Warranty Company of Canada Inc. (RWC) and Residential Warranty Insurance Services Ltd. (RWI) (collectively the Companies), which operated a home warranty business in Alberta and British Columbia.

[4] The Applicant, Kingsway General Insurance Company (Kingsway), was an insurance underwriter of home warranty policies brokered or administered by the Companies.

[5] Kingsway's contingent claim arises from a series of transactions detailed in a broadly drafted Amended Statement of Claim, which it filed in the British Columbia Supreme Court in June 2004, prior to the Proposals being made (BC Action). The Amended Statement of Claim is comprised of 125 paragraphs over 42 pages. It contains allegations of breach of contract, fraud, conversion, breach of trust, and breach of fiduciary duty. The Debtors, the Companies and certain other of their employees are the defendants in the lawsuit.

[6] Kingsway found out about the Proposals from the Companies' then interim receiver, Deloitte & Touche LLP. By then, the creditors had voted on the Proposals. The application for court approval of MacDonald's Proposal was to be heard the next day, while the application for court approval of Garritty's Proposal (Garritty Motion) was scheduled for about a month later. Kingsway did not seek an adjournment of the MacDonald Proposal, which was approved the

¹ R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27.

following day. Kingsway's lawyer, who is from British Columbia, subsequently advised the trustee administering the Proposals (Trustee) that he would be retaining local counsel to either seek an adjournment or to oppose the upcoming Garritty Motion if the Trustee did not agree to the adjournment by the next day. He also expressed Kingsway's view that its claim, based on fraud, was unaffected by the Proposals in any event.

[7] As events unfolded, the Trustee never responded to the adjournment request and no one appeared on Kingsway's behalf at the Garritty Motion. The Trustee's lawyer was unaware of Kingsway's adjournment request and intended appearance and, therefore, did not advise the Registrar of such. The Registrar approved the Garritty Proposal. Two weeks passed before Kingsway contacted the Trustee to ask what had happened on the Garritty Motion. It was not for another month that it filed the Notices of Motion relating to the present Applications. After another four months, it sent the Trustee proofs of claim by which it claimed as a secured creditor in both Proposals. It amended its proofs of claim on the eve of these Applications, to claim as an unsecured creditor. The Trustee disallowed all of Kingsway's claims and Kingsway appealed the disallowances. The appeals are extant, but as yet unscheduled.

[8] The Debtors oppose Kingsway's Applications on the basis that: (1) Kingsway is unaffected by the Proposals and it should not be allowed to interfere; and (2) a s. 187(5) review is unavailable in these circumstances and, even if it were, the Applications should be stayed until Kingsway has proved its claim. The largest proven creditor, Canada Revenue Agency (CRA) joins in the Debtors' opposition to the Applications. It regards the Applications as procedural manoeuvring that, if successful, will do nothing to improve the return available to the creditors.

B. Chronology of Events

[9] The following is the chronology of events relevant to these Applications:

2003

August Kingsway terminates contractual relations with the Companies.

2004

April Kingsway complains to the British Columbia Financial Institutions Commission (FICOM) about the Companies' alleged wrongdoings.

FICOM suspends RWI's broker license, reinstating it three weeks later on conditions, one of which is payment of \$3,100,000.00 in trust for premiums allegedly owed to Kingsway.

Garritty surrenders his broker's license.

- June 16 Kingsway starts the BC Action and a parallel lawsuit in Alberta that it does not advance.
- Early July RWC pays Kingsway \$3,092,612.50.
- August 30 The defendants in the BC Action defend and counterclaim seeking damages of approximately \$195,000.00. Some time later, Kingsway demands document production in the BC Action.
- November 30 This Court appoints Deloitte & Touche LLP the interim receiver of the Companies (IR) in the context of a minority shareholder's oppression action.

2005

- January Kingsway amends the BC Statement of Claim to allege further wrongdoing.
- February 23 MacDonald files a Notice of Intention to make a *BIA* Division I Proposal to his unsecured creditors. The Statement of Affairs lists \$308,003.00 in total debt, comprised of \$272,000.00 CRA debt, \$1.00 Kingsway debt, and the balance owed to miscellaneous creditors. Kingsway's mailing address is listed as c/o Owen Bird, defence counsel in the BC Action.
- March 3 Garritty files a Notice of Intention to make a *BIA* Division I Proposal to his unsecured creditors. The Statement of Affairs lists \$701,002.00 in total debt. Unsecured debt is \$407,002.00, comprised of \$337,500.00 CRA debt, \$1.00 owed to Kingsway, and the balance owed to miscellaneous creditors. No address is listed for Kingsway.
- March 15 MacDonald's creditors vote in favour of the Proposal. CRA attends the meeting.
- March 24 Garritty's creditors vote in favour of the Proposal. CRA and a minority shareholder, Eco Pharm Holdings Ltd, attend the meeting.
- April 4 The IR informs Kingsway's counsel, Mr. Rhodes, about the Proposals. It is unclear if Kingsway was aware of the application to sanction MacDonald's Proposal the following day.
- April 5 Registrar Smart grants an Order sanctioning MacDonald's Proposal.
- The Trustee tells Rhodes that he will send him the Proposal documents.

- April 15 Rhodes faxes the Trustee asking for the documents, stating:
- We understand that your clients, Peter MacDonald and Gordon Garritty have filed proposals in bankruptcy. Given that allegations of fraud have been alleged in Kingsway's Action, by virtue of the *Bankruptcy and Insolvency Act*, Kingsway's Action survives your clients' bankruptcy.
- ...
- We are in the process of scheduling a meeting with Deloitte & Touche to discuss Kingsway's Action. In order to make an informed decision with respect to discussions with Deloitte & Touche about Kingsway's action, we require a copy of the proposals your clients filed in the bankruptcy proceedings.
- April 18 Rhodes receives the Proposal documents. (I note that the Order approving MacDonald's Proposal was not in the package of material sent that day and it is unclear if Kingsway had actual notice of this Order before April 26.)
- April 26 Rhodes advises the Trustee as to Kingsway's position on the lack of notice it received of the creditors' meetings and its general objection to the Proposals, and seeks adjournment of the Garritty Motion.
- April 27 Rhodes faxes the Trustee confirming his discussion of the day before, stating:
- If you are not prepared to consent to an adjournment we will have local counsel appear and advise the court that we just became aware of the matter and of concerns we have relating to lack of notice to Kingsway and the fraudulent conduct of the debtor. Please confirm by April 28th that you will adjourn the hearing for at least two weeks and will provide the requested information.
- April 28 The Trustee does not respond to the adjournment request.
- The Companies file Notices of Intention to make Proposals to their creditors.

- May 3 The Garritty Motion proceeds with CRA and Eco Pharm in attendance. Eco Pharm unsuccessfully applies for standing and an adjournment.
- CRA supports the Proposal and Registrar Wachowich grants the Order.
- May 19 Kingsway learns the outcome of the Garritty Motion and that there is no appeal of the Order. The Trustee concedes to Rhodes that he could not say if the Court was informed of the adjournment request.
- May 28 The Companies are deemed bankrupt. Deloitte & Touche LLP is their trustee in bankruptcy.
- June 7 Kingsway's forensic accountant calculates the amount that remains owing to Kingsway from the Companies is \$3,786,606.00.
- June 16-21 Kingsway files the Notices of Motion relating to the present Application and serves them on MacDonald and Garritty.
- Late June After receiving certain financial information from the Companies' trustee in bankruptcy, Kingsway's forensic accountant determines that \$11,292,224.00 (over and above the monies already paid by RWC), plus additional amounts for unliquidated damages, is still owing from the Companies.
- October 7 Kingsway delivers proofs of claim to the Trustee by which it claims as a secured creditor for approximately \$11, 200,000.00. Appended to both claims is a copy of the Amended Statement of Claim in the BC Action and three Affidavits.
- Mid-October Kingsway obtains a transcript of the Garritty Motion.
- October 20 The Debtors seek to have these Applications heard before the various applications brought by Kingsway in the Companies' bankruptcies, including its appeal of Deloitte & Touche's disallowance of its trust claim for approximately \$11,200,000.00.
- November 7-25 The Trustee disallows Kingsway's proofs of claim and Kingsway appeals the disallowances.
- 2006**
- January 22 Kingsway amends its proofs of claim to claim as an unsecured creditor owed approximately \$11, 200,000.00.

January 23 – These Applications are adjourned for submissions from CRA. The
February 23 Trustee provides a Report to the Court.

III. Analysis

A. Jurisdiction - Registrar or Judge

[10] One member of the Court should not vary or rescind the order of another unless the circumstances mandate it; for example, where the person making the initial order died or is unavailable because of an extended illness or absence.² Only the parties' consent or exceptional circumstances warrant one member of the Court varying an order made by another. These Applications are to review orders made by Registrars Smart and Wachowich, both of whom are alive, well and working.

[11] The authorities conflict about whether the Registrar's jurisdiction includes reviewing final orders, but they agree that it extends to hearing applications concerning orders they have granted, particularly orders made within their jurisdiction in the first instance.³ Most also agree that the Registrar may hear a contested application under s. 187(5).

[12] In *Re 247178 Alberta Ltd.*,⁴ Registrar Funduk considered his jurisdiction to conduct a s. 187(5) review of an order that he had made. He concluded that the then equivalent of s. 192 of the *BIA*, which sets out the Registrar's powers, is one of inclusive rather than exclusive jurisdiction. While he found that he had the jurisdiction to set aside his own orders, he determined that the nature of the order in question in that case precluded him from doing so as it was a final order which could only be appealed, something which was beyond his jurisdiction. In reaching this conclusion, he applied the Alberta Court of Appeal's decision in *Elias v. Hutchison*.⁵

² See: The Annotation to *Traders Finance Corp. v. Garage Morrissette & Fils Ltée*, [1960] C.S. 712, 1 C.B.R. (N.S.) 267 (Que. Sup. Ct), in which the author suggests that there will be situations where there is good reason to attend on another judge, citing as an example *Re Pehlke*, [1940] 1 D.L.R. 657, 21 C.B.R. 159, where the judge who made the original order had died.

³ *Re 247178 Alberta Ltd.*, [1984] A.J. No.535 (Q.B.) (QL). There is some dispute about whether an order made outside of the Registrar's jurisdiction can be reviewed by the Registrar. The Quebec Court of Appeal held that a Registrar has jurisdiction to review any order that he or she has made, whether valid or invalid: *Re Poulin* (1937), 64 Que. K.B. 543 at paras. 13 to 14, 19 C.B.R. 289. However, in *Re MacCulloch* (1992), 113 N.S.R. (2d) 367, 13 C.B.R. (3rd) 204 (S.C.), the court found that the Registrar's ability to review was limited to circumstances where the initial order was validly made. *Poulin* was not referred to.

⁴ See footnote 3.

⁵ (1981), 27 A.R. 1, 37 C.B.R. (N.S.) 149 (C.A.).

[13] Registrar Cook in *Re Fackler and Patterson*⁶ dealt with the issue of his jurisdiction in the context of a contested application to annul a receiving order that he had granted. After reviewing case authority, he decided that his jurisdiction permitted him to hear the application.

[14] A contested application to rescind a proposal was brought before a Registrar in *Re Foster's Fashions Ltd.*⁷ A challenge to the Registrar's jurisdiction in that case was summarily dismissed.

[15] In *Re Dimant*,⁸ Steele J. ruled that a contested application for review of an order discharging a bankrupt under what is now s. 187(5) of the *BIA* was not available because it should have been made to the Registrar.⁹

[16] Madam Justice Bielby in *Christiansen v. Paramount Developments Corp.*¹⁰ took jurisdiction on a contested s. 187(5) review of a Registrar's order, observing that, but for the parties' consent, it would have been before the Registrar. However, the contrary view was expressed in *Re MacCulloch Estate*,¹¹ a case where an application to set aside a Registrar's order was brought jointly by way of an appeal and under s. 187(5).

[17] My view is that these Applications should have been brought before Registrars Smart and Wachowich, who have jurisdiction to hear contested applications under s. 187(5). Their jurisdiction should be determined in this instance not by the fact that it is a contested motion for review, but rather by the scope of s. 187(5) and the nature of the application *per se*.

[18] However, given the exceptional circumstances of this case, I find it appropriate for me to hear the Applications. The parties indicate that, if the matters are remitted to the Registrars, appeals from their decisions are inevitable. As the case manager, any such appeals would be assigned to me and my assuming jurisdiction simply fast-forwards the process. It does not deprive the Debtors of any substantive rights. As appeals from a Registrar are true appeals, not appeals *de novo*, the parties do not have a second "kick at the can".¹²

⁶ (1948), 14 C.B.R. (N.S.) 152 at paras. 2-3 (Ont. H.C.J.).

⁷ (1984), 53 C.B.R. (N.S.) 183 (Ont. H.C.J.).

⁸ (1980) 118 D.L.R. (3d) 568, 31 O.R. (2d) 371, 36 C.B.R. (N.S.) 67 (H.C.J.).

⁹ The court did, however, grant a concurrent application to appeal.

¹⁰ (1998), 234 A.R. 149, 8 C.B.R. (4th) 220, 1998 ABQB 1005 at para. 13.

¹¹ See footnote 3 at C.B.R. p. 211

¹² s. 192(2) of the *BIA* allows the powers and jurisdiction of a Registrar to be exercised by a judge at any time.

B. Standing

[19] Kingsway submitted amended proofs of claim as an unsecured creditor after the Debtors advanced the argument in written submissions on these Applications that Kingsway had no standing since the Proposals were made to unsecured creditors and Kingsway was claiming as a secured creditor.

[20] The *BIA* does not limit the number of amendments to proofs of claim that a creditor can make, whether last minute or otherwise. Accordingly, the timing of the amendment does not rob Kingsway of standing. There may be circumstances where repeated amendments constitute an abuse of the process. Here, the Debtors and CRA contend that Kingsway's claims are "like shifting sands". That does not equate to an allegation of abuse of process.

C. Trustee Error, Notice and Adjournment Request

[21] A trustee in bankruptcy is:

- (i) required to know the provisions of the *BIA*, and ignorance is no excuse for non-compliance with the law;¹³
- (ii) an officer of the court obliged to make full and frank disclosure to the court and to present the facts in a dispassionate and non-adversarial manner in every court proceeding;¹⁴
- (iii) obliged to look after all parties' interests; and
- (iv) required to avoid entering into the fray between competing stakeholders.¹⁵

[22] The Debtors' Statements of Affairs prepared in connection with their Proposals list Kingsway as a creditor owed \$1.00. Although s. 50.4 of the *BIA*¹⁶ requires that a trustee send every known creditor a copy of any Notice of Intention to make a Proposal within five days of its

¹³ *In re Bryant Isard & Co.* (1923), 4 C.B.R. 41, 24 O.W.N. 597 (Ont. S.C.).

¹⁴ *Re Beetown Honey Products Inc.* (2003), 67 O.R. (3d) 511, 46 C.B.R. (4th) 195,(Ont. Sup. Ct. Just.); affirmed (2004), 3 C.B.R. (5th) 204 (Ont. C.A.).

¹⁵ *Engles v. Richard Killen & Associates Ltd.* (2002), 35 C.B.R. (4th) 77, 60 O.R. (3d) 572 at para.150 (Sup. Ct. Just.), affirmed (2004) 69 O.R. (3d) 183, 48 C.B.R. (4th) 68 (C.A.).

¹⁶ s. 50.4(6) requires that every know creditor be given notice of any Notice of Intention to make a Proposal within five days of its filing.

filing, that was not done here. The Trustee sent the material only to creditors with claims valued at more than \$250.00.

[23] As a proposal constitutes substantial interference with creditors' rights, all statutory provisions must be complied with strictly.¹⁷ In his post-Application Report, the Trustee contended that he complied with this requirement as it was his understanding, based on advice he received, that Kingsway did not have an enforceable debt. As such, it was not a "creditor" entitled to notice. He suggested that if Kingsway had attended the creditors' meetings, he would have refused to allow it to vote on that basis.

[24] The provisions of s. 121 of the *BIA* govern the provability of claims in a proposal and who is a "creditor". Section 121(1) provides that:

121(1) All debts and liabilities, present or future, to which the Bankrupt is subject on the day on which the Bankrupt becomes bankrupt or to which the Bankrupt may become subject before the Bankrupt's discharge by reason of any obligation incurred before the day on which the Bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[25] A trustee's duty is to assess claims following the process outlined in s. 135:

135(1) The trustee shall examine every proof of claim or proof of security and the grounds therefore and may require further evidence in support of the claim or security.

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, a proved claim to the amount of its valuation.

[26] Kingsway's claim is contingent, but that does not remove Kingsway from the list of "every known creditor" that is entitled to receive notice under s. 50.4. Indeed, it is that notice which starts the process for proving a claim and determining who is entitled to participate at creditors' meetings.

[27] The Trustee's conclusion that Kingsway was not a "creditor" entitled to notice because its claim was at the early stages of litigation and there was no enforceable debt presumed that a contingent claim cannot be "proved" within the meaning of the *BIA*. It also resulted in the

¹⁷ *Re Davis* (1924), 27 O.W.N. 131, 5 C.B.R. 182 (S.C.)

Trustee bypassing the necessary steps for assessing the claim under s. 135. Neither the Trustee's conclusion nor the decision to bypass the process in s. 135 was proper.

[28] In any event, it is difficult to reconcile the Trustee's position with his actions at the relevant time. If he did not consider Kingsway to be a "creditor" entitled to a s. 50.4 notice, why do the Statements of Affairs show Kingsway as a creditor owed \$1.00 and why did the Trustee send notice of MacDonald's Proposal to Kingsway, even if to the wrong address?

[29] Trustee error is one factor which the courts consider in deciding whether to grant relief to a creditor who did not receive notice of a *BIA* proceeding to which it was entitled. It does not necessarily result in upsetting an order. Every case is fact driven. The factors considered on an application to rescind a *BIA* order include: (i) the degree of debtor and trustee misconduct; (ii) the likely effect on the voting of other creditors if they had knowledge of the contingent claim; (iii) the likely effect on the granting of the initial order if notice been given; and (iv) safeguarding public confidence in the bankruptcy system and the administration of justice generally.

[30] There are a number of notable authorities which deal with non-compliance with *BIA* notice requirements. Most do not relate specifically to proposals, but the courts' reasoning is helpful nevertheless.

[31] In *Flexi-Coil Ltd. v. Dutch Industries Ltd.*,¹⁸ the trustee failed to send statutory notice of proposal proceedings to two contingent creditors. One of them learned about the creditors' meeting and sent a representative. The trustee, having accepted the debtor's statement that contingent claims were "all covered off", turned the representative away. There was some discussion about the contingent claims at the meeting. In allowing the excluded creditor's appeal of the order approving the proposal, the Saskatchewan Court of Appeal criticized the debtor for not disclosing the true state of affairs and the trustee for reporting that he had made detailed and careful inquiry into liabilities of the debtor when it was apparent that he had not. The court indicated that it considered the proceedings fundamentally flawed as the notice requirement applied to contingent and unliquidated claims in a proposal, stating that:¹⁹

Since the procedure in s.135 of the Act applies to such claims the trustee must carry out its statutory duties under that provision... Furthermore an application of this nature should be brought by the trustee before application is made for approval of the proposal: *Re Cadillac Explorations Limited (No.2)* (1985), 51 C.B.R. (N.S.) 178 (B.C.S.C.). A debtor cannot avoid the application of these provisions by failing to make full disclosure of contingent claims in the first place.

¹⁸ (1998), 163 Sask. R. 241, 2 C.B.R. (4th) 207 (C.A.).

¹⁹ footnote 18 at para. 14.

[32] The court also expressed concern about commercial morality and the potential that knowledge of the contingent claim could have caused other creditors to reconsider their vote.

[33] *Re Gaucher*²⁰ concerned a contested application for an order approving a proposal where the debtor's major creditor was unaware of the process until after the creditors' meeting and a favourable vote. The court refused to sanction the proposal.

[34] In *Re Lofchik*,²¹ the trustee mailed notice of the creditors' meeting to all of the creditors. A creditor with a significant claim who would have voted against the proposal did not receive the notice. The court held that the trustee did all that was legally required and that failure of the creditor to receive the notice did not affect approval of the proposal by the other creditors.

[35] The complaining creditor in *Re Merrick*,²² did not have notice of the bankrupt's discharge application. At the time of the bankruptcy, the creditor was a contingent claimant, but later proved his claim. Doherty J. held that it would be unfair to set aside the discharge order for a wide variety of reasons. The facts in *Re Merrick* were dramatically different than those here. Nonetheless, the case includes a useful discussion concerning the considerations on an application of this sort, including the need for evidence that the order would have been any different had the creditor opposed the discharge.

[36] Like the creditor in *Re Merrick*, the complaining creditor in *Re Kornis*²³ did not have notice of the bankrupt's discharge application. The creditor successfully appealed the Registrar's refusal to review the discharge order. The court found that fault for the want of notice lay largely, if not solely, with the trustee, and also expressed concern about the bankrupt's apparent misconduct.

[37] In *Dell Chemical & Marketing Ltd. v. Heinz*,²⁴ a creditor did not receive notice of the bankrupt's assignment into bankruptcy or application for discharge despite the trustee having been told of its claim. Burrows J. granted an order under s. 187(5) rescinding the bankrupt's discharge, but stayed it for two months to allow the trustee to make submissions if it chose to do so.

²⁰ (1961) 4 C.B.R. (N.S.) 33 (Que. S.C.).

²¹ (1998), 1 C.B.R. (4th) 245 (Ont. Ct. (Gen. Div.)).

²² (1989), 73 C.B.R. (N.S.) 85 (Ont. H.C.J.).

²³ (1984), 54 C.B.R. (N.S.) 160 (Ont. H.C.J.).

²⁴ (2001), 22 C.B.R. (4th) 60, 2001 ABQB 57.

[38] The Registrar in *Re Newbrook*²⁵ refused a trustee's accounts where it was apparent that the trustee was less than diligent in discharging its duties to creditors in administering a proposal. Among other acts of trustee misfeasance, the court found that the trustee had pressed forward with a court application to approve a proposal knowing that two major creditors did not have notice of the meeting and would not have approved the proposal.

[39] The consequence of the Trustee's non-compliance with the s. 50.4 notice requirements in the present case was the denial of Kingsway's ability to:

- (i) present its proofs of claim for the Trustee's assessment;
- (ii) protest the Trustee's conclusion that the claims were unprovable;
- (iii) ask for an adjournment of the creditors' meetings to prove its claims;
- (iv) ask that its vote be marked as objected to and held subject to the outcome of an appeal, and²⁶
- (v) oppose the application to sanction MacDonald's Proposal.

[40] It is irrelevant to this stage of the inquiry that Kingsway may have succeeded only in having the Trustee assess its proofs of claim under s. 135.

[41] The Trustee's failure to advise his lawyer about the adjournment request in relation to the Garritty Motion is also troubling, but in light of Kingsway's want of explanation for its failure to attend court, less so than it might otherwise have been.

[42] As a general principle, trustees in bankruptcy should advise the court of any adjournment request where the person requesting the adjournment does not appear in person. In cases such as

²⁵ (1998), 7 C.B.R. (4th) 231 (B.C.S.C.).

²⁶ s. 108 of the *BIA* provides:

108(1) The chairman of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

(2) Notwithstanding anything in this Act, the chairman may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

this, where a vocal and objecting creditor fails to appear after saying that it will, a warning bell should sound prompting the trustee to inquire if the non-appearance is by misfortune or design.

[43] The Trustee's lawyer, Mr. Tkachuk, was unaware of the adjournment request. Had he known, I expect that the application would have unfolded quite differently, although in the end the result might have been the same. Presuming that matters would have unfolded as they usually do when a party fails to appear after saying that it will, I expect that Tkachuk would have told the Registrar about the adjournment request and tried to raise Rhodes to find out what was happening. He would have provided the Registrar with disclosure of the discussions with Kingsway and, armed with that information, the Registrar would have decided whether to proceed in Kingsway's absence. If Rhodes could not be reached, the Registrar might have considered adjourning the application. If he was contacted, I think it fair to speculate that the Registrar would have refused an adjournment. I reach this conclusion because of Kingsway's failure to explain even at the hearing of the present Applications why it did not attend the hearing before the Registrar.

[44] The degree to which the process is tainted by want of notice in the context of the Garritty Proposal is less clear-cut than in MacDonald's. Actual notice casts a different light on the situation. Kingsway had the opportunity to appear but, for some unexplained reason, it chose not to do so. As a result, I am hesitant to conclude that Kingsway should be permitted to rely completely on the Trustee's non-compliance with the statutory notice provision.

D. Process

1. Rescission under Section 187(5) - Governing Principles

[45] Section 187(5) of the *BIA* provides that:

187(5) Every court may review, rescind or vary any order obtained by it under its bankruptcy jurisdiction.

[46] The principles governing an application under s. 187(5) are that:

- (i) The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.²⁷

²⁷ *Elias v. Hutchison* (1980), 27 A.R. 13, 12 Alta. L.R. (2d) 241, 35 C.B.R. (N.S.) 30 (Q.B.), leave to appeal refused (1981), 27 A.R. 1, 37 C.B.R. (N.S.) 149 (C.A.); *Re Lyall* (1991), 8 C.B.R. (3d) 82 (B.C.S.C.).

- (ii) Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.²⁸
- (iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order.²⁹
- (iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.³⁰
- (v) In exercising its discretion, the court must consider the rights not only of the debtor and of the creditors but also of the public.³¹
- (vi) The court should resort to its s. 187(5) jurisdiction if it is just and expedient in the control of its own process.³²
- (vii) Trustee conduct is a factor where statutory non-compliance results in lack of notice, particularly if it negatively affects the integrity of the bankruptcy system.³³
- (viii) The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted.³⁴

[47] The definition of “rescission” is “to make void, annul, cancel, repeal or revoke”.³⁵

²⁸ *Re Northlands Café Inc.*, (1996), 192 A.R. 211, 44 C.B.R. (3d) 170 (Q.B.).

²⁹ *Re Swanborough* (1980), 33 C.B.R. (N.S.) 281 (Ont. S.C.).

³⁰ *Canadian Imperial Bank of Commerce v. Backman* (2001), 102 A.C.W.S. (3d) 876 at para. 62 (Ont. Sup. Ct. Just.).

³¹ *In re Izod; Ex parte Official Receiver*, [1898] 1 Q.B. 241, 67 L.J.Q.B. 111; *In re a Debtor*, [1920] 1 K.B. 461, 89 L.J.K.B. 113.

³² *Re Quinn* (1989), 72 C.B.R. (N.S.) 80 at para. 5 (Ont. H.C.J.).

³³ *Re Merrick*, footnote 22.

³⁴ *Re Strachan* (1980), 34 C.B.R. (N.S.) 136 (Ont. H.C.J.).

³⁵ *Black’s Law Dictionary*, 8th ed. (St. Paul, Minn. : West, 2004), p. 1332: “...2. To make void, to repeal or annul <rescind the legislation.> ...”; *The Dictionary of Canadian Law*, 3rd ed. (Scarborough, Ont.: Thomson Carswell, 2004), p.1134 defines it by reference to the word “revoke”, which means “ To annul, cancel, repeal, rescind”.

[48] The result of rescission of a bankruptcy order, assignment (into bankruptcy), or order discharging a person from bankruptcy are clear – the person is either in or out of bankruptcy. There is a return to the pre-order or pre-assignment *status quo*. The effect of rescission of an order approving a proposal is not so readily apparent. If the order is annulled in the dictionary sense, as compared to the *BIA* sense, which carries specific legal consequences, a suspended state is created. The proposal exists, as does the stay against enforcement triggered on filing a Notice of Intention to File a proposal. The debtor is not deemed bankrupt by virtue of the order being refused. The question is whether this suspended state can be lifted without causing injury to others.

2. Annulment vs. Rescission

[49] There are many reported s. 187(5) cases reported in the literature, but only *Re Amertek Inc.*³⁶ and *Re Divell*³⁷ deal specifically with applications to rescind orders sanctioning a proposal. In both, the court considered the impact of s. 63, which contemplates annulment of a proposal and therefore deemed bankruptcy if there is default in the performance of any provision in a proposal, if it appears to the court that the proposal cannot continue without injustice or undue delay, or because the court's approval was obtained by fraud.

[50] In *Amertek*, the application was made under s. 187(5) to rescind and under s. 63 to annul. The court observed that the argument for annulment as the proper approach was a “powerful” one, but did not expressly find that it was the only approach. Instead, the court held that the criteria had not been met for either application. Killeen J. observed that “the court should not twist s. 187(5) out of shape in a misguided effort to do more than s. 63(1) permits”.³⁸

[51] The court in *Divell* went the extra step of finding that annulment, not s. 187(5) rescission, was the proper approach for setting aside a sanction order. There, the application made under s. 187(5) followed a successful appeal of the Registrar's order rejecting an application to annul a proposal on the ground that it could not proceed without injustice because of default in performance. The Registrar gave the debtor a short period in which to cure the default, failing which the annulment order would issue. On appeal, the court found that the Registrar was without jurisdiction to do that.

³⁶ (1998), 4 C.B.R. (4th) 23 (Ont. Ct. (Gen. Div.)).

³⁷ (1996), 41 C.B.R. (3d) 178 (Ont. Ct. (Gen. Div.)).

³⁸ footnote 36 at para. 44

[52] In refusing the rescission application, Registrar Ferron concluded that s. 187(5) is not available to undo an order approving a proposal, essentially finding that he could not effect a return to the pre-order status quo without creating an intolerable situation. He commented that:³⁹

When an order is rescinded the consequences is to place the party affected by the order in the position of and with the status held prior to the order having been made. It is as if the order had not been made...

This proposal is in default...If I were asked to annul the proposal (and if I had the jurisdiction), I would have had no hesitation in applying s. 63. The effect of such a declaration would be to terminate the proposal and to deem the insolvent person a bankrupt.

If, on the other hand, I rescind the Order as I am asked to do, the insolvent person returns to the position which he was in immediately before the approval of the proposal by the court and after the acceptance of the proposal by creditors. The proposal would still be extant and the s. 69 stay still in place: There is no deemed bankruptcy. The trustee could not administer the proposal because the approval of the court would have been set aside nor would there be a bankruptcy to administer. Transactions which might have occurred in the interim between the approval of the proposal and any rescission of the order of approval would be in jeopardy (and section 62(2) would not apply). The situation would be intolerable both for the debtor and the creditors. To avoid that situation, s. 63 of the Act specifically sets out the procedure to be followed in the event of default...

[53] The *Divell* approach concludes that rescission of an order approving a proposal creates an intolerable legal limbo, but must the same considerations apply where the reason for setting aside the sanction order is want of fairness in the process, as here?

[54] In cases of default, like *Divell*, the debtor has succeeded in making a compromise with his creditors, but for any number of reasons has failed to carry it out and, presumably, the creditors have not agreed to let the default pass unnoticed or to amend the compromise. In such situations, fault lies solely with the debtor, as it does with debtor fraud. Consequently, annulment and the deemed bankruptcy that it brings may be a fitting end. The debtor is no longer considered worthy of access to statutorily sanctioned debt compromise facilities. The same consideration does not come into play where, as here, the process is flawed and that flaw is the result of the trustee's actions, not the debtor's.

[55] While there may be creditors so opposed to the proposal that they would be pleased to have a deemed bankruptcy on annulment visited on the debtor, there are other possible scenarios. As is seemingly the case here, the excluded creditor may be undecided about whether it wants

³⁹ footnote 37 at paras. 5 to 7.

that result. Others may want to participate in the proposal. In such situations, annulment seems unnecessarily harsh and counterproductive to the goals of the parties and the long-standing recognition enshrined in the BIA⁴⁰ that debt compromise should be considered before resorting to bankruptcy.

[56] Bankruptcy courts often are called on to be pragmatic problem-solvers. To that end, many decisions are made on a case-by-case basis applying not a legalistic approach, which is considered to be unhelpful,⁴¹ but one that is sensitive to commercial realities and business efficacy. Where necessary to effect a remedy or to fill gap in the *BIA*, courts will exercise their inherent jurisdiction. However, pragmatism must yield to a principled approach if prejudice to creditors or third parties may result or if *stare decisis* so demands.

[57] The *BIA* is commercial legislation and in recognition of the realities of commerce, it specifically provides for the protection of persons who transact business with a party who is the subject of *BIA* proceedings. Section 63(2), which concerns the annulment of proposals, offers specific protection for post-proposal transactions. It provides that:

63(2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the proposal, and notwithstanding the annulment of the proposal, a guarantee given pursuant to the proposal remains in full force and effect in accordance with its terms.

[58] Similarly, there is protection for post-bankruptcy transactions in s. 99, which states:

99(1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

[59] Another example is found in s. 199, which requires undischarged bankrupts to disclose their status to those with whom they transact business. Section 199 reads:

⁴⁰ As evidenced by the requirement in s. 170 that trustees in bankruptcy must consider whether a proposal to creditors was a viable alternative to bankruptcy in making their recommendation to the court on a bankrupt's discharge application.

⁴¹ *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547 at 556.

199 An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of five hundred dollars or more from any person or persons without informing such persons that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

[60] In addition to these provisions, the short appeal period set out in *BIA General Rules* 30-31 is designed to quickly bring finality for the benefit not only of the debtor, but also those with whom he conducts business.

[61] The Debtors in the present case undoubtedly have transacted business since the Orders approving their Proposals were made some 10 months ago. The effect of trying to return to the pre-Order status quo and allow correction of the process can place some of the persons with whom they transacted business at risk. There is no guarantee that the Proposals, whether as presently drafted or otherwise, would be approved if revisited by the creditors and the Court. If they were not, deemed bankruptcy without the protections afforded by the *BIA* on annulment would result, exposing intervening creditors to an eventuality that they might not reasonably have foreseen. Even though Court approval of the Proposals is not a guarantee of successful performance, the very existence of the Orders may have been a factor considered by some creditors in assessing whether to do business with the Debtors. Rescission of the Orders might also result in proceedings to set aside intervening transactions as preferences or settlements under the *BIA* or other legislation. Were the Applications brought earlier, this risk might have been minimized and, perhaps, a more practical solution than annulment would have been available.

[62] Quite apart from post-Proposal transaction concerns, it is questionable whether s. 187(5) should be available at all as a means of rescinding orders approving a proposal given the broadly drafted annulment provisions in s. 63. Section 63 expressly contemplates annulment where the proposal cannot continue without injustice, the very stuff of Kingsway's complaint - because the process is flawed, a substantial injustice results.

[63] The issue of overlapping remedies, one specific and the other general, was flagged but left unresolved in *Re Amertek*. The court did caution, however, that s. 187(5) should not be twisted out of shape in a misguided effort to do more than s. 63(1) permits.⁴²

⁴² footnote 36 at para. 44

[64] Courts in a handful of reported decisions have indicated their reluctance to employ s. 187(5) relief where there is an alternate specific remedy provided by the *BIA*. Such cases are, however, in the minority. The vast number of s. 187(5) cases do not expressly address this issue.

[65] A review of the jurisprudence indicates that s. 187(5) is sometimes used as a multi-purpose tool, notwithstanding the availability of an alternate remedy such as annulment or appeal. The rationale appears to be that s. 187(5) provides an expedient means to advance the ends of justice and avoid the costs of appeal.⁴³

[66] The court in *Re Hogg*⁴⁴ rejected a s. 187(5) review in favour of annulment where the issue was a discharge order involving debtor fraud, a ground of annulment specifically enumerated in s. 180(2). The court referred to *Re De Grandpré*,⁴⁵ a factually similar case where the same conclusion was reached.

[67] At the trial level in *Workers' Compensation Board. (Manitoba) v. Claus*,⁴⁶ another case of alleged debtor fraud on discharge, Bastin J. compared what is now s. 180 and s. 187(5) and concluded that:⁴⁷

When parliament provided in s. 137(2) [now s. 150(2)] of the Act that a discharge could be annulled on the ground of fraud, it is a reasonable conclusion that the power given to the court by s. 144(5) [now s. 157(5)] to “review, rescind or vary any order made by it” would not include an order granting a discharge.

Furthermore, it would not be consistent with the purpose of the legislation, which is to enable an insolvent debtor to make a fresh start, that after he had been granted an unconditional discharge he should remain indefinitely liable to be returned to a condition of bankruptcy.

[68] On appeal,⁴⁸ the Manitoba Court of Appeal declined to provide appellate guidance on the issue, stating:⁴⁹

⁴³ *Re Strachen* (1980), 34 C.B.R. (N.S.) 136 (Ont. H.C.J.).

⁴⁴ (2005), 12 C.B.R. (5th) 20, 2005 MBQB 109.

⁴⁵ (1969), 15 C.B.R. (N.S.) 262 (Que. S.C.)

⁴⁶ (1969), 5 D.L.R. (3d) 755 at 756, 68 W.W.R. 282 (Man. Q.B.), aff'd (1969), 69 W.W.R. 79, 5 D.L.R. (3d) 755, 14 C.B.R. (N.S.) 4 (Man. C.A.).

⁴⁷ footnote 46 at D.L.R. p. 759

⁴⁸ See footnote 46.

⁴⁹ See footnote 46 at 69 W.W.R. 79 at 80.

We will assume, but without deciding, that the court has a discretion under sec. 144(5) of the *Bankruptcy Act*, RSC, 1952, ch. 14, to rescind an order of discharge from bankruptcy in circumstances where fraud on the part of the bankrupt is not present. Even on that assumption we do not believe, on the facts of this case, such discretion should be exercised in favour of rescission of the order of discharge.

[69] As observed in L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*,⁵⁰ s. 187(5) is available to revoke an order of discharge where other provisions of the *BIA* do not apply to the factual circumstances. This explains why s. 187(5) is resorted to in many cases concerning procedural non-compliance in bankruptcy discharge cases. Annulment is not available, except for cases of fraud or non-compliance with the bankrupt's duties under the *BIA*.⁵¹ The same observation does not apply to annulment of a proposal. Section 63 is broadly drafted to allow annulment where injustice is created by continuing the proposal, thereby capturing procedural flaws like notice non-compliance.

[70] In my view, s. 187(5) is not available for rescission here of the Orders approving the Debtors' Proposals because of statutory notice non-compliance. First, it would expose post-Proposal creditors and other innocent third parties with whom the Debtors have transacted business to unnecessary risk; and, second, because the *BIA* provides for a specific alternate remedy in s. 63. In the final analysis, despite the harsh result of annulment, it is the proper recourse.

[71] Kingsway has not sought annulment of the Proposals. All parties are entitled to consider their positions. Should Kingsway choose to apply for annulment, one small consolation is that a good part of the work done to argue the merits of these Applications can be recycled. From the Debtors' perspective, another consolation is that if Kingsway prevails and annulment is ordered,

⁵⁰ 3rd ed. (Toronto: Carswell, 1992), H§26

⁵¹ Examples include *Dell Chemical & Marketing Ltd. v. Heinz*, footnote 24, where Burrows J. allowed an application to rescind a bankruptcy discharge where a creditor did not have notice of the assignment into bankruptcy or of the application for discharge, and the trustee was told of the claim; *Re Kornis*, footnote 23; and *Re McQuade* (1997), 201 A.R. 317, 47 C.B.R. (3d) 285 (Q.B.). In *Re McQuade*, the aggrieved creditor appealed the discharge order and subsequently sought leave to amend its notice of motion for an order allowing the receipt of new evidence on appeal and an order directing remission of the matter for reconsideration by the Registrar on the basis of the new evidence. The creditor was properly served with notice of the discharge hearing, but either did not receive it or, through inadvertence, did not bring it to the attention of its staff member having carriage of the matter. The bankrupt failed to disclose certain conduct akin to misrepresentation to his trustee and through the trustee to the Registrar. Madam Justice Bielby ruled that substantial injustice resulted because the Registrar was not informed of the bankrupt's misconduct before granting him discharge from bankruptcy and remitted the matter to the Registrar for reconsideration under s. 187(5). See also *Christiansen v. Paramount Developments Corp.*, footnote 10, where a complex and curious fact pattern lent itself to rescission of a receiving order under s. 187(5) rather than annulment. *Re MacCulloch Estate*, footnote 11, involved notice non-compliance and an application made jointly as an appeal and under s. 187(5) to set aside a Registrar's order vacating certain judgments.

they can make another proposal to their creditors if they are so inclined. There will be additional costs, but the process can begin afresh on proper notice. Any injustice is rectified and, by then, perhaps, Kingsway will have “proven” its claim within the meaning of the *BIA*.

3. Review vs. Appeal

[72] *Re a Debtor (No. 32-SD-1991)*,⁵² is often quoted for the proposition that the very existence of s. 187(5) evidences Parliament’s intention that a bankruptcy judge is not *functus officio* on making an order. In speaking of s. 375 of the *Insolvency Act 1986*, which is similar to s. 187(5) of the *BIA*, Millett J. in that case remarked that:

.... Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made upon the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of fresh evidence, whether or not such evidence might have been obtained at the time of the original hearing. The matter is one of discretion, and where the evidence might and should have been obtained at the original hearing that will be a factor for the court to take into account; but the rationale of the rule in *Ladd v. Marshall*, that there should be an end to litigation and that a litigant is not to be deprived of the fruits of a judgment except on substantial grounds, has no bearing in the bankruptcy jurisdiction. The very existence of section 375 is inconsistent with such a rationale.

[73] Outside of Alberta, the jurisprudence is inconsistent as to the applicability of s. 187(5) to final orders. For example, in *Traders Finance Corp. v. Garage Morrissette & Fils Ltée.*,⁵³ the Quebec Superior Court held that it is limited to interlocutory matters.⁵⁴ *Workers’ Compensation Board v. Claus*⁵⁵ is cited for the same proposition.

[74] A creditor in *Re Bryden*⁵⁶ asked for a second time to have the bankrupt’s order of discharge rescinded under s. 157(5) (now s. 187(5)). In rejecting his application, the court commented that the section does not provide an option to change a final order unless there is a

⁵² [1993] 1 W.L.R. 315 at 318-319 (Ch. D.).

⁵³ [1960] C.S. 712, 1 C.B.R. (N.S.) 267 (Que. Sup. Ct.).

⁵⁴ *Houlden & Morawetz*, footnote 50 at I§40

⁵⁵ See footnote 46.

⁵⁶ (1975), 21 C.B.R. (N.S.) 166 (B.C.S.C.).

fundamental change in circumstances or new evidence that would, or should have led to a different result at that time. Fulton J. observed that:⁵⁷

It is true that on the face of them the words of s. 157(5) are wide and the power to review is unrestricted. But the principle is well established that, a court having once dealt with a matter, that matter cannot be reopened in that same court, unless there is some fundamental change in circumstances between the time of making the original disposition and the time when the review is sought, or unless it can be shown that there is evidence or are facts now known which were not known at the time of the original disposition and which, had they been known, would or should have led to a different result at that time. As I see it, it is precisely because of such a possibility -- some change in the circumstances of the bankrupts, perhaps, or some new evidence coming to light which would make it unjust to maintain the original order -- that Parliament enacted the provision in question. But I find nothing in that provision, or in the inherent nature of bankruptcy matters, which leads me to believe that Parliament intended by its enactment to set aside or override the principle of *res judicata* which has been a long-standing principle of our law.

[75] The issue in *Re Strachen*⁵⁸ was whether s. 187(5) was available to reopen a conditional order of discharge on the ground of financial hardship. Henry J. commented that in furtherance of the objects of the *BIA* and avoiding the cost of appeal, s. 187(5) should be available to adduce new evidence or to draw the court's attention to a material argument or point of law that was overlooked in first instance.

[76] The court in *Re Swanborough*⁵⁹ ruled that the intent of the section was very broad and, in giving effect to that intent, set aside a consent receiving order. *Re Bryden* was distinguished on the basis that, given the consent, there was no determination on the merits and thus no "final order". The desired outcome in *Swanborough* was to right the perceived wrong of allowing a consent order to stand where the Registrar accepted that the self-represented bankrupt signed the order while suffering from "mental fatigue" and had understood that bankruptcy was inevitable and that signing the order was to his advantage. I note that although the application was made under s. 187(5), it could have been brought under s. 181 to annul the bankruptcy on the ground that the receiving order ought not to have been made.

⁵⁷ footnote 56 at pp 168-169.

⁵⁸ See footnote 43.

⁵⁹ See footnote 29.

[77] In *Re Bardyn*,⁶⁰ a motion to annul or rescind a bankrupt's discharge was made some eight years after the fact. The court refused to annul the discharge because of concerns of prejudice, relying instead on s. 187(5) to right the wrong caused by lack of notice to a significant creditor. The court's solution to avoid having the bankruptcy system brought into disrepute was to impose a retroactive six-month suspension of the discharge.

[78] I turn now to the Alberta perspective. In *Elias*,⁶¹ Waite J. described the remedy under s. 157(5) (now s. 187(5)) as "in itself in the nature of an appeal". He went on to say:⁶²

However, if I am wrong on the technical procedural aspect of his matter and obliged therefore to deal with the application under s. 157(5) [now s. 187(5)] on its merits, that portion of the application would still be dismissed. The power under s. 157(5) has been described as one that should be 'sparingly exercised' ... as 'a matter of indulgence, and must be carefully guarded' ... It is clear that in Canada the power under s. 157(5) should only exercised if there is new evidence of a substantial nature. Evidence that is merely corroborative of material formerly before the court is insufficient. I would add to that that the exercise of the jurisdiction on the ground of new material should not be made if that material was known or could have been known by reasonable diligence at the time of the first application...

[79] McGillivray C.J.A., speaking for the Court of Appeal, did not go so far. He stated:⁶³

While the language of this section is broad, it seems to me that it is designed to permit of a judge to deal with continuing matters in the bankruptcy so as not to be bound by an earlier decision if faced by changing circumstances. Thus, while a judge might approve the appointment of a trustee, he at a future date might alter that order by appointing more than one trustee or removing a trustee. He might refuse a discharge to a bankrupt but later, having regard to circumstances then existing, vary that order so as to permit of a discharge on terms and he might again at a future date vary that order. Similarly, the manner of remuneration might from time to time be subject to variation and review. Against this, however, there is that type of case where a final adjudication has to be made. The claim of one class of creditors over another has to have priority. The question whether a particular piece of property forms part of the bankrupt's estate, the validity of the

⁶⁰ (2005), 14 C.B.R. (5th) 163 (Ont. Sup. Ct. Just.).

⁶¹ See footnote 27 at 12 Alta. L.R. (2d) 241 at 248.

⁶² See footnote 27 at 12 Alta. L.R. (2d) 241 at 247.

⁶³ See para. 27 at (1981), 27 A.R. 1 at para. 31.

claim or the amount of the claim are all matters which should be the subject of a final adjudication in respect of which an appeal with leave would lie, but surely, adjudication of claims of that sort cannot be the subject of repeated applications. There have been cases where an order disallowing a creditor's claim has been reviewed, but new evidence was available and it was apparently very cogent evidence, but I am of the view that by and large claims capable of final determination should not be the subject of repeated applications. The learned authors of Houlden and Morawetz, *Bankruptcy Law of Canada* in their 1980 revision of an earlier text in dealing with this subject say this [p. 7-9]:

The power given by Sec. 157(5) can only be applied in respect of judgments on interlocutory matters and not where a final judgment dealing with the rights of the parties has been given; in the latter type of situation an appeal under Sec. 163 is the proper remedy. A judgment dismissing a petition for a receiving order is a final judgment and an appeal under Sec. 163 not an application under Sec. 157(5) is the appropriate recourse: *Traders Finance Corpn. Ltd. v. Garage Morrissette et Fils Ltée*, [1960] Que. S.C. 712, 1 C.B.R. (N.S.) 267.

[80] In *Re Alexander*,⁶⁴ and *Re 247178 Alberta Ltd.*,⁶⁵ Registrar Funduk commented that McGillvray C.J.A.'s observations appear to be like the approach taken to Alberta Rule of Court 390, a similarly worded provision allowing review and variation of orders in civil actions. He found that the nature of the relief granted must be considered rather than the method by which it was granted in order to determine if the order was final or interlocutory. If the latter, then s. 187(5) could apply.⁶⁶

[81] Clarke J. acknowledged the limitation on s. 187(5) imposed by *Elias* in *Re Northlands Café*,⁶⁷ but expressed concern that the court had not been referred to the earlier Quebec Court of Appeal case of *Re Richelieu Oil Co.*,⁶⁸ which ruled that a s. 187(5) review is available even

⁶⁴ (1986), 75 A.R. 387, 62 C.B.R. (N.S.) 99 (Q.B.).

⁶⁵ See footnote 3.

⁶⁶ There, the application was to set aside an absolute discharge from bankruptcy premised on the mistaken belief that the conditions of a conditional order of discharge were satisfied. The bankrupts opposed the application on the ground that it was a final order and thus outside the purview of s. 187(5). Registrar Funduk found that the "absolute order of discharge" was simply a procedural order to update the record by acknowledging that the bankrupts had complied with the condition imposed on them by the court, not a decision based on the merits that would thus be a "final order". Accordingly, it was a proper subject of s. 187(5) proceedings

⁶⁷ See footnote 28 at para. 6.

⁶⁸ (1946), 28 C.B.R. 110 (Que. K.B.).

where an order is under appeal. In the end, Clarke J. found that he did not have to decide on the substantive issue of whether s. 187(5) can only be relied on for interlocutory matters because the evidence did not satisfy the grounds for conducting a review under that section in any event.

[82] *Elias* is not referred to in *Dell Chemical Christensen Developments* and *Re Mc Quade*, each of which involved the exercise of the s. 187(5) jurisdiction in relation to a final order. I observe that in each of these cases there was no alternative statutory remedy and the cases could have easily been decided by exercise of the court's inherent jurisdiction to "gap fill".

[83] Kingsway urges that the Court of Appeal, in using the words "by and large claims capable of final determination should not be the subject of repeated applications", left the door open to reconsideration of a final order under s. 187(5) if cogent new evidence is available to warrant intervention. This statement followed the observation that the court was aware of reconsideration applications of final matters on cogent new evidence. Rather than validate the practice, the court instead referred to a passage from *Holden and Morowetz*, which clearly limits s. 187(5) to interlocutory matters.

[84] Having found for other reasons that annulment is the appropriate mechanism to set aside the Orders approving the Debtors' Proposals in the present case, I need not strictly decide whether s. 187(5) is available in terms of final orders. An appeal in this case could in any event be problematic given third party prejudice concerns and the fairly stringent test for leave to appeal.⁶⁹

IV. Conclusion

[85] The Applications to set aside the Orders of Registrars Smart and Wachowich approving the Debtors' Proposals to their unsecured creditors are denied. Kingsway is at liberty to apply for alternate relief. Scheduling of any such application(s) may be spoken to at the next case management meeting.

⁶⁹ *Kubota Canada Ltd. v. Case Credit Ltd.* (2004) ABCA 41 at paras. 9-12.

V. Costs

[86] If the parties cannot agree on costs, they may speak to the issue on the earliest of either June 30, 2006 or the conclusion of Kingsway's further application(s), concerning the Orders sanctioning the Proposals.

Dated at the City of Edmonton, Alberta this 28th day of March, 2006.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Brian D. Rhodes
Dolden Wallace Folick LLP

John I. McLean
Davis & Company
for Kingsway General Insurance Company

Kent Rowan
Ogilvie LLP
for Deloitte & Touche Inc.

Douglas N. Tkachuk
Reynolds Mirth Richards & Farmer LLP
for Gordon Garritty and Peter MacDonald

Vivian R. Stevenson
Duncan & Craig
for One Stop Insurance Services Ltd., John Devich and George Raymond

**Corrigendum of the Memorandum of Decision
of
The Honourable Madam Justice J.E. Topolniski**

The date of June 30, 2005 in line 2 of paragraph 86 was changed to June 30, 2006.

TAB 21

1997 NSCA 67
Nova Scotia Court of Appeal

Black v. Ernst & Young Inc.

1997 CarswellNS 239, 1997 NSCA 67, [1997] N.S.J. No. 195, 159 N.S.R.
(2d) 378, 468 A.P.R. 378, 47 C.B.R. (3d) 129, 71 A.C.W.S. (3d) 829

In The Matter of the Bankruptcy of NsC Diesel Power Incorporated

Frederick W.L. Black et al., Appellants and Ernst & Young Inc., et al, Respondents

Freeman, Matthews and Finn JJ.A.

Heard: April 10, 1997
Judgment: May 6, 1997
Docket: C.A. 127649

Counsel: *Frederick W.L. Black*, for the Appellants.

Tim Hill, for the Respondent Ernst & Young Inc. (Trustee).

Robert W. Wright, Q.C., for the Respondent Ernst & Young Inc. in its personal capacity.

David G. Coles, for the Respondent ABN Amro Bank Canada.

D. Bruce Clarke, for the Respondent the Superintendent in Bankruptcy.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XVII Practice and procedure in courts](#)

[XVII.6 Discovery and examinations](#)

[XVII.6.c By others](#)

Bankruptcy and insolvency

[XVII Practice and procedure in courts](#)

[XVII.9 Miscellaneous](#)

Headnote

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — By others

Principal of bankrupt company applied for order for examination of witnesses under s. 163(2) of Act — Case Management Judge refused to read affidavits in support of application and refused to grant order on basis that applicant was engaged in fishing expedition — Case Management Judge did not exercise his discretion judicially as he had not considered all evidence before him — Applicant's appeal allowed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 163(2).

Bankruptcy --- Practice and procedure in courts — Practice in miscellaneous proceedings

Appellant's appeal from order requiring him to have counsel dismissed on ground that appellant had failed to comply with order respecting posting of security for costs — Appellant applied under s. 187(5) of Act for order reviewing and rescinding order — Appellant attempted to use s. 187(5) of Act as method of launching further appeal — Section 187(5) not designed as appellate provision — Appellant's appeal from dismissal of application under s. 187(5) dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, s. 187(5).

The appellant, the principal operating officer, a director, and the driving force of the bankrupt company, applied for an order for examination of witnesses under s.163 of the *Bankruptcy and Insolvency Act*. The application was supported by two affidavits, one by the appellant and one by the Inspectors. Both affidavits indicated that the Trustee in Bankruptcy may have conducted informal examinations when it was authorized to conduct formal examinations, and may have received information and documents that it did not disclose to the Inspectors or the creditors of the estatem among other irregularities. The Case

Management Judge refused to consider the affidavit of the Inspectors and concluded that the appellant was on a fishing expedition. The application was dismissed. The appellant appealed.

The appellant appealed an order requiring him and the bankrupt corporation to have counsel in all further applications. The appeal was dismissed on the ground that the appellant had failed to comply with an order respecting the posting of security for costs. The appellant subsequently applied under s.187(5) of the *Bankruptcy and Insolvency Act* to review and rescind the counsel order. The application was dismissed. The appellant appealed.

Held: The appeal was allowed in part.

If the Case Management Judge had reviewed the affidavit of the Inspectors, he would have found corroboration for the depositions of the appellant and as a result would not, in all probability, have considered that the appellant was on a fishing expedition. By refusing to consider all of the evidence which was before him in support of the application, the Case Management Judge did not exercise his discretion judicially.

The appellant applied to rescind the counsel order not because of a change in circumstances, but because he believed that the order was unfair. The application followed shortly after the appellant's appeal from that order had been dismissed. The appellant was essentially using s.187(5) of the *Act* as a method of launching a further appeal. Section 187(5) is not an appeal provision, and the application was therefore without merit.

Table of Authorities

Cases considered by *Flinn J.A.*:

Exco Corp. v. Nova Scotia Savings & Loan Co. (1983), 59 N.S.R. (2d) 331, 35 C.P.C. 245 at 255, 125 A.P.R. 331 (N.S. C.A.) — referred to

Minkoff v. Poole (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143 (N.S. C.A.) — referred to

Statutes considered:

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

s. 163 — considered

s. 163(2) — considered

s. 187(5) — considered

s. 192(2) — referred to

APPEAL from order dismissing application for examination of witnesses under s.163(2) of *Bankruptcy Act* and from order dismissing application to vary and rescind order requiring appellant and bankrupt company to have counsel.

The judgment of the court was delivered by *Flinn J.A.*:

1 The matter of the bankruptcy of NsC Diesel Power Incorporated has been rife with litigation, and it is not advancing in a normal manner towards conclusion. Over the past two years, at least, it has been mired down in the litigation of procedural issues.

2 Mr. Frederick W.L. Black was the principal operating officer, a director and the driving force of the bankrupt company. He is also a creditor, having filed a proof of claim. In October 1996, following a lengthy two-day Chambers hearing before Chief Justice Clarke, Mr. Black was granted leave to appeal two matters to this Court. He was denied leave in several other matters, which are not in issue here.

3 At issue in this appeal is whether Mr. Black was wrongly denied an order to conduct examinations under s. 163 of the *Bankruptcy and Insolvency Act* (the *Bankruptcy Act*), R.S.C. 1985, c. B-3 as amended, and whether he was wrongly denied the right to have an order of the Court, respecting legal representation, reviewed and rescinded pursuant to s. 187(5) of the *Bankruptcy Act*.

4 It is not necessary to review the lengthy history associated with this bankruptcy matter. To provide a factual basis for considering the issues which give rise to this appeal, a useful starting point would be the appointment of Palmeto A.C.J., as this bankruptcy matter's Case Management Judge, in December, 1993 (the Case Management Judge).

5 On February 9th, 1994, the Case Management Judge wrote a letter to counsel for all of the parties. Mr. Black was included as an addressee. In that letter he said the following:

From my observations the whole situation has gotten completely out of hand and the various actions must be brought to a conclusion as soon as possible. Accordingly, the matter will no longer be litigated by correspondence between the various parties and this Court. In future all matters to be determined will be by application in Chambers, before me, on specific dates set by application to our Chamber scheduler, Ms. Barbara Grant, or at a case management meeting if I decide to call one.

This Court will no longer accept applications from Mr. Black, either on his own behalf or on behalf of his companies, and in particular NsC Corporation Limited. In future these companies must be represented by a solicitor authorized to practice in our Courts. I have also determined that Mr. Black and the solicitor for the Inspectors of the Estate have no status at any case management meeting and will not attend....

6 This was all reiterated in letters written by the Case Management Judge on March 2, 1994 and March 31, 1994. Prior to a scheduled case management meeting, Mr. Black wrote to the Case Management Judge, requesting permission to attend the meeting. The Registrar in Bankruptcy responded to Mr. Black and advised that he was not permitted to be in attendance.

7 This case management meeting was held, with the Case Management Judge, on May 31, 1994. It was transcribed. Shortly after the meeting began, the Case Management Judge said the following:

...I should again, for the record of this meeting, which incidentally is being taped, that I do not intend to hear NsC Corporation or Mr. Black except through counsel. That was an order of our Court and that order is going to be continued and that will be my decision, rightly or wrongly, throughout this whole piece.

And further:

...I want to bring this to a conclusion and I don't want to get off on any other track.

8 The Case Management Judge, during the meeting, acknowledged that Mr. Black, in his personal capacity, was an interested party. He said:

There is a question of Mr. Black. Is he an interested party and it would appear that he is a creditor of the bankrupt or at least he has filed a ... Proof of claim. So that he is certainly an interested party in his personal capacity, at least until I can be shown ... (inaudible).

9 On June 2nd, the Case Management Judge wrote a letter to all counsel (Mr. Black was included as an addressee) in which he summarized what had taken place at the case management meeting and in that letter said, with respect to his refusal to allow Mr. Black to attend:

Because of orders of this Court, I did not allow Mr. Black to attend...

10 The only "order of the Court" which had been previously issued, following a hearing on its merits, and dealing with Mr. Black's inability to appear without counsel, was an order of Boudreau, J., of the Supreme Court of Nova Scotia dated February 12, 1993. Boudreau J. had ordered all proceedings taken by NsC Corporation Limited (the sole shareholder of the bankrupt) to be stayed until such time as the Corporation engaged counsel to act in such proceedings.

11 On June 14th, 1994, Mr. Black, by-passing the case management process, and the directive of the case management judge that all matters were to be heard before him in Chambers, made application (ex parte) to the Registrar of Bankruptcy for an order, pursuant to the provisions of s. 163(2) of the *Bankruptcy Act*. On Friday, July 17th, 1994, the Registrar granted an Order permitting Mr. Black to conduct examinations of certain personnel of the trustee, and former and present solicitors, all with respect to the administration of the estate of the bankrupt. Over the weekend, the trustee complained to the Case Management Judge concerning this ex parte order of the Registrar.

12 On Monday, June 20th, 1994, the Case Management Judge issued an Order, *ex parte*, which provided that the Order of the Registrar of Bankruptcy, dated June 17th, 1994, "be stayed pending further determination by This Honourable Court". The Case Management Judge also wrote to Mr. Black on June 20th, 1994, advising him that he had issued the stay order, and that he was prepared to hear Mr. Black on an application for an order for examinations under s. 163 of the *Bankruptcy Act*.

13 A hearing was held before the Case Management Judge on July 13th, 1994. The Inspectors of the estate had filed an affidavit in support of Mr. Black's application for an order for s. 163 examinations.

14 With respect to Mr. Black's status, the Case Management Judge decided that Mr. Black had status to make the application for an order for examinations under s. 163 of the *Bankruptcy Act*. In fact, during the course of submissions on the question of Mr. Black's status, by counsel for ABN Amro Bank, the Case Management Judge noted:

There has been no application to refuse Mr. Black to act either for the bankrupt or on his own behalf.

15 Following a hearing of the application, the Case Management Judge dismissed Mr. Black's application. He refused to consider the affidavit of the Inspectors which was filed in support of Mr. Black's application. The Case Management Judge said, with respect to the affidavit of the Inspectors:

But I don't think it has any bearing today and I do not intend to complicate matters.

16 On the merits of Mr. Black's application, he said the following:

THE COURT: All right. Well quite frankly, I had no hesitation in bringing this matter before me before and issuing the stay. I was quite amazed that an order (a) had been applied for in view of my previous correspondence and (b) on the basis of the affidavit which has been submitted which, in my view, does not establish one little bit the necessary requirements under Section 163. Section 163 should almost be automatic but there's no question that it is "may." There is a discretion completely in the Court. And the Court has to look at this. I've looked at the affidavit of Mr. Black and the affidavit of Mr. Black, quite frankly, is in my opinion a fishing expedition involving other documents.

17 On August 3rd, 1994, the Case Management Judge issued three orders which were sent by him to all counsel (Mr. Black was included) with a covering letter. The first order dismissed Mr. Black's application for examinations under s. 163 of the *Bankruptcy Act*. The second order dismissed a further application which Mr. Black had made to remove the solicitors for the creditor ABN Bank. This Order is not relevant to this appeal.

18 A third order, which did not arise out of any application which had been made and heard on its merits, was described by the Case Management Judge in his letter which accompanied the order as follows:

The third Order deals with the practice and procedure in this Court as it relates to the above-noted matter. It directs that all applications by the Bankrupt, or by NsC Corporation Limited, or by Nova Scotia Commonwealth (NsC) Consultants Limited, or by Frederick W.L. Black as an officer of any of these companies, be stayed pending legal representation. In addition, it provides that all future applications etc., dealing with the Bankruptcy shall be made to the Case Management Justice of this Court and not to the Registrar.

It is not necessary for me to set forth the reasons for this Order other than I accept completely the reasoning of Boudreau J. of this Court in his decision of February 12th, 1993, which culminated in his order of February 24th, 1993, and also the reasoning of the decision of the Nova Scotia Court of Appeal delivered June 22, 1993 (C.A. No. 028919).

19 For simplicity, I will refer to this Order as "the Order requiring counsel dated August 3rd, 1994".

20 Mr. Black filed a notice of appeal with respect to this Order requiring counsel dated August 3rd, 1994. In that notice of appeal, Mr. Black also gave notice that, subject to a decision on that appeal, he would appeal other orders of the Case Management Judge, including his Order refusing the s. 163 examinations.

21 On November 24th, 1994, on an application made to Chief Justice Clarke in Chambers by the trustee, the Chief Justice ordered that Mr. Black's appeal, with respect to the Order requiring counsel dated August 3rd, 1994, be dismissed. Mr. Black had failed to comply with an order respecting the posting of security for costs.

22 I will not review, here, the myriad of other applications which Mr. Black brought between August, 1994, and April, 1996, in this bankruptcy matter. They are all outlined in the decision of [Chief Justice Clarke granting Mr. Black leave to bring this appeal \(See \(1997\), 155 N.S.R. \(2d\) 90 \(N.S. C.A. \[In Chambers\]\)](#)).

23 On April 11th, 1996, Mr. Black brought an ex parte application before Justice Goodfellow of the Supreme Court of Nova Scotia pursuant to s. 187(5) of the *Bankruptcy Act*.

24 Mr. Black applied for an order to "review and rescind" the Order requiring counsel dated August 3rd, 1994. Justice Goodfellow dismissed the application on the grounds that he had "no discretion or authority to overrule and rescind an order that was granted almost two years ago by a fellow justice".

25 Mr. Black filed a notice of appeal from Justice Goodfellow's decision.

26 On October 10th and 11th, 1996, Chief Justice Clarke, in Chambers heard a series of applications arising out of this bankruptcy. His decision on these applications is reported in [\(1997\) 155 N.S.R. \(2d\) 90 \(N.S. C.A. \[In Chambers\]\)](#). The only matters, in that decision, which are relevant to this appeal are the denial of Mr. Black's application for s. 163 examinations; and the Order requiring counsel dated August 3rd, 1994.

27 With respect to the first matter, Chief Justice Clarke said the following at pp. 103-104:

As a judge sitting in Chambers of the Court of Appeal, I am satisfied that I have the discretion to extend the time to file and serve a notice of appeal from the Order of Associate Chief Justice Palmetter dated June 20, 1994. In the circumstances, Mr. Black has satisfied the requirements to justify the exercise of such a discretion. The material indicates that he had a bona fide intention to file an appeal of the June 20, 1994, Order which he in fact did but after appearing in the Chambers of this court, elected to proceed with an appeal of the August 3, 1994, Order. There is an arguable ground of appeal based on the circumstances which gave rise to the June 20, 1994, Order. Finally, given Mr. Black's inability to obtain an Order for Examination of certain of the Trustee's personnel, it is in the interest of justice that time should be extended for filing and serving a notice of appeal.

.....

By reason of the decisions/Orders of Associate Chief Justice Palmetter on June 20, 1994 and July 13, 1994, coupled with that of August 3, 1994, Mr. Black has not been able to apply to the court for an Order for Examination of the individuals listed in the Registrar's Order of June 17, 1994. This is especially disturbing given the fact that other interested parties have been able to obtain such Orders in the Supreme Court without difficulty.

28 With respect to the Order requiring counsel dated August 3rd, 1994, Chief Justice Clarke said at pp. 105-106:

The effect of the Order of August 3, 1994, has impaired Mr. Black's ability to advance his case in the matters relating to the bankruptcy of NsC Diesel Power Inc. Since the stay was issued Mr. Black, as an interested party in the bankruptcy proceedings, has been prevented from participating in the proceedings. This has both directly and indirectly affected his rights as an officer of the bankrupt companies. The difficulties with which he has been confronted are well illustrated by the ongoing problems he faces in being precluded from seeking an Order for Examination unless he retains counsel.

Section 187(5) BIA provides that an application can be made to the court of original jurisdiction to review and rescind an Order of that court. In this instance, Mr. Black availed himself of that provision and applied to Justice Goodfellow to exercise his discretion under s. 187(5) to rescind the August 3, 1994, Order of Associate Chief Justice Palmetter. As noted above, the application was dismissed and Mr. Black filed a notice of appeal from that decision. In the ordinary course an appeal from the decision of Justice Goodfellow, already set in motion, will enable Mr. Black to challenge the August 3,

1994, Order of Associate Chief Justice Palmeto. In my opinion, Mr. Black should be permitted to set down his appeal to a panel of this court from the decision and Order of Justice Goodfellow.

Disposition

29 I will deal with the issues raised in this appeal under two general headings:

(1) Was Mr. Black wrongly denied the right to an order for examination of witnesses under s. 163(2) of the *Bankruptcy Act*?; and

(2) Does Mr. Black have a valid appeal from the decision of Goodfellow J. rejecting Mr. Black's application to "review and rescind" the Order requiring counsel dated August 3rd, 1994?

Section 163 Examinations

30 In considering this issue, I will take into account the Order of the Registrar permitting these examinations; the Order of the Case Management Judge which stayed the Registrar's Order ("pending further determination by This Honourable Court"); the decision of the Case Management Judge dated July 13th, 1994, refusing Mr. Black's application for s. 163 examinations; and the Order issued pursuant to that decision (one of the three orders of the Case Management Judge dated August 3rd, 1994).

31 On January 20th, 1994, when the Case Management Judge stayed the Order of the Registrar, he agreed, at the same time, to hear Mr. Black's application for the s. 163 examinations, on its merits.

32 Clearly, the Case Management Judge had the jurisdiction to grant the stay of the Order of the Registrar. Section 192(2) of the *Bankruptcy Act* expressly authorizes a judge of the Supreme Court to exercise the powers and jurisdiction of a Registrar. It was known by both Mr. Black, and the Registrar, that a Case Management Judge had been appointed with respect to this bankruptcy matter. Both Mr. Black and the Registrar were aware of the directions of the Case Management Judge that all applications with respect to the file were to be brought before him. Therefore, the decision by the Case Management Judge to stay the Order of the Registrar, and have the s. 163 application brought before him, on its merits, was clearly part of the general supervisory jurisdiction of the Supreme Court to control its own process.

33 Mr. Black's application was made pursuant to s. 163(2) of the *Bankruptcy Act* which provides as follows:

163(2) On the application of any creditor or other interested person to the court, and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

34 Any order which the judge makes on such an application, is an interlocutory discretionary order. This Court has repeatedly said that it will not interfere with such a discretionary order unless wrong principles are applied or a patent injustice will result (See *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143 (N.S. C.A.) and *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1983), 59 N.S.R. (2d) 331 (N.S. C.A.)). The discretion, in a word, must be exercised judicially.

35 There were two affidavits which supported Mr. Black's application under s. 163(2).

36 The affidavit of Mr. Black deposed:

(a) That the trustee had conducted informal interviews of witnesses rather than formal s. 163 examinations as were authorized by the Inspectors;

(b) That the trustee may have misrepresented the nature of the interviews to the persons who were being interviewed;

- (c) That the solicitors for the Estate were in a conflict of interest;
- (d) That the trustee and S. Gordon McKee (one of its solicitors) examined the files of Corporation House (a former consultant of NsC Diesel);
- (e) That information obtained by the trustee from the "interviews" was given by the solicitors for the Estate to ABN Bank, which information was used by the Bank for its private benefit in litigation in Ontario;
- (f) That the trustee Ernst & Young, in assisting in this process was in a conflict of interest and violated its fiduciary duties; and
- (g) That the trustee Ernst & Young did not file the examination material that they received so that it would have been available to the Court, the Inspectors and the general body of creditors.

37 The Inspectors filed an affidavit in support of Mr. Black's application which deposed:

- (a) That the Inspectors had given the authorization for the s. 163 examinations;
- (b) That in reporting to the Inspectors, the trustee did not divulge that the trustee conducted an examination of the files of Corporation House, nor did the trustee disclose the existence of the documents which the trustee received; or that those documents were given to ABN Bank;
- (c) That the documents delivered to ABN Bank were used by it in legal proceedings to which the estate was not a party;
- (d) That the Inspectors had requested the trustee to do proper s. 163 examinations but that the trustee had refused;
- (e) That the Inspectors had requested the trustee to provide a copy of a letter from one of the Estate's solicitors to the trustee and the trustee refused; and
- (f) That further s. 163 examinations were required and that if the order were granted to Mr. Black it would allow the necessary information to be made available to the Estate at no cost to the Estate.

38 At the hearing of the application, the Case Management Judge refused to consider the affidavit of the Inspectors which was filed in support of Mr. Black's application. He concluded that Mr. Black's application "does not establish one little bit the necessary requirements under s. 163" without indicating those requirements, and in what manner the application was deficient. He further concluded that Mr. Black's application was a "fishing expedition"; and he dismissed the application.

39 The Superintendent of Bankruptcy appeared as a statutory intervener at the hearing of this appeal. In his factum, counsel for the Superintendent says the following:

...There were two affidavits before the Court which were consistent in their information. The affidavits had Exhibits attached which seem to support the statements in the affidavits. It appears that the Trustee may have conducted informal examinations when they were authorized to conduct formal examinations, may have received information and documents that it did not disclose to the Inspectors or the creditors of the Estate and may have participated in the delivery of those documents and that information to ABN Bank through their mutual solicitors.

At this time all of the facts are not known and there may be good explanations for the conduct of the Trustee. The purpose of a s. 163 examination would be to make available the information relating to these issues. One effect of the order preventing the s. 163 examinations has been to prolong the atmosphere of uncertainty and innuendo that has clouded this matter far too long.

40 I agree with those submissions. Further, as counsel for the Superintendent told the Panel at the hearing of this appeal, orders for s. 163 examinations issue almost as a matter of course. They are often issued ex parte. If the Case Management Judge

had reviewed the affidavit of the Inspectors (which he refused to do) he would have found corroboration for the depositions of Mr. Black (that there were questions yet to be answered, and documents yet to be produced) and, as a result, he would, in all probability, not have considered that Mr. Black was on a "fishing expedition".

41 By refusing to consider all of the evidence which was before him, in support of the application, the Case Management Judge did not exercise his discretion judicially, in dismissing Mr. Black's application. I would, therefore, allow the appeal with respect to this issue. I would set aside the Order of the Case Management Judge dated August 3rd, 1994, which dismissed Mr. Black's application for s. 163 examinations. I would further order that Mr. Black be at liberty to make a fresh application, pursuant to s. 163(2) of the *Bankruptcy Act*, on notice, to a judge in Chambers of the Supreme Court of Nova Scotia.

42 Mr. Black's status to make such an application is not hampered by any existing order of the Supreme Court. As the Case Management Judge indicated, Mr. Black is an interested party in his personal capacity as a creditor. He is, therefore, a "creditor or other interested person" within the meaning of s. 163(2) of the *Bankruptcy Act*. The Order of Boudreau J. dated February 13th, 1993, which stays proceedings taken by NsC Corporation until such time as counsel is retained, does not inhibit Mr. Black from making an application under s. 163(2) of the *Bankruptcy Act*. Likewise, the Order requiring counsel, dated August 3rd, 1994, does not affect his status to make such an application.

43 If I was satisfied that Mr. Black was entitled to an order to conduct s. 163 examinations on all fifteen (15) of the persons identified in the original Order of the Registrar, dated June 17th, 1994, this Court could make such an order. I am reluctant to do that. In my view it is preferable that the matter be dealt with by way of a fresh application to a judge of the Supreme Court of Nova Scotia in Chambers because:

- (1) I am not satisfied, on the basis of the material which was before the Case Management Judge, that Mr. Black is entitled to an order to examine all fifteen (15) of the persons identified. The precise nature of each person's involvement is not clearly disclosed in the documentation which supports the application;
- (2) New facts may have come to light, since the original application in 1994, and, if so, those facts should be before the Court; and
- (3) In view of the history of this entire matter, a Chambers judge may very well limit the number of people to be examined, initially; and, in addition, may wish to place time constraints or other restrictions on such examinations.

44 In summary, and in conclusion on this issue, Mr. Black's initial application for examinations under s. 163(2) of the *Bankruptcy Act*, supported as it was by the Inspectors, was not, on its face, without merit. The Case Management Judge erred in dismissing the application, and Mr. Black should be at liberty to make a fresh application to be heard, and decided upon, on its merits.

45 In granting the appeal on this issue, and if a Supreme Court judge grants Mr. Black an order for s. 163 examinations, it is my hope that these matters can be handled expeditiously; and that all parties will co-operate to provide whatever relevant information and documentation is requested. This long outstanding bankruptcy matter must be moved forward instead of standing still as it has done for the past number of years.

46 It is my further hope that if these examinations do not bear the fruit which Mr. Black anticipates they will, that he will heed his own conclusions which he indicated to the panel hearing this appeal, i.e., that he will decide that "it's over" - "I am not going to beat the drum forever".

Appeal from the decision of Goodfellow J. - (April 11, 1996)

47 Section 187(5) of the *Bankruptcy Act* provides as follows:

187 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

48 On April 11th, 1996, Mr. Black made an application before Justice Goodfellow of the Supreme Court for an order to "review and rescind" the Order requiring counsel dated August 3rd, 1994. He did not request that the Court "review, rescind or vary" the Order because of any particular change of circumstances. Mr. Black wanted to have the Order requiring counsel dated August 3rd, 1994, rescinded, because, as he alleged, it was unfair.

49 In dismissing Mr. Black's application Justice Goodfellow said the following:

Well, I've already - the reasons are, one, in my view I have no discretion or authority to overrule and rescind an order that was granted almost two years ago by a fellow justice. Secondly, if I have such discretion, the delay in my view is such and the background of this matter is such that it's not an appropriate exercise in discretion almost two years later to resurrect something that ought to have been dealt with before. And you have had a run at the Court of Appeal. I'm not a hundred percent certain what transpired there, quite frankly, but in my view if I have discretion it would be inappropriate to exercise my discretion with such a long, long period of delay. So, there, you can take those remarks to the Court of Appeal.

50 With respect to Justice Goodfellow's concern as to whether he had the jurisdiction to review, rescind or vary a prior order of a judge of the same Court, in my view, a judge of the Supreme Court clearly has such jurisdiction under s. 187(5) of the *Bankruptcy Act*. The obvious purpose of s. 187(5) is to provide the flexibility that is needed to deal with the changing circumstances which can arise in a lengthy bankruptcy administration. Any number of legitimate reasons could arise which would make it expedient for the Court to review, rescind or vary a previous order. If, for example, it could be argued that the Order requiring counsel dated August 3rd, 1994, prevented Mr. Black from bringing his application for s. 163 examinations; then, in that case, it would be appropriate to request a variation order, under s. 187(5) of the *Bankruptcy Act*, to enable the examinations to proceed.

51 However, Mr. Black's application, as it was presented to Justice Goodfellow, had no merit. It was an application to rescind a prior order because that Order was alleged to be unfair, rather than alleging a change of circumstances. Further, the application followed shortly after Mr. Black's appeal of that Order, to this Court, had been dismissed. Mr. Black was, essentially, using s. 187(5) of the *Bankruptcy Act* as a method of launching a further appeal. Section 187(5) is not an appeal provision, and Mr. Black's application was, therefore, without merit.

52 In my opinion Mr. Black has no basis for an appeal of Justice Goodfellow's dismissal of this application. I would, therefore, dismiss the appeal with respect to this issue.

53 Success on this appeal has been divided; and considering all of the circumstances I would make no order as to costs.

Appeal allowed in part.

TAB 22

CITATION: Impact Tool & Mould Inc. (Re) , 2008 ONCA 187

DATE: 20080314
DOCKET: C47464

COURT OF APPEAL FOR ONTARIO

FELDMAN, LANG and MACFARLAND JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF IMPACT TOOL & MOULD INC., OF
THE CITY OF WINDSOR, COUNTY OF ESSEX

AND IN THE MATTER OF THE INTERIM RECEIVERSHIP OF IMPACT TOOL &
MOULD INC., CARRYING ON BUSINESS IN THE CITY OF WINDSOR, COUNTY
OF ESSEX, PROVINCE OF ONTARIO

B E T W E E N

BDO DUNWOODY LIMITED, TRUSTEE OF THE ESTATE OF IMPACT TOOL &
MOULD INC., A BANKRUPT

Applicant (Appellant)

and

DOYLE SALEWSKI INC., in its capacity as Court-Appointed Interim Receiver of
IMPACT TOOL & MOULD INC.

Respondent (Respondent)

Frank Bennett for the appellant

Justin R. Fogarty and Renée Brosseau for the respondent

David Moore for the moving party, Windsor Precision Gundrill Inc.

Heard: February 27, 2008

On appeal from the order of Justice John H. Brockenshire, of the Superior Court of
Justice dated June 26, 2007.

ENDORSEMENT

[1] This is an appeal by the trustee in bankruptcy from the decision of Brockenshire J., which dismissed the trustee's motion to examine the court-appointed interim receiver under ss. 163 and 164 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*). The trustee's motion had also sought to vary the sale approval and vesting order made by Brockenshire J. on April 23, 2003, approving the interim receiver's sale of the assets of Impact Tool and Mould Inc. The basis for the trustee's motion was its stated concern regarding the propriety of selling Impact's assets to a new company formed by two of Impact's former principals.

[2] As a preliminary matter on the appeal, Windsor Precision Gundrill Inc. sought to review the order of LaForme J.A. dated February 13, 2008, which dismissed its motion to intervene in this appeal. Following oral argument, we dismissed the motion for review. We agree with LaForme J.A. that the proposed intervener would add nothing to the argument to be made by the trustee: *Pearson v. Inco Ltd.* (2005), 195 O.A.C. 77 (C.A.) at para. 6.

[3] The trustee also applied to admit fresh evidence. Following oral argument, we dismissed that application because the proposed evidence does not meet the test in *R. v. Palmer*, [1980] 1 S.C.R. 759.

[4] The motion judge dismissed the trustee's motion to examine the interim receiver for two reasons: first, because four years had passed since the sale was approved and implemented; and second, because the interim receiver had already responded to the trustee's questions, providing "much more information than unsecured creditors, hoping to receive something from the bankruptcy, could reasonably expect." The motion judge also took into account the fact that the trustee had succeeded in obtaining confidential information from the National Bank, another of Impact's secured creditors, so that the trustee "may now know more than the Receiver about Impact."

[5] The three legal issues raised by the trustee on the appeal are: (1) whether a trustee in bankruptcy is entitled to examine a court-appointed receiver as of right under s. 163(1) of the *BIA*, (2) alternatively, if leave of the court is required for such an examination, whether the unusual circumstances of this sale justify granting leave; and (3) whether paragraph 15 of the sale approval and vesting order should be varied.

[6] Dealing with issues (1) and (2) together, we do not need to decide whether there is an absolute right for a trustee to examine a court-appointed receiver, or whether leave is required, because we see no error in the motion judge's conclusion that, through the informal question and answer process, the interim receiver has provided all the information requested and required by the trustee. As the motion judge said, the trustee

was not able to “point to a lack of information or a refusal to provide information which would in any way support his application.” Counsel for the trustee was given the further opportunity to point to any area of deficiency in the interim receiver’s responses on oral argument of the appeal, but was unable to do so. Accordingly, we would dismiss the trustee’s appeal on these issues.

[7] Turning to issue (3), paragraph 15 of the sale approval and vesting order reads as follows:

THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) the bankruptcy of Impact Tool & Mould Inc.; and
- (c) the provisions of any federal or provincial statute,

neither the Purchase Agreement and the Transactions nor the vesting provisions of this Order will be void or voidable at the instance of creditors and claimants and do not constitute nor shall they be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances or other reviewable transactions under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, and they do not constitute conduct meriting an oppression remedy and shall be binding on the trustee in bankruptcy of the Estate of Impact Tool & Mould Inc.

[8] The motion judge refused to vary this paragraph on the basis of delay and because the trustee failed to establish any error or omission in the order. We see no error in the motion judge’s conclusions. Under s. 187(5) of the *BIA*, a party may move to vary an order. However, that section cannot be used purely for the purpose of bringing an appeal out of time: *Re Catalina Exploration & Development Ltd.* (1981), 121 D.L.R. (3d) 95 at 102-103 (Alta. C.A.). That is essentially what the trustee was attempting to do in this case. No appeal was taken from the sale approval and vesting order issued on April 23, 2003, although the trustee was appointed within a month of that date. In an earlier matter on this bankruptcy that came before this court in 2006, the court noted that no appeal had been taken from the sale approval and vesting order: (2006), 79 O.R. 241 at para. 19. The trustee is now seeking to appeal the order under the guise of a variation. Eliminating a critical paragraph of a vesting order four or five years after the transaction took place is not a variation, and cannot be accomplished under s. 187(5) of the *BIA* or the *Rules of Civil Procedure*.

[9] Accordingly, the appeal is dismissed. The interim receiver is entitled to partial indemnity costs as claimed against Gundrill in the amount of \$9,498.30, inclusive of disbursements and G.S.T. The interim receiver is entitled to partial indemnity costs of \$5,000, inclusive of disbursements and G.S.T., against the trustee for the trustee's fresh evidence application. The interim receiver is entitled to costs of the appeal in the amount of \$15,000, inclusive of disbursements and G.S.T. The costs against the trustee are awarded against the trustee personally because it was acknowledged that this is currently a no-asset bankruptcy.

Signed: "K. Feldman J.A."

"S. E. Lang J.A."

"J. MacFarland J.A."

C & K MORTGAGE SERVICES INC.
Applicant (Respondent in Appeal)

-and- **CAMILLA COURT HOMES et al**
Respondents

Court of Appeal File No. C68751
Court File No. CV-20-00643021-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

RESPONDING PARTY'S BOOK OF AUTHORITIES

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