

**COURT OF APPEAL FOR ONTARIO**

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

**B E T W E E N:**

**B&M HANDELMAN INVESTMENTS LIMITED, FLORDALE HOLDINGS LIMITED,  
M. HIMEL HOLDINGS INC., 1530468 ONTARIO LTD., MAXOREN INVESTMENTS,  
and SHEILACO INVESTMENTS INC.**

Applicants  
(Respondents in Appeal)

- and -

**CHRISTINE DROTOS**

Respondent

**REPLY FACTUM OF THE APPLICANTS (RESPONDENTS IN APPEAL)**  
*(Motion before a Judge of the Court of Appeal for Ontario on December 14, 2018 at 10:00 am)*

December 12, 2018

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Appeal)



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**REPLY FACTUM OF THE APPLICANTS (RESPONDENTS IN APPEAL)**

1. Capitalized terms used herein have the meanings ascribed to them in the Second Mortgagee's Factum.
2. There are a number of serious misstatements of fact in PCC's Factum.
3. In paragraph 9 of its Factum, PCC asserts that it acquired the First Mortgage by way of assignment from Home Trust on August 14, 2014. That is factually impossible as PCC (Cayman) was not incorporated until October 20, 2014. It could not have acquired the First Mortgage on August 14, 2014, because it did not exist.
4. In paragraph 10 of its Factum, PCC states that the assignment of the First Mortgage was not formally registered until May 5, 2015 because of the bankruptcy proceedings involving Drotos. That, too, is impossible. It is trite that a mortgagee is free to assign its mortgage without



the concurrence of its mortgagor.<sup>1</sup> Moreover, it is clear from the record that Missaghi was well aware that the consent of Drotos' trustee-in-bankruptcy to the transfer of the First Mortgage was unnecessary, as he noted in an email to Verma dated January 26, 2015 that "[w]e didn't need their permission..."<sup>2</sup>

5. In paragraph 19 of its Factum, PCC asserts that the Motion Judge made negative findings about Missaghi's evidence without justification. On the contrary, the Motion Judge carefully considered and expressly noted that he had read Missaghi's affidavits and the transcript of Missaghi's cross-examination and found that the most charitable comment that he could make regarding the quality of Missaghi's evidence is that he is careless with his words and consequently unreliable. He expressly found that in a large number of cases, factual assertions by Missaghi were simply wrong or tended towards generalizations that were not supported by the documents.<sup>3</sup> The Motion Judge was "mindful" of the serious challenges to Missaghi's credibility advanced by the Second Mortgagee, including a number of conflicting mortgage statements that were in the record.<sup>4</sup>

6. The Motion Judge also noted that there was at least one forged document in the record, namely a written statement with respect to the amount due under the Second Mortgage, attributed to the Second Mortgagee's affiant from November 2017, in which the Second Mortgagee's affiant's last name was misspelled and bore a signature that was clearly not his. The Motion Judge recognized that there was no conclusive evidence before him as to who the author of the forged statement was, although it was attached to an email originating from Missaghi.<sup>5</sup>

7. Finally, the Motion Judge noted that it was fair for the Second Mortgagee to ask him to be circumspect as to the authenticity or completeness of Missaghi's answers to undertakings, which were delivered on November 20, 2018, more than two months after Missaghi's cross-examination, notwithstanding that the original timetable contemplated that answers to

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<sup>1</sup> Walter M. Traub, *Falconbridge on Mortgages*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2003) (loose-leaf updated December 2018) at p. 11-7, s. 11-20; *Jones v. Gibbons* (1804), 9. Ves. Jun. 407 at p. 411, applied in *Duggan v. London & Canadian Loan Co.*, 1890 CanLII 20 (ONCA), at para. 44.

<sup>2</sup> Correspondence between Ara Missaghi and Anita Verma dated January 26, 2015, Volume IV, Tab 7G of the Receiver's Compendium of Documents dated December 10, 2018 (the "**Compendium**") at p. 1113.

<sup>3</sup> Decision of Justice Dunphy dated November 26, 2018 ("**Reasons of Justice Dunphy**") at para. 30.

<sup>4</sup> *Ibid* at para. 31.

<sup>5</sup> *Ibid* at para. 32.



undertakings were to be delivered swiftly after the cross-examinations were completed. The Motion Judge's review of Missaghi's answers to undertakings led him to conclude that the documents produced and the answers given were largely unresponsive to the questions asked, and were delivered late without any compelling explanation.<sup>6</sup> Contrary to PCC's statement in paragraph 19 of its Factum, the Motion Judge was well equipped to exercise his discretion in making negative findings about Missaghi's evidence.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of December, 2018.



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<sup>6</sup> *Ibid* at paras. 33-35.





## SCHEDULE "A"

### LIST OF AUTHORITIES

1. Walter M. Traub, *Falconbridge on Mortgages*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2003) (loose-leaf updated December 2018)
2. *Jones v. Gibbons* (1804), 9. Ves. Jun. 407
3. *Duggan v. London & Canadian Loan Co.*, 1890 CanLII 20 (ONCA)



**SCHEDULE "B"**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS**



**B & M HANDELMAN INVESTMENTS LIMITED et al.**  
Applicants (Respondents in Appeal)

**CHRISTINE DROTOS**  
Respondent

-and-

Court File No. CV-18-594590-00CL  
Court File No. C66196

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PROCEEDING COMMENCED AT  
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