Court File No.: CV-18-591534-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

CHINA MACHINERY ENGINEERING CORPORATION

Applicant

-and-

2284649 ONTARIO INC., 2270613 LIMITED PARTNERSHIP and 2270613 ONTARIO INC.

Respondents

Application Under Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended, and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

BOOK OF AUTHORITIES OF THE RESPONDENTS

MILLER THOMSON LLP
40 King Street West
Suite 5800
Toronto Ontario
M5H 3S1, Canada

Kyla Mahar LSO#: 44182G
Tel: 416.597.4303 / Fax: 416.595.8695

Gregory Azeff LSO#: 45324C
Tel: 416.595.8695 / Fax: 416.595.2660

Lawyers for the Respondents, 2284649 Ontario Inc., 2270613 Limited Partnership and 2270613 Ontario Inc.

INDEX

Court File No.: CV-18-591534-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

CHINA MACHINERY ENGINEERING CORPORATION

Applicant

-and-

2284649 ONTARIO INC., 2270613 LIMITED PARTNERSHIP and 2270613 ONTARIO INC.

Respondents

Application Under Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended, and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

INDEX

TAB 1

2009 CarswellOnt 4257
Ontario Superior Court of Justice [Commercial List]

Ron Handelman Investments Ltd. v. Mass Properties Inc.

2009 CarswellOnt 4257, 179 A.C.W.S. (3d) 114, 55 C.B.R. (5th) 271

B&M HANDELMAN INVESTMENTS LIMITED et al v. MASS PROPERTIES INC. AND MASS BANQUET HALLS INC.

Pepall J.

Judgment: July 14, 2009
Docket: 09-CL-7995

Counsel: David Preger for Receiver, Harris and Partners Inc.
Allan V. Mills for Mass Properties Inc., Mass Banquet Halls Inc.
James S.G. Macdonald for Samra Singh
Satwant Merwar for 2205884 Ontario limited
S. Sood for Castimis Inc., Manjit Kaur Sidhu
S. Schneiderman for Tara Singh

Headnote

Real property --- Mortgages — Sale — Judicial sale — Application for order confirming sale — Miscellaneous
Mortgagors owned property on which they operated banquet hall — Mortgagee held first mortgage on property — Property was also subject to second mortgage, tax liens, construction liens, and one-half interest of judgment creditor — Mortgagee successfully brought application for appointment of receiver over all of mortgagors' assets — Offers made to receiver for property ranged from $2,400,000 to $3,750,000 — Receiver accepted unconditional offer of $3,735,000 with $500,000 deposit from prospective purchaser — Second prospective purchaser made offer directly to mortgagors — Judgment creditor wished to redeem mortgage or purchase property for higher price — Receiver brought application for approval of sale to first prospective purchaser and for vesting order — Application granted — Second prospective purchaser did not have standing — Judgment creditor was not entitled to redeem at this stage of proceedings — Receiver was exclusively authorized and empowered to pursue sale of property to exclusion of all other persons — Allowing redemption at this stage would make mockery of practice and procedures relating to receivership sales — Receiver had acted properly in sale of property — While advertising in ethnic newspapers would have been preferable, receiver had not acted improvidently — Receiver's efforts to obtain best price were certainly sufficient and best offers were above both appraised value and listing price — Prospective buyer was serious buyer — Receiver had considered interests of all parties.

***Pepall J.*:**

Relief Requested

1 Harris and Partners Inc., the Receiver of the debtor respondent companies, Mass Properties Inc. ("MPI") and Mass Banquet Halls Inc.("MBHI") (the "Receiver"), seeks an order approving a sale transaction contemplated by an agreement of purchase and sale between the Receiver and Balbir Bharwalia dated May 8, 2009. It also seeks a vesting order. The Receiver's motion is supported by the Applicant mortgagees and the purchaser, Mr. Bharwalia.

2 There is opposition to the motion. There are two cross-motions. Tara Singh is a 50% owner of the subject real estate. She seeks a discharge of the Applicants' mortgage and a discharge of the Receiver. The debtors, Mass Properties Inc. and Mass Banquet Halls Inc., seek declaratory relief, an order withholding approval of Mr. Bharwalia's agreement of

purchase and sale and directing the Receiver to accept any counter-offer proposed by the Respondents. Others opposing the motion consist of Daljit Samra and Sukhvinder Singh, plaintiffs in an action against the debtors commenced in September, 2007 in which they claim a 50% interest in the subject real estate, and Castimis Inc., a lien claimant owed approximately $16,271 and the principal of whom, Manjit Kaur Sidhu, also wishes to purchase the property.

Facts

3 The relevant facts are as follows. On March 31, 2009, Hoy J. appointed Harris and Partners Inc. as Receiver of all of the assets of the debtor Respondent companies. The appointment order was made after four adjournments of the application to appoint the Receiver were granted by Hoy J. According to the Receiver, these were at the request of the debtor Respondent companies and the premise of the adjournments was imminent refinancing that did not materialize.

4 The assets under the Receiver's administration consist of real property known as 75 Hedgedale Road, Brampton and personal property (the "Property"). The former is a 2.478 acre parcel of land with a one storey, 12,603 sq foot building which is used as a banquet hall. The latter consists of chattels in connection with the banquet hall, the liquidation value of which was appraised as being $17,900.

5 The Applicants hold a first mortgage over the real property that was registered on September 26, 2005. As at June 24, 2009 the Applicants state that $2,259,498.31 is due and owing to them by the debtors pursuant to the mortgage. There is a second mortgage in the amount of $184,882.00 that is registered against the real property but the Receiver has been unable to locate the second mortgagee, Kishor Kamal. The City of Brampton is owed $265,076.68 on account of realty taxes as of January 22, 2009 and there are construction liens of approximately $100,000 registered against the real property along with a tax lien registered in the amount of $94,538.67 pursuant to the *Excise Tax Act*.

6 The registered owner of the real property is the debtor Respondent, MPI. Manjit Singh Saini ("Manjit") is the principal of MPI. He is also the principal of the other debtor Respondent, MBHI, which owns the personal property.

7 On January 13, 2009, Klowak J. granted a judgment in favour of Tara Singh in an action she brought against Manjit, the debtor Respondent companies and certain others. On consent of Manjit and the debtor Respondent companies, Klowak J. granted Ms. Singh a 50% interest in the real property subject to encumbrances registered between August 2, 2002 and October 4, 2005. Her interest was therefore subject to the Applicants' mortgage. Klowak J. ordered that the real property immediately be listed for sale at a price to be determined by Ms. Singh and MPI. According to the Receiver, Ms. Singh through her counsel has had notice of each Court appearance in this proceeding and did not oppose the appointment of the Receiver.

8 Upon the granting of the appointment order, the Receiver negotiated an arrangement with Manjit to permit him to remain in occupation and continue to operate the banquet hall business. In return, he agreed to pay ongoing expenses and occupation rent. The Receiver was of the view that a better realization would result if the banquet hall business continued to operate.

9 The Receiver also engaged Chris Kelos of Coldwell Banker Case Realty, an agent with significant experience selling commercial real estate on behalf of secured lenders and secured creditors. The Receiver set May 7, 2009 as a deadline for submission of offers. The Property was listed for $3,690,000 pursuant to a listing agreement dated April 8, 2009. The listing price was higher than the appraised value of the Property. The Property was listed on MLS and 1,573 hits were received on the MLS listing. In addition, advertisements for the Property were placed in the Globe and Mail on April 23 and 28, 2009. The Receiver sent 49 detailed information packages to prospective purchasers, select real estate agents and persons who responded to the advertisements. 97 showings of the Property were conducted and the Receiver received 9 offers to purchase the Property ranging from a high of $3,750,000 to a low of $2,400,000.

10 On May 8, 2009, the Receiver accepted an unconditional offer of $3,735,000 from Mr. Bharwalia who paid a deposit of $500,000. The purchase agreement imposed an obligation on the Receiver to apply for court approval of the purchase agreement and a vesting order. The allocation of the purchase price as between the real and personal property was to be

determined at a later date and on June 4, 2009, the purchaser and the Receiver agreed to allocate $18,000 towards the personal property and $3,717,000 towards the real property. Mr. Bharwalia secured private financing for the purchase. He has had to pay both lenders' fees and legal fees in that regard. The price offered was the second highest offer received by the Receiver prior to the May 7, 2009 deadline. The highest offer received was for $3,750,000 but it was conditional on obtaining financing. Due to market volatility, uncertain market conditions, the difficult credit environment, and the $15,000 price differential, the Receiver was of the view that acceptance of the higher offer presented significant downside risk and for those reasons, did not accept it. The Receiver was and remains of the view that Mr. Bharwalia's terms including the price represent the best offer in the circumstances. Acceptance of his offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. The price proposed is both higher than the appraised value and the listing price and the offer is unconditional. The Receiver entered into an agreement of purchase and sale with Mr. Bharwalia that is subject to Court approval. The Receiver now recommends that the Court approve that purchase agreement and grant a vesting order.

11 Turning to those opposing the order requested, on June, 9, 2009, the Receiver received an agreement of purchase and sale dated May 29, 2009 between Manjit Kaur Sidhu as purchaser and MPI as vendor. Manjit purported to bind MPI even though only the Receiver had power to do so and the listing agent was described as Homelife/Miracle Realty Ltd. even though the property had been listed with Coldwell Banker. The purchase price was $4,200,000 which is $465,000 more than the price offered by Mr. Bharwalia. No deposit was paid but the agreement stated that a deposit of $600,000 would be payable upon acceptance. There are various purchaser's conditions contained in the offer. Ultimately Manjit Kaur Sidhu provided the Receiver with an unconditional offer to purchase the real and personal property for $4,300,000 however, the closing date is 50 days following court approval in contrast with the 10 days provided for in Mr. Bharwalia's offer. The Receiver has asked but received no explanation as to why the offer of Manjit Kaur Sidhu was outside the May 7, 2009 deadline; why 50 days are required for closing; why Manjit purported to bind MPI and why Homelife Miracle Realty Ltd. was described as the agent; and why, according to the Receiver, there is an apparent proximity of relationship between Manjit and Manjit Kaur Sidhu. In addition, although requested by the Receiver, no information on Manjit Kaur Sidhu's creditworthiness has been forthcoming.

12 MPI and MBHI bring a cross motion for a declaration that the mode of advertising was inadequate as the Receiver failed to advertise in any national paper or any Indian or South Indian paper thereby limiting the prospects of yielding maximum returns. They ask that approval of Mr. Bharwalia's offer be refused and that I grant an order directing the Receiver to accept a counter offer proposed by them. They also seek a declaration that they are entitled to a sale process that would yield maximum returns to creditors and that would guarantee a viable continuation of the debtors' business activities. Manjit states that it would have been far more productive to have enlisted the aid of a real estate agent of his ethnic backround and experience who might better understand the intrinsic value of the hall, the facilities and the nature of the events that take place at the premises. He does not take exception with the listing agent but does take exception to the mode of advertising chosen. The facility was not advertised in any Indian or South Asian paper or in any national publication that might be specifically seen and reviewed by persons of an Indian or South Asian backround. The advertisement, according to Manjit, did not include the correct size of the real property and the parking lot, understated the value of the chattels and failed to indicate that bookings were available as was the cooperation of the existing operators (being the debtors). He provided no particulars with respect to these complaints about the advertisement. He also notes that the equipment appraisers have the same address as Mr. Bharwalia. He says that he is familiar with the other offeror, Manjit Kaur Sidhu, and his group.

13 Daljit Samra and Sukhvinder Singh commenced their action in September, 2007 but have not obtained a judgment against the debtors. They state that they advanced funds to Manjit and MPI that were used to buy the 75 Hedgedale property. They learnt of the Receivership on March 31, 2009. They complain, amongst other things, that the Receiver's plan of action was to list the Property for sale but there was no mention of any sale of the on going banquet hall business. They state that the total claims amount to over $5,000,000 and question whether the Receiver's lack of knowledge of the quantum of debts caused it to assume that a sale of $3,500,000 would satisfy all of the creditors. They also complain that the marketing and sale process was without any consultation with creditors other then the Applicants. In addition,

the Receiver should have retained a business valuator. They also complain that the one month listing was too short a time period. They say that the Sidhu offer indicates that the Receiver's sales and marketing process did not attract the attention of at least one serious buyer. They ask the Court to refuse the approval of the Bharwalia agreement of purchase and sale and accept submissions from other interested parties. They state that the Court should be concerned as to how the Receiver came to determine a list price, the listing period and the deadline for submission of offers. The failure of the Receiver to consider the value of the business was a glaring omission. They further state that there was a lack of consideration of the interests of all parties.

14 In response, the Receiver states that it did not disregard their interests and the Property was appraised on the basis of its continued use as a banquet hall which the appraiser considered to be the highest and best used for the real property. The appraiser used a direct sales approach to value in part because although requested by the Receiver, no income and expense statements were forthcoming from Manjit and it appeared likely that none existed. The appraiser did prepare a reconstructed income and expenses statement based on industry norms but the income approach yielded a considerably lower value.

15 As to the one month time period, no prospective purchasers or agents suggested that they would have submitted an offer have they had more time.

16 Turning to Tara Singh, she states that she advanced $946,000 for the purchase of the Property of which she has been repaid $427,000. She wishes to discharge the mortgage of the Applicants. Her position is that there is no binding agreement of purchase and sale in that Mr. Bharwalia's has been terminated and she therefore retains the right to redeem. As mentioned, she had commenced an action against the debtors and Manjit. The parties to that action signed minutes of settlement in which the defendants were to pay Tara Singh $600,000 within 120 days during which time she was not to act upon a consent judgment given to her as part of the settlement and she also was not to have any dealings with mortgagees of the Property. The 120 days expired on May 13, 2009. Meanwhile, on May 8, 2009, the Receiver had entered into an agreement to sell the Property. Section 6 of Mr. Bharwalia's purchase agreement states that there is no agreement of purchase and sale until the offer has been accepted by the vendor and approved by the Court. As such, Ms. Singh maintains that she is still entitled to redeem. Alternatively, she states that if Court approval has not been granted within 21 days of waiver of the purchaser's conditions, the agreement automatically terminates. Ms. Singh submits that 21 days had elapsed and therefore there is no agreement. Ms. Singh wishes to discharge the mortgage or failing same, she is prepared to purchase the Property for $4,220,000, closing to occur within 14 days of June 29, 2009 with no conditions for financing. This is $485,000 higher than Mr. Bharwalia's offer and $20,000 higher than that of Manjit Kaur Sidhu but with an early closing date. There is no evidence of any deposit having been paid.

17 The Receiver states that before the Receivership proceeding was launched, the option of obtaining an assignment of the Applicants' security was canvassed with Ms. Singh's counsel on January 22, 2009. On February 5, 2009, the option of purchasing the Property was also canvassed with her counsel. The Receiver states that the sale process would be undermined if stakeholders were permitted to wait by the sidelines until an offer is accepted before acting to protect their equity.

Issues

18 The issues to consider are:

(i) Does Manjit Kaur Sandu have standing?

(ii) May Tara Singh redeem the Applicants' mortgage?

(iii) Should the agreement of purchase and sale between the Receiver and Mr. Bharwalia be approved as recommended by the Receiver?

Discussion

(a) Standing

19 Manjit Kaur Sandu does not have standing in his capacity as a prospective purchaser. In contrast to a successful purchaser, an unsuccessful prospective purchaser has no standing on a sale approval motion: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* [1] and *Winick v. 1305067 Ontario Ltd.* [2]

(b) Redemption

20 The Receiver accepts that Ms. Singh is a mortgagor but states that she is not entitled to redeem at this stage of the proceedings. I agree.

21 The Receiver was appointed pursuant to section 47(1) of the BIA and section 101 of the Courts of Justice Act on March 31, 2009. The Court order empowered the Receiver to market the Property and to sell it out of the ordinary course of business with the approval of the Court if the purchase price exceeded $250,000. It was ordered that notices under section 63(4) of the Personal Property Security Act and section 31 of the Mortgages Act were not required. In each case where the Receiver took such steps, it was exclusively authorized and empowered to do so, to the exclusion of all other persons including the debtors and without interference from any other person. The order also provided that proceedings against the debtor, Mass Properties Inc., or its property were stayed. The order specifically addressed the exercise of rights and remedies against the debtor as follows:

> THIS COURT ORDERS that all rights and remedies against the Debtor, Mass Properties Inc., the Receiver or affecting Mass Property Inc.'s 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 Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors 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.

22 In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

23 Secondly, I do not accept that the agreement of purchase and sale has been terminated. As in *Winick v. 1305067 Ontario Ltd.* [3], it is clear from the parties' position in Court and from their conduct that they both relinquished their right to insist on and rely on the 21 day time requirement and waived any rights in that regard. This was a mutual, not a unilateral waiver. In any event, subject to my discussion of the principles associated with sale approval, I would approve the agreement of purchase and sale nunc pro tunc.

(c) Approval of Mr. Bharwalia's Agreement

24 The leading case on approval of receiver sales is *Royal Bank v. Soundair Corp.* [4] In deciding whether a receiver has acted properly in the sale of property, the Court must consider:

> (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) the interests of all parties;
>
> (iii) the efficacy and integrity of the process by which offers are obtained; and

(iv) whether there has been unfairness in the working out of the process.

25 While it would have been preferable had the Receiver advertised in the Indian and South Indian newspapers, it did not act improvidently and it certainly made sufficient effort to get the best price. It placed the property on MLS where there were 1573 hits, advertised twice in the Globe and Mail and contacted 49 prospects. The Property was shown 97 times and was on the market for a month. As to the listing of one month, there was never any suggestion made to the agent, Mr. Kelos, by any prospective purchaser or agent that an additional offer would have been submitted had there been more time. Nine offers were received and the Property sold for more than both the appraised value and the listing price. Mr. Bharwalia is a serious buyer as evidenced by the deposit of $600,000 that was paid and the absence of conditions to the offer.

26 The appraisal that was done by Lebow, Hicks Ltd., described the highest and best use of 75 Hedgedale Road as being continuation of its use as a banquet hall. The appraiser used a direct sales approach. Contrary to the submissions of the debtor corporations, an income approach was also used. Income approach indicates value based on the potential income stream that can reasonably be expected to result from the operation of the property. The validity of the income approach depends on the reliability of the underlying data. In that regard, the appraiser noted that no income or expense statements or operational information were supplied. A cursory income approach based on comparable lease rates and industry performance levels was included in the appraisal. The Receiver indicated that he sought information from the debtors but it was not forthcoming. The Receiver was of the view that it likely did not exist. The income approach used by the appraiser yielded a considerably lower value and was therefore dismissed as a proper approach to market value. As is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

27 The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair* [5], it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver. In this case, it is clear that the Receiver considered the interests of all relevant parties. It contacted Ms. Singh well before it entered into any agreement. Indeed, she was unopposed to the appointment of the Receiver. The Receiver also was in discussions with others including the debtors.

28 As to the efficacy and integrity of the process by which the offer was obtained, Macdonald J.A.'s commentary in *Cameron v. Bank of Nova Scotia* [6] continues to be apropos:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

29 There is nothing in the evidence that causes me to question the efficacy and integrity of the process by which offers were obtained. Furthermore, there was no unfairness in the process. In my view, the Receiver's recommendation that the purchase agreement with Mr. Bharwalia be approved should be accepted.

30 The proposed order is largely similar to the Commercial List Users' Committee model approval and vesting order and should be granted with the exception of paragraph 11 for which there is no compelling evidentiary support. The remaining provisions are reasonable in the circumstances.

Application granted.

Footnotes

1 (2000), 47 O.R. (3d) 234 (Ont. C.A.)

2 (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]).

3 Ibid, at paras. 7 and 8.

4 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

5 Ibid, at paras. 39 - 40.

6 (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) at p.11.

TAB 2

2014 ONSC 1039
Ontario Superior Court of Justice [Commercial List]

Home Trust Co. v. 2122775 Ontario Inc.

2014 CarswellOnt 1888, 2014 ONSC 1039, 237 A.C.W.S. (3d) 650

Home Trust Company, Applicant and 2122775 Ontario Inc., Respondent

D.M. Brown J.

Heard: February 14, 2014
Judgment: February 18, 2014
Docket: CV-13-10313-00CL

Counsel: L. Corne, for Receiver, Collins Barrow Toronto Limited
C. Ho, for Applicant, Home Trust Company
B. Jenkins, for Defendant, 2122775 Ontario Inc.
S. Crocco, for Proposed Purchaser, Urbancorp (Downtown) Developments Inc.
L. Finegold, for Subsequent Mortgagees, US Capital Corp. and Ali Visram

Headnote
Debtors and creditors --- Executions — Stay of execution — General principles
Real property --- Mortgages — Change of ownership — Mortgaged land — Sale or transfer of interest in land — Miscellaneous

***D.M. Brown J.*:**

I. Receiver's sale approval motion and debtor's effort to stay the motion

1 Collins Barrow Toronto Limited, the receiver of 2122775 Ontario Inc. (the "Debtor") pursuant to the November 15, 2013 appointment order of Thorburn J., moved for the approval of an agreement of purchase and sale between it and Urbancorp (Downtown) Developments Inc. ("Urbancorp") of certain assets of the Debtor. The Debtor moved for a temporary stay of the receivership and its sale process for 30 days in order to enable it to complete a re-financing. At the hearing I dismissed the Debtor's motion and granted the approval and vesting order sought by the Receiver. These are my reasons for so doing.

2 The Debtor owned property on the east side of Bayview Avenue, north of Post Road (the "Property"). The Debtor was undertaking to develop a townhouse complex on the Property. Following its appointment the Receiver moved for an order approving a sales and marketing process for the Property. I granted that order on December 11, 2013.

3 The Receiver then conducted a standard marketing process, including the distribution of a marketing flyer, placing advertisements in local papers, distributing a confidential information memorandum to 111 parties who signed a confidentiality agreement, making an electronic data room available to such parties and conducting 28 site tours. The Receiver set a bid deadline of January 23, 2014.

4 Ten offers were made to the Receiver, and the Receiver contacted the top four offerors to clarify their bids. The Receiver then set a revised deadline of January 30 for the top four offerors to improve their bids. Following a call from one of the other offerors, the Receiver contacted the remaining six bidders and afforded them the opportunity to submit improved bids. By the time of the revised deadline, 11 offers had been sent to the Receiver. After discussing the offers with Home Trust, the Receiver accepted the offer from Urbancorp, subject to Court approval.

5 The Receiver filed, on a confidential basis, a summary of all offers received at the initial and revised deadlines. The Urbancorp offer was superior in regards to price, as well as its unconditional nature.

6 Shortly before the return date of the Receiver's approval motion, the Debtor advised that it had negotiated term sheets with two lenders — Toronto Capital Inc. and USHJO Enterprises Inc. — which, if completed, would take out the first mortgage of Home Trust and allow the development of the project so that on completion the Debtor could pay the amounts due to the second, third and fourth mortgagees. The Debtor advised the Receiver that it would apply to the Court to request the redemption of the Home Trust mortgage and to stay the sale process. The subsequent mortgagees supported the Debtor's motion to stay the sale approval process to permit the negotiation of the refinancing.

7 In its Second Supplemental Report the Receiver observed that neither term sheet was "firm" and the combined amounts in the term sheets would be insufficient to pay out the Home Trust mortgage and the Receiver's actual and accrued receivership costs. At the hearing counsel for the Debtor advised that his client was working on obtaining revised term sheets which would eliminate any such deficiency.

8 Urbancorp filed an affidavit from its Chief Financial Officer, Susanna Han, which stated that it had spent time and money participating in the Receiver's bidding process and it had participated in good faith believing that the superior offer would be approved by the Court. Urbancorp also stated that a delay in the closing of the purchase could push back the start of resuming the development of the townhouses, thereby increasing costs and delaying the timing of the development. Han deposed: "[I]t would be manifestly unfair and prejudicial to Urbancorp if the approval of the sale is not granted in these circumstances".

9 Although the Debtor portrayed its request as one seeking a stay of the sale in order to enable it to redeem the first mortgage, in essence the Debtor sought an extension of the bid deadline in order to make a late bid. If granted, the stay requested by the Debtor would seriously impugn the integrity of the court-sanctioned sales and marketing process. The bid process employed by the Receiver was done pursuant to the Sales and Marketing Order and was transparent. It was open to the Debtor to participate in the bid process. While the Debtor did not do so until well after the bid deadline had passed, 11 other bidders complied with the rules of the sales process set by the Receiver, and Urbancorp submitted the superior bid. To permit the Debtor to stay the sales process in such circumstances would risk seriously eroding the confidence of the market in the integrity of receivership sales processes sanctioned by the Ontario Superior Court of Justice.

10 Moreover, this is not a case where the Debtor had presented a vastly superior offer to that accepted by the Receiver. On the contrary, the Debtor's proposal was inferior in all respects: it was not firm and the consideration would be inadequate to pay the first mortgage and the Receiver's charge.

11 I concluded that the sales process conducted by the Receiver and the agreement it submitted for court approval satisfied the principles set out in *Royal Bank of Canada v. Soundair* [1] — the Receiver sought prior court approval for a sales and marketing process; it followed that process; it used a transparent sales process; it afforded all offerors an opportunity to submit improved bids; and, the Receiver accepted the superior bid.

12 For those reasons, I dismissed the Debtor's motion to stay the sale process, and I granted the approval and vesting order sought by the Receiver. Given the commercially sensitive information contained in the Receiver's Supplemental Report dated February 5, 2014, I order that it be sealed until the closing of the Urbancorp agreement of purchase and sale or the further order of this Court.

Footnotes

1 (1991), 4 O.R. (3d) 1 (C.A.)

TAB 3

2015 ONSC 3909
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.

2015 CarswellOnt 9453, 2015 ONSC 3909, 255 A.C.W.S. (3d) 896, 27 C.B.R. (6th) 166

Business Development Bank of Canada, Applicant and Marlwood Golf & Country Club Inc., Respondent

Newbould J.

Heard: June 15, 2015
Judgment: June 22, 2015
Docket: CV-15-10878-00CL

Counsel: Wojtek Jaskiewicz, Bobby H. Sachdeva for Receiver, BDO Canada Limited
Anthony O'Brien for Applicant
R. Graham Phoenix for T.P.C.@Marlwood Inc.
Tony N. Nguyen for Respondent

Headnote

Real property --- Mortgages — Redemption — When redemption available — Miscellaneous
Mortgagor mortgaged golf course — Mortgagor defaulted on mortgage — Receiver was appointed and undertook sales process which resulted in acceptance of successful bid — Principals of mortgagor allegedly threatened bidders — Receiver brought motion to approve sale — Mortgagor brought motion for permission to redeem mortgage — Receiver's motion granted; mortgagor's motion dismissed — Redemption of mortgage in circumstances would interfere with integrity of sales process — Sales process was reasonable and appropriate — Mortgagor did not establish that it came to court with clean hands — Mortgagor had not acted in good faith — Sale approved.
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Mortgagor mortgaged golf course — Mortgagor defaulted on mortgage — Receiver was appointed and undertook sales process which resulted in acceptance of successful bid — Principals of mortgagor allegedly threatened bidders — Receiver brought motion to approve sale — Mortgagor brought motion for permission to redeem mortgage — Receiver's motion granted; mortgagor's motion dismissed — Redemption of mortgage in circumstances would interfere with integrity of sales process — Sales process was reasonable and appropriate — Mortgagor did not establish that it came to court with clean hands — Mortgagor had not acted in good faith — Sale approved.

***Newbould J.*:**

1 The receiver moved for approval of a sale transaction in which an 18 hole golf course property in Wasaga Beach was sold to a purchaser named the Smardenka Group and then assigned to T.P.C.@Marlwood Inc. The approval was opposed by the respondent, the first mortgagee of the property, who now wishes to redeem the first mortgage and has brought a motion for that relief. At the conclusion of the hearing I granted the motion of the receiver approving the sale and dismissed the motion by the respondent, with reasons to follow. These are my reasons.

2 Marlwood was operated by Trilinks Golf Limited in conjunction with another golf course in Wasaga Beach called the Links at New England Village. Marlwood, Trilinks and the Links are all related and owned by Baywood Homes Partnership. The receiver was advised that Trilinks and Baywood were experiencing cash flow difficulties in 2014. Baywood entered into an agreement under which a third party named Simmons took possession of Marlwood late in the 2014 golf season and operated the golf course. During the winter of 2014-15 Marlwood and Simmons had a falling out and no utilities were paid.

3 The first mortgage by Marlwood to BDC was made in 2007 for $2.6 million. It went into default on July 31, 2014. Demand by BDC on the first mortgage was made on October 9, 2014.

4 On February 17, 2015 BDC applied for the appointment of a receiver of the property of Marlwood. By that date there were no services to the Marlwood clubhouse and all leased golf carts and turf equipment had been removed by the lessors as payments for leased equipment and utilities had not been made. The golf course superintendent had also not been paid. Simmonds had offered memberships for 2015 to the members of Marlwood and money from the members who accepted had been deposited into a Marlwood account.

5 On February 17, 2015 Justice Spence adjourned the BDC application for the appointment of a receiver to March 3, 2015 and appointed BDO as a monitor of the property of Marlwood. On March 3, 2015 Justice McEwen continued the appointment of BDO as monitor, ordered a $25,000 forbearance fee to be paid by Marlwood and ordered that Marlwood sign a consent to the appointment of a receiver to be held in escrow until March 31, 2015 subject to terms including the right of BDC to act on the consent if the second mortgagee failed to consent by May 6, 2015 to the terms of a refinancing of the first mortgage proposed by Toronto Capital Corp.

6 The second mortgagee is Romspen Investment Corporation which holds a mortgage for $55 million registered on July 9, 2014. It is a collateral mortgage and part of a larger security package in which Romspen has first mortgage security over several other pieces of land including adjacent development land and another golf course. Romspen failed to consent to the refinancing of the BDC first mortgage by May 6, 2015. Accordingly BDO was appointed receiver of the property on May 12, 2015. Marlwood did not oppose the appointment of BDO as receiver. In its motion material before me, Marlwood requested an order setting aside the receivership order, but this was abandoned at the hearing.

7 The order appointing BDO as receiver authorized it to market the property. BDO determined that if it marketed the property quickly, it might be able to complete a sale of the assets by early June allowing a purchaser to operate the course during the busiest summer months of July and August. While it would have been possible for the receiver to operate the course for play during the sales process, it believed that the costs of doing so would not be recovered by income taken in before a sale could be achieved.

8 The receiver undertook a sales process. It is described in detail in the receiver's report at paras. 29 to 36. I am satisfied that it was a reasonable sales process and that the property was sufficiently exposed to the market for a reasonable period of time to enable prospective bidders to assess the property and bid for it. Marlwood contends that the property was not listed through a "real estate agent experienced in golf courses". There is no evidence that such a real estate agent exists in the market or that such an agent would have achieved any better result than the receiver did. The receiver advertised twice in the Globe and Mail, local newspapers and online. It also engaged a Canadian firm with expertise in the golf industry which provided an electronic notice of the sale to approximately 4,000 industry parties drawn from its own data base. The sales process resulted in 60 enquiries. Twenty-two persons signed confidentiality agreements and obtained access to the receiver's data room. Two offers were received.

9 Marlwood contends that the sale was an improvident sale. I cannot so find based on the evidence. BDC obtained an appraisal from an accredited appraiser with an effective date of February 9, 2015. BDO obtained its own appraisal from an accredited appraiser with an effective date of February 24, 2015. The bid from the successful purchaser is very favourable compared to the appraisals. The appraisals appear to be thorough and well supported. The appraisers each opined that the highest and best use of the property was as a golf course.

10 Marlwood complains that it did not have access to the sale agreement or to the appraisals obtained by BDC and BDO. The sale agreement and appraisals have been filed under seal, as is usual in the Commercial List, in case any approved sale fails to close and the property must be again exposed to the market place. The integrity of any future sales process would be jeopardized if these documents were available to any future bidders. Marlwood had no special right to these documents. The receiver declined to provide these documents to Marlwood and I cannot quarrel with that

decision. Indeed, Mr. Ralph Canonaco, a director of Marlwood and together with his brother Tony Canonaco the two principals of Marlwood, filed an affidavit in which he referred to the down payment on the sale and had no concern estimating the purchase price based on the amount of the deposit. This was not helpful to the process in the event that the sale were to fall through. In my view, the *Sierra Club* test has been met to require the documents to be filed under seal until the sales process has been completed and a sale to the successful purchaser has been completed.

11 Mr. Canonaco asserted in his affidavit that the Marlwood assets should be valued at approximately $2 million, much higher than his estimate of the sale price. There is no cogent evidence from him as to how he arrived at a $2 million value, nor have any appraisals been provided on behalf of Marlwood to support it. I do not accept his assertions of value as being in any way reliable.

12 I am satisfied that the sales process carried out by BDO in the circumstances was reasonable and appropriate and meets the test of the *Soundair* principles in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

13 Marlwood moved for an order permitting it to redeem the first mortgage. On June 9, 2015 BDC provided a mortgage discharge statement stating that the amount outstanding was $2,129,477, inclusive of principal, interest and costs of BDC incurred in enforcing its mortgage, including expected receiver costs. At the hearing, counsel for Marlwood stated that he had a certified cheque in hand to pay that amount. In all of the circumstances, I declined to permit the first mortgage to be redeemed. The essential reason is that it would upset the integrity of sales process undertaken by the receiver.

14 In its affidavit material sworn June 15, 2015, BDC takes the position that it supports the sale to the Smardenka Group. In argument, counsel for BDC said BDC believes in the court sales process but took no position on whether Marlwood should be entitled to redeem its mortgage. While it was not said, the fact that BDC would get less on the sale of the property than if its mortgage were immediately redeemed, may mean that BDC is satisfied that Marlwood and any guarantors would be good for the shortfall on the mortgage covenant.

15 Immediately after the appointment of the receiver, the principals of Marlwood told the receiver that it wished to redeem the BDC mortgage. The earlier proceedings in which the application to appoint a receiver had been adjourned featured some offer of financing from Toronto Capital Corp. that Romspen had not consented to. In mid-March, Marlwood advised it was in the process of arranging financing and the receiver provided an estimate of the amount required to redeem. However no redemption at that time took place.

16 During the currency of the sales process, the receiver was advised that the principals of Marlwood had reached a conditional agreement with BDC for an assignment of the BDC security. The receiver understood that this information had been communicated as fact within the local community by the principals of Marlwood and the receiver received many inquiries regarding the return of the golf course to Marlwood. Some parties interested in the assets of Marlwood asked the receiver about the rumours that Marlwood was going to take back its assets and what effect that would have on the sale process. The receiver believes that based on conversations with interested parties, a number of potential purchasers did not make bids because of the rumours of redemption and the activities of the principals of Marlwood. An e-mail from one interested party to the receiver of May 6, 2015 is troubling. It refers to threats from Mr. Ralph Canonaco that led to the third party backing away from a bid as he viewed the sales process as tainted. Mr. Canonaco did not deny this in his affidavit.

17 The receiver established May 8, 2015 as the deadline for bids to be submitted. On that day, just prior to the bid deadline of 12:00 noon, the receiver was advised by counsel for BDC that they had been contacted by counsel for Toronto Capital Corp., Marlwood's mortgage consultant, that funds were in place to redeem the mortgage. By this date the bid from both bidders, including the winning bid from the Smardenka Group, had been received. The bids were irrevocable until 5 p.m. on May 13, 2015 and after acceptance of the winning bidder, that bidder had 15 days to complete due diligence.

18 On May 13, 2015 at 10:45 am counsel for BDC advised the receiver that the deal with Toronto Capital Corp. was officially dead and that the solicitor for the investor group had been directed to return the funds to his clients. On that day the receiver contacted the two bidders and requested improved bids. The improved bids were received and on May 15, 2015 the bid by the Smardenka Group was accepted.

19 Mr. Alex Smardenka received what he described as two unsolicited visits. The first was from an Eva Ricci and Ralph Canonaco on May 31, 2015. Mr. Smardenka said that Mr. Canonaco strongly suggested that it was in their best interest to forge a partnership with him for the golf course or that Mr. Canonaco and his legal team would put a swift end to the Smardenka purchase of the golf course and that Mr. Canonaco would again be the owner. Mr. Smardenka took this as a threat. The second was the next day on June 1, 2015 from a Michael Sannella and a person named Frank who said they were from Toronto Capital Corp. working on behalf of Mr. Canonaco. They insisted that Mr. Smardenka enter into a partnership with Mr. Canonaco or that the Smardenka purchase of the golf course would not happen. Mr. Smardenka said he was rattled by their threats and so suggested they put their offer on paper for his lawyer to review. They said that this would not be proper in the eyes of the court and so refused to provide any offer. Mr. Sannella also said that for the deal to work Mr. Smardenka must hire his son for $150,000 per year and that his job would be to redevelop the golf course into residential. Mr. Sannella said that Baywood was not in the golf course business but in the land development business and that they would reclaim Marlwood with or without Mr. Smardenka. Mr. Smardenka recorded the visits in an e-mail to the receiver on June 1, 2015.

20 On June 2, 2015 the solicitors for BDO wrote by e-mail to Mr. Canonaco and Mr. Sannella of Toronto Capital Corp. and advised that the visits to Mr. Smardenka were a deliberate interference with the receiver's mandate and were designed to disrupt the receiver's intended action to sell the golf course. They suggested that the recipients of the e-mail feel free to have their lawyers get in touch if they wished to discuss the matter. No response to the e-mail was received back.

21 Mr. Canonaco admits he called and met with Mr. Smardenka. He puts a different light on it. He says that he presented Mr. Smardenka with an opportunity of a joint venture. He said at no material time was it his intention to undermine the receiver's efforts. He says that at the time, he disagreed with the receiver's plans to sell Marlwood to a third party and he believed that by working together with the purchaser, the affected stakeholders, being BDC, the receiver, Mr. Smardenka and Marlwood's shareholders and guarantors could benefit. He denies threatening Mr. Smardenka.

22 There has been no cross-examination on the affidavits of Mr. Smardenka or Mr. Canonaco and I hesitate to say too much about the evidence of the visit from Mr. Canonaco to Mr. Smardenka. I note, however, that no evidence from Eva Ricci was provided about that meeting to deny what Mr. Smardenka has stated took place. Even on Mr. Canonaco's version of his visit to Mr. Smardenka, it is an indication that Mr. Canonaco was prepared to interfere in the sales process. He could have waited until the sale closed and then approached Mr. Smardenka. It is clear from his affidavit that Mr. Canonaco was against the receiver selling the property to a third party.

23 I accept the evidence of Mr. Smardenka as to what took place on June 1, 2015 in the visit from Mr. Sannella of Toronto Capital Corp. Neither Mr. Sannella nor Frank Mondelli of Toronto Capital Corp. gave any evidence denying what Mr. Smardenka says happened, and Mr. Canonaco did not say anything in his affidavit about the visit by Mr. Sannella or deny that Mr. Sannella was speaking for him. In his affidavit, Mr. Canonaco just said that when he met with Mr. Smardenka, he told him that Michael Sannella and Frank Mondelli of Toronto Capital Corp. would be calling to discuss the matter further. I take it from the evidence that Messrs Sannella and Mondelli were speaking on behalf of Mr. Canonaco. The threats made by them to Mr. Smardenka indicate a complete interference with the sales process undertaken by the receiver and indicate a lack of good faith on the part of Mr. Canonaco and Toronto Capital Corp.

24 At the hearing, counsel for Marlwood said that he had in his possession a certified cheque signed by the solicitors of Toronto Capital Corp. for the amount to redeem the BDO mortgage. He said that Romspen, the second mortgage, now was prepared to consent to the new financing. What caused the change from May 13, 2015 when Toronto Capital Corp. had said that the deal was dead was not explained by any evidence, nor was any evidence provided as to why any

problems with the earlier Toronto Capital Corp. endeavours to provide financing to redeem the mortgage could not have been solved before the sales process was to be completed. The mortgage had been in default for nearly one year and, when Toronto Capital Corp. announced on May 13, 2015 that the refinancing was dead, the receiver was justified in completing the sales process and selling the property.

25 A mortgagee has no automatic right to redeem in these circumstances. In another case involving a mortgagee who on a motion to approve a receiver's sale applied for the right to redeem the mortgage in default, *Ron Handelman Investments Ltd. v. Mass Properties Inc.* [2009 CarswellOnt 4257 (Ont. S.C.J. [Commercial List])], Pepall J. (as she then was) denied the request to redeem. Her statements in that case are completely apt to the present situation. After referring to the terms of the receivership order, which were the same as in this case, she stated:

> **22** In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

26 While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. See Galligan J.A. in *Soundair*. Moreover, the interests of a purchaser in a property run sales process by a receiver are to be considered. In *B&M Handelman* Pepall J. also stated:

> **27** The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair*, it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver.

27 In this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process. I also find that the respondent has not established that it has come to court with clean hands entitling it to the order sought permitting it to redeem its mortgage. The respondent has not acted in good faith.

28 In the circumstances, it is appropriate that the sale to the Smardenka Group and assigned to T.P.C.@Marlwood Inc. be approved and that the motion by the respondent Marlwood to redeem the first mortgage be dismissed.

Receiver's motion granted; mortgagor's motion dismissed.

TAB 4

2012 ONSC 7319
Ontario Superior Court of Justice [Commercial List]

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community

2012 CarswellOnt 16827, 2012 ONSC 7319, 19 C.L.R. (4th) 1, 224 A.C.W.S. (3d) 323, 97 C.B.R. (5th) 303

Peoples Trust Company (Applicant) and Rose of Sharon (Ontario) Retirement Community (Respondent)

D.M. Brown J.

Heard: December 21, 2012
Judgment: December 27, 2012
Docket: CV-11-9399-00CL

Counsel: C. Prophet, C. Stanek for Receiver, Deloitte & Touche Inc.
R. Jaipargas for Trisura Guarantee Insurance Company

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Lifting stay — General contractor began proceedings against condominium — Receiver was appointed over condominium and proceedings stayed pursuant to Bankruptcy and Insolvency Act — Default judgment was granted in favour of contractor — Contractor brought motion to set aside stay — Motion granted — Receiver did not object to claim but on condition of setting aside default judgment — Lien claim would expire if stay not lifted — Default judgment was likely made without knowledge of appointment and was in contravention of its terms — Court had authority to determine all matters touching on receivership — Receiver met test for setting aside stay under s. 54(3) of Construction Lien Act, and default and noting in default were set aside.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Miscellaneous

General contractor began proceedings against condominium — Receiver was appointed over condominium and proceedings stayed pursuant to Bankruptcy and Insolvency Act — Default judgment was granted in favour of contractor — Contractor brought motion to set aside stay — Motion granted — Receiver did not object to claim but on condition of setting aside default judgment — Lien claim would expire if stay not lifted — Default judgment was likely made without knowledge of appointment and was in contravention of its terms — Court had authority to determine all matters touching on receivership — Receiver met test for setting aside stay under s. 54(3) of Construction Lien Act, and default and noting in default were set aside.

***D.M. Brown J.*:**

I. Motion to lift stay in a receivership in order to set down for trial a construction lien action

1 On September 27, 2011, C. Campbell J. appointed Deloitte & Touche Inc. receiver and manager of all the assets, undertakings and properties of Rose of Sharon (Ontario) Retirement Community. Paragraph 8 of the Appointment Order contained the standard clause staying proceedings against the debtor.

2 Rose of Sharon owned a long-term care condominium located on Maplewood Avenue, Toronto. Prior to the appointment of the Receiver construction lien litigation had broken out over the condominium project and the general contractor, Mikal-Calladan Construction Inc., had initiated lien proceedings. On January 30, 2012, Trisura Guarantee Insurance Company obtained an assignment of Mikal-Calladan's lien. On November 26, 2012, Trisura obtained an order to continue the construction lien action. As required by the terms of section 37 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, Trisura must set the construction lien action down for trial by December 31, 2012, failing which its lien will expire.

3 Trisura therefore moved for an order lifting the stay of proceedings to allow it to pursue the construction lien action so that it can set the action down for trial.

4 The Receiver did not oppose the lifting of the stay, but it sought certain terms for the order. Trisura has agreed to all the terms, but one — whether as a condition of lifting the stay this Court should set aside a default judgment granted against Rose of Sharon some two days after the Appointment Order was made and the earlier noting in default of Rose of Sharon.

II. Governing legal principles governing the lifting of stays

5 On a motion to lift a stay of proceedings in a receivership the moving party bears the onus of convincing the court that the relief should be granted, and in considering such a request the court should look at the totality of the circumstances and the relative prejudice to both sides.[1] The parties agreed that the court may find guidance in the jurisprudence which has developed around requests to lift stays imposed by the *Bankruptcy and Insolvency Act*. Section 69.4(1) of the *BIA* provides that a court may declare that the statutory stays no longer operate, "subject to any qualifications that the court considers proper", where the court is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the stays or that it is equitable on other grounds to make such a declaration. In *Ma, Re*[2] the Court of Appeal set out the basic considerations on a request to lift a stay under *BIA* s. 69.4:

> Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied
>
> (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or
>
> (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.
>
> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

III. The basic chronology

6 Mikal-Calladan preserved a Claim for Lien on November 19, 2010 against title to the Project. It perfected its lien by commencing the construction lien action — CV-10-417426 — on December 31, 2010. On July 21, 2011, Peoples Trust served a statement of defence in the Lien Action. Rose of Sharon was noted in default in the Lien Action; exactly when, the materials did not disclose.

7 On August 31, 2011, with the consent of Peoples Trust, the parties agreed to refer the Lien Action to a construction lien master in Toronto for a trial. MacDonald J. made a standard Reference Order on that day which provided that "the Master determine all questions arising in this action on the reference".

8 Then, less than a month later, at the suit of Peoples Trust, the Appointment Order was made.

9 On September 12, 2011, before the Appointment Order was made, Mikal-Calladan had requisitioned default judgment against Rose of Sharon. On September 29, two days after the Appointment Order was made, the Registrar signed default judgment against Rose of Sharon for $4,195,768.64, plus costs of $1,350.00 (the "Default Judgment").

10 As mentioned, earlier this year Trisura took an assignment of Mikal-Calladan's Lien Claim and obtained an order to continue the Lien Action about a month ago.

11 With the December 31 deadline looming to set down the Lien Action or face the expiry of its lien, on November 7, 2012 Trisura's counsel wrote to the Receiver's requesting that the Receiver consent to a lifting of the stay so it could set the Lien Action down for trial. Trisura's counsel indicated that "the main issue in the lien action relates to the priority of the lien over the People's Trust mortgage".

12 Receiver's counsel responded on November 22, 2012 advising that the Receiver was prepared to consent to lifting the stay on the following terms:

> Condition 1: Trisura obtained an order to continue in the Lien Action;
>
> Condition 2: Trisura agreed to set aside the noting in default of Rose of Sharon and the Default Judgment so that the Receiver could defend the Lien Action;
>
> Condition 3: Issues of liability, timeliness and quantum in the Lien Action would be determined in a Reference before a Master; and,
>
> Condition 4: The issue of the priorities of the construction lien vis-à-vis any other encumbrance would be determined by a judge of the Commercial List.

13 Mr. Edouard Chassé, a claims adjuster retained by Trisura, in his affidavit stated that Trisura had obtained an order to continue and it agreed to Conditions 3 and 4. Trisura opposed Condition 2 "as the Receiver has had notice of the default for 14 months and has taken no steps" to set aside the noting in default and default judgment.

IV. Analysis

14 There is no doubt that if the stay is not lifted, Trisura would be prejudiced materially by losing its ability to advance its lien claim. Section 37(1) of the *Construction Lien Act* provides that a perfected lien, such as that assigned to Trisura, expires immediately after the second anniversary of the commencement of the lien action unless either (i) an order is made for the trial of an action in which the lien may be enforced or (ii) an action in which the lien may be enforced is set down for trial. December 31, 2012 is the second anniversary of the commencement of the Lien Action, so unless the stay is lifted, Trisura's lien claim will expire. As mentioned, the Receiver has consented to the lifting of the stay, so the remaining dispute centres only around Condition 2 — the Receiver's requirement that the noting of default and Default Judgment against Rose be set aside.

15 Trisura advanced two arguments why no setting aside should occur. First, Trisura argued that because the August 31, 2011 Reference Order of MacDonald J. stipulated that "the Master determine all questions arising in this action on the reference and all questions arising under the *Construction Lien Act*", it was not open to the court supervising the receivership proceedings to set aside a noting of default which had occurred in the Lien Action.

16 I disagree, for two reasons. First, the Default Judgment was made two days after the Appointment Order. No doubt that occurred because the papers requisitioning the Default Judgment were moving through the court's administrative office and the Registrar was unaware of the Appointment Order. Nonetheless, given the stay of proceedings ordered

in the Appointment Order, the Default Judgment contravened the Appointment Order and therefore was of no force or effect.

17 Second, Trisura's submission ignored what occurred less than one month after MacDonald J. made his Reference Order — this receivership came about. As a result of the Appointment Order, the court supervising the receivership considers all issues relating to or touching upon the receivership and therefore is the proper court to determine whether, as a condition of lifting a stay of proceedings, certain relief should be granted to the receiver as part of the process of balancing the respective interests at stake on the lift-stay motion.

18 Which brings me to the second argument made by Trisura: it contended that the appropriate test for considering whether to set aside a noting in default in a construction lien action is that set out in the *Construction Lien Act* and the related jurisprudence and, in the circumstances of this case, the Receiver could not meet that test. Section 54(3) of the *CLA* provides that where a defendant has been noted in default, it shall not be permitted to contest the claim "except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence". Section 67(3) of the *CLA* states that "except where inconsistent with this Act...the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act."

19 In *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, Master Polika held that Rule 19.03(1) of the *Rules of Civil Procedure* dealing with the setting aside of notings in default was inconsistent with *CLA* s. 54(3) because it was less stringent than the test under the *CLA* by reason of granting the court a discretion to set aside a noting of default on such terms as were just. Master Polika stated that the sole test a party moving to set aside the noting of default in a construction lien action needed to meet was that set out in *CLA* s. 54(3) — i.e. to satisfy the court that there existed evidence to support a defence. [3] In *A1 Equipment Rental Ltd. v. Borkowski* Lederer J. stated that a party moving to set aside a noting in default under the *CLA* must not only demonstrate that evidence existed to support a defence, it also had to move promptly to set aside the noting in default. [4]

20 Whether, when a lien claimant seeks leave of the court supervising a receivership to lift the stay of proceedings and the receiver seeks a condition that a noting of default be set aside, the court must apply the test under *CLA* s. 54(3) or may proceed on a less stringent basis as part of its discretion in lifting the stay, is a question I need not determine for the simple reason that on the facts of this case the Receiver meets the test under the *CLA*.

21 Trisura submitted that the Receiver cannot now attempt to impose a condition setting aside the noting of default when over a year has passed since that event. The evidence does not support that contention. First, just over a week after the making of the Appointment Order, counsel for Mikal-Calladan wrote to Receiver's counsel advising of the Default Judgment and stating:

> Under the circumstances, we will not take any steps to enforce our client's judgment in the absence of obtaining the necessary leave from the Court.

In light of that position taken by the lien claimant, it is not surprising that the Receiver took no immediate steps to set aside the Default Judgment or the noting in default.

22 In its First Report dated December 12, 2011 the Receiver reported:

> While there may be setoffs against Mikail's claim that may be asserted by the Receiver, pending disposition of the Property, the Receiver does not intend to take any action in connection with any of the above-noted lien claims at this time.

Again, this constitutes evidence of a reasonable explanation by the Receiver about why it did not take steps at the time in the Lien Action.

23 On February 29, 2012, Trisura advised the Receiver of the assignment of the Lien Claim, but then took no further steps to move the Lien Action along until October 24, 2012 when it informed the Receiver that it wished to obtain a trial date. Further emails between counsel ultimately resulted in the Receiver's November 22, 2012 letter setting out the terms for lifting the stay of proceedings. In those circumstances, I see no argument that the Receiver failed to take steps promptly to set aside the noting in default once it became aware of Trisura's intention to proceed with the Lien Action. I also would note, by way of chronology, that on September 14, 2012, a month before Trisura approached the Receiver about further steps in the Lien Action, the Receiver had commenced a claim against Trisura under the performance bond for the Project.

24 As to whether the Receiver has filed evidence to support a defence, it has. Although the Receiver has not filed a draft Statement of Defence, the Receiver provided Trisura with ample details of its defence through its July 10, 2012 letter to Trisura's counsel, in particular the sections entitled "Set-Offs" and "Deficiencies", as well as in portions of its Statement of Claim in the performance bond action, specifically paragraphs 42 and 62 of the claim.

25 In balancing the interests of Trisura and the Receiver on this motion to lift the stay of proceedings, I conclude that it is fair and appropriate to require, as a term of lifting the stay, that both the noting of default of Rose of Sharon and the Default Judgment be set aside, and that the Receiver be permitted to file a Statement of Defence in the Lien Action within 20 days.

V. Summary and costs

26 By way of summary, I grant the motion of Trisura to lift the stay of proceedings contained in the Appointment Order to allow it to pursue the Lien Action, including allowing Trisura to set the Lien Action down for trial. Out of an abundance of caution, given the proximity of the December 31 deadline, I also order the trial of the Lien Action. As conditions for lifting the stay I order as follows:

> (i) the noting in default of Rose of Sharon and the Default Judgment against it are set aside so that the Receiver can defend the Lien Action;
>
> (ii) the Receiver may file a Statement of Defence in the Lien Action within 20 days;
>
> (iii) the issues of liability, timeliness and quantum in the Lien Action shall be determined in a Reference before a Master; and,
>
> (iv) the issue of the priorities of the construction lien vis-à-vis any other encumbrance shall be determined by a judge of the Commercial List in these receivership proceedings.

As to costs, the conditions sought by the Receiver in its November 22, 2012 letter were reasonable. There really was no need for a contested motion. Accordingly, I grant the Receiver its costs of this motion fixed at $4,000.00 payable by Trisura within 20 days of the date of this Order. I am available at a 9:30 appointment tomorrow, Friday, December 28, 2012, to issue this order, if required.

Motion granted.

Footnotes

1 *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199 (Alta. Q.B.), paras. 13 and 14.

2 (2001), 24 C.B.R. (4th) 68 (Ont. C.A.), paras. 2 and 3.

3 (2009), 79 C.L.R. (3d) 144 (Ont. Master), para. 24.

4 (2008), 70 C.L.R. (3d) 274 (Ont. S.C.J.), para. 51.

TAB 5

1976 CarswellOnt 420
Supreme Court of Canada

Petranik v. Dale

1976 CarswellOnt 420F, 1976 CarswellOnt 420, [1977] 2 S.C.R. 959, 11 N.R. 309, 69 D.L.R. (3d) 411

Helga Petranik, Appellant and Alice Dale, Frederick W. Parker and Eugene F. Berwick, Respondents

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

Judgment: May 5, 1976
Judgment: October 5, 1976

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *Nelles Starr, Q.C.*, and *Walter S. Gonet, Q.C.*, for the appellant.
George T. Walsh, Q.C., and *Tom Pratt*, for the respondents.

Headnote

Mortgages --- Sale — Practice and procedure — Appeals — Right to appeal
Order for foreclosure — Mortgagee not foreclosing but selling property — Whether sale proper.
A mortgagee of premises obtained, an order for foreclosure of the mortgaged property. The order was silent as to the mortgagor's right to redeem. Instead of foreclosing, the mortgagee proceeded to sell the property, purportedly exercising the power of sale contained in the mortgage. In an action for a declaration that the mortgagee's sale and conveyance of the property were null and void, plaintiff was successful at trial but not on appeal. On futher appeal, held, the appeal should be allowed and the judgment of the trial Court restored. A judgment nisi left open the equitable right to redeem, at least until judgment absolute was obtained. In such circumstances, the mortgagee could not sell under the power of sale without leave of the Court.

The judgment of Laskin C.J. and Spence JJ. was delivered by *The Chief Justice*:

1 This appeal arises out of an action brought by the appellant on April 28, 1969 claiming a declaration that (1) a mortgage on certain property allegedly given by her to one Alice Dale on July 12, 1958, registered on January 8, 1959 and subsequently recorded in full on June 15, 1962, was void because the signature thereon was not hers, and (2) a conveyance of the property by Alice Dale to the respondents Parker and Berwick on June 1, 1962 under the power of sale contained in the mortgage was void and that the respondents held the property in trust for the appellant.

2 Neither the trial judge nor the Ontario Court of Appeal found in the appellant's favour on her contention that the mortgage was not executed by her, and this question was not pressed in this Court. What is evident from the record is that the mortgage transaction between the appellant and Alice Dale (who was not represented in this Court nor in the Court of Appeal), and other transactions in which the appellant and her husband were involved were carried out by a solicitor whose irresponsibility, incompetence and negligence are made plain in reasons of the trial judge given in a companion case which, as to the evidence and findings, was by consent of counsel, made applicable to the present case. The solicitor in question arranged the mortgage on which no more than $4,000 was advanced although it is stated to be for $5,000. He acted for both parties to the mortgage, and then took foreclosure proceedings on behalf of the mortgagee, Alice Dale. She was an elderly woman and, as found by the trial judge, relied on her daughter, who was the solicitor's secretary, and upon the solicitor, in respect of the transaction in this case. The daughter herself was involved in a mortgage transaction affecting the very property which is the subject of these proceedings.

3 A question arose in these proceedings whether the appellant had ever been served with the writ in the foreclosure action and, although it was left open by the trial judge who found on other grounds in the appellant's favour, I agree with the Court of Appeal that the issues in this case must be considered on the footing that there was proper service, as indeed is shown by a sheriff's officer's certificate.

4 Arising out of the foregoing is another matter that should be laid to rest, one which the trial judge considered favourably to the appellant and on which the Court of Appeal did not pronounce because, as it noted, no argument was addressed to that Court on it. I refer to the matter of the delay *ex facie* involved in the prosecution by the appellant of her claim herein. The proceedings out of which this appeal arises were commenced on April 28, 1969. Since they relate to the foreclosure action, which was begun on July 17, 1961, and to the exercise of a power of sale on June 1, 1962, an explanation of the delay was obviously required.

5 Default judgment in the foreclosure action was signed against the appellant on March 23, 1962 and a writ of possession was issued on April 17, 1962 and executed at the solicitor's behest. If the appellant did not know of the default judgment (and it appears that she did not), she certainly knew of the writ of possession; the evidence makes this clear. On learning of the sale to Parker and Berwick on June 1, 1962 pursuant to an accepted offer of May 17, 1962, the appellant took certain proceedings which proved abortive. It is enough to say that by an order of the Ontario Court of Appeal of December 10, 1968, that Court gave leave to the appellant to re-open an action instituted by her in 1964 against Alice Dale, Parker and Berwick, or to institute such other proceedings as she might be advised, under a limiting date in either case of February 3, 1969. A motion by the appellant to re-open the former action was dismissed on April 9, 1969 and the proceedings now in appeal were begun, as already stated, on April 28, 1969. The trial judge indicated that there was no evidence to show that the motion to re-open was not commenced before February 3, 1969. Hence, he proceeded to deal with the case before him on the merits. I think, in view of all the circumstances, that was the proper course. It was the one that the Court of Appeal took, and it was on the merits that the argument proceeded in this Court.

6 The default judgment in the foreclosure action, which as already noted, was signed on March 23, 1962, was in the following terms:

> UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed;
>
> I. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.
>
> II. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

7 When originally drawn up in typed form, the proposed default judgment consisted of three clauses, the first and third clauses being those set out above and a second clause which was as follows:

> 2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that (subject to the provision of section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

This clause was struck out, the deletion being initialled by the Assistant Registrar. No explanation was given for the deletion. It is common ground that had this stricken clause remained in the default judgment the appellant would have

been entitled to succeed and to have a proper reference at which the accounts would be taken and the amount properly owing on the mortgage ascertained. There was a contention by the respondents that their position was better than that of Alice Dale in that they were purchasers for value, but it is quite clear that they were aware of the foreclosure proceedings and of the default judgment. Since they took with notice thereof, their title would be vulnerable if the mortgagee was disentitled to act when she did under the power of sale in the mortgage.

8 I note also that Alice Dale swore an affidavit on May 31, 1962 in respect of the sale to the respondents in which she alleged a continuing default of interest under the mortgage to the date of the sale, which she said was May 29, 1962. The deed of June 1, 1962 also recited that there was default in interest for more than two months (this being a proviso in the mortgage permitting sale) and that it had continued to date. The record shows that the solicitor who was behind all the transactions involving the appellant's mortgaged property had in fact paid up the interest to the end of April, 1962, which was for a period beyond the date on which default judgment was signed and beyond the date of the writ of possession.

9 The default judgment was a judgment *nisi* for foreclosure, and para. I thereof directed a reference to the Master for the usual enquiries with respect to the accounts and as to redemption or foreclosure. Alice Dale did not proceed with the reference which was directed by para. 1 of the default judgment but, instead purported to act under the power of sale contained in the mortgage, and this is what raises the central issue in the present case. In short, was she entitled to exercise the power of sale against the appellant who had not entered an appearance, had not filed a defence and had not filed a notice of her desire of an opportunity to redeem, and to do so after the judgment *nisi* for foreclosure and without the leave of the Court?

10 The trial judge founded himself on the principle expressed in *Stevens v. Theatres, Ltd.* [1], a case which was followed by the British Columbia Court of Appeal in *De Beck v. Canada Permanent Loan and Savings Co.* [2] and approvingly referred to by Stewart J. in *Marshall v. Miles* [3], at p. 397. Although there is language in the reasons of Farwell J. in the *Stevens* case that indicates that it was because the decree *nisi* of foreclosure directed a reference and also a reconveyance (as under the paragraph deleted from the default judgment herein) that the power of sale was suspended and could not be exercised without leave of the Court, the trial judge viewed the case in wider compass. For him, the direction in para. 1 of the default judgment for a reference was enough to preclude exercise of the power of sale without leave of the Court.

11 In the Court of Appeal, Arnup J.A. speaking for the Court, was of opinion that the *Stevens* case was inapplicable by reason of the omission of the deleted paragraph from the default judgment and, moreover, that his result was compelled by the change in mortgage practice that occurred in Ontario after 1941. His reasons contain the following:

> In my opinion, the *Stevens* rule did not apply in Ontario after 1941 in a situation where a defendant by writ (as mortgagor) did not enter an appearance nor file a D.O.R., even if there were encumbrancers, thus requiring a reference. There would be in such a case no judgment under which the mortgagor acquired rights that would be taken away by the mortgagee's exercising his power of sale. This conclusion is further justified by the facts of this case, namely, that the actual judgment issued is completely silent as to any right of redemption, or direction to the mortgagee to reconvey on payment. The exercise of the power of sale by the mortgagee was not in any way contrary to the order of the Court which had been issued at the behest of the mortgagee.

I would observe that the learned judge's statement in the above-quoted passage that there was no right of redemption given in the default judgment herein is not correct, unless it be taken as a specific reference to the mortgagors right of redemption as depending only on whether there was a direction to reconvey, pursuant to the deleted paragraph. In the absence of this paragraph, it was the learned judge's opinion, fortified by the change in Ontario mortgage practice, that para. 1 of the default judgment referred only to redemption by subsequent encumbrancers and, even if there were such encumbrancers, the failure to proceed to a reference was not a matter of which the mortgagor could complain.

12 Arnup J.A conceded that his conclusion "may seem to be a highly technical position to reach but the *Stevens* rule itself is a technical one...". I do not think so in the light of the regard which equity has always had for the position of a

mortgagor. "Once a mortgage, always a mortgage" is not an idle maxim when even a final order of foreclosure may, in some circumstances, be set aside. Under the original draft of the default judgment containing the paragraph subsequently deleted, the only provision for redemption is in para. 1; the deleted paragraph builds upon para. 1 by referring back to it, and is based upon the assumption that a reference before the Master will take place.

13 Counsel for the respondent in this Court viewed the deleted paragraph as relating to judgment on the covenant for payment of the mortgage debt, but I do not think that this meets the issue here. The question in this case is whether the excision of the draft para. 2 *ipso facto* relieves the mortgagee in equity from holding the property to answer the exercise by the mortgagor of the equitable right to redeem when the legal right has been lost by a default in payment at the time prescribed in the mortgage. The contention of the respondent, which was upheld by the Ontario Court of Appeal, is that para. 1 of the default judgment did not preserve any right of redemption by the mortgagor.

14 In the *Stevens* case, it does not appear that the judgment *nisi* for foreclosure was a default judgment. The recital of facts includes the statement that the order *nisi* for foreclosure was in the common form, directing accounts and directing the plaintiff to reconvey the property on payment of what should be found due. Instead of proceeding to a reference the mortgagee gave notice to the mortgagor of intention to sell, and two weeks later entered into a contract of sale which was later followed by a conveyance to the purchaser. The holding of Farwell J. that the power of sale in the mortgage was suspended in view of the judgment *nisi* for foreclosure and could not be exercised without leave of the Court "because it prejudices the rights given to the mortgagor under the direction to reconvey" relates, of course, to the actual terms of the judgment *nisi* in that case.

15 The question that arises is whether the *Stevens* case expresses a principle which is equally applicable where there is a provision, as here, for a reference and for redemption or foreclosure under a default judgment *nisi* which, as approved by the Registrar (or Assistant Registrar) omits the follow-up clause containing the direction to reconvey upon payment of the amounts found due on the reference. In the course of his reasons, Farwell J. made some general observations as to the relations of mortgagor and mortgagee which, I think, are relevant here. He said this (at p. 860):

> Now this question — whether a decree for foreclosure directing accounts and reconvenance, or, by parity of reasoning, a decree for redemption directing accounts and reconveyance, on payment, operates to prevent the exercise of the power of sale in the mortgage, or that given by the statute — has to be decided on principle in the absence of authority. The first proposition, which I think is plain, is this — neither the mortgagee nor the mortgagor is entitled to dismiss his action, or to discon tinue after judgment. The general principle on which the Court acts with regard to actions of this sort is to regard the plaintiff as dominus litis until judgment; but if, and so far as the judgment operates for the benefit, nor merely of himself but for some one else, he cannot get rid of his action mero motu after judgment....
>
> Now, if the plaintiff cannot get rid of his action after judgment because the judgment is for the benefit also of the defendants, it must follow that he cannot in any way vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court has directed him to do as the condition of getting the judgment.

16 It is also useful to consider the British Columbia case of *DeBeck v. Canada Permanent Loan and Savings Co., supra*. There, a mortgagee obtained a judgment *nisi* for foreclosure against the mortgagor who had appeared in the action and filed a defence, and also a judgment *nisi* for foreclosure against a second mortgagee who did not (apparently) appear and did not file a defence. A reference was had, and neither the mortgagor nor the second mortgagee attempted to redeem within the six month period fixed on the reference. The foreclosing mortgagee then purported to sell the property, having given notice to the mortgagor but not to the second mortgagee, but without having obtained an order absolute for foreclosure and without having the leave of the Court. The purchaser knew of the foreclosure proceedings. Three years later the mortgagor and the second mortgagee made a tender seeking redemption, and when it was denied they sued the foreclosing mortgagee and the purchaser claiming that they were entitled to redeem.

17 Their claim was upheld by Hunter C.J. whose judgment, relying on the *Stevens* case, was sustained on appeal. The trial judge noted that the sale agreement was made before the expiry of the time fixed for redemption, and the foreclosing mortgagee was therefore disentitled to sell without leave of the Court. This is entirely consistent with the principle of the *Stevens* case. If a private sale is prohibited without leave of the Court where a reference is directed but has not been held, it must equally be prohibited where it is held but the period fixed thereunder for redemption has not expired.

18 What emerges from the *DeBeck* case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see *Falcon*-bride, *Law of Mortgages* (3rd. ed. 1942), pp. 50-53. I question, therefore, whether it can be put aside by a rule of practice that would preclude a Court from considering all the circumstances that may support a discretion to allow redemption, albeit on terms.

19 In his reasons in the Court of Appeal, Arnup J.A. emphasized the view that the reason for the suspension of the power of sale under a judgment *nisi* for foreclosure, unless leave of the Court is obtained, is that the mortgagor is given certain rights under the foreclosure judgment (for example, the right to a reconveyance on paying what is owing, as ascertained on a reference), and a sale without leave would deprive him of those rights. I think that this overlooks the fact that a mortgagor under a judgment *nisi* for foreclosure has not yet been deprived of his pre-existing equitable right to redeem; the judgment *nisi* cannot be said to have conferred new rights but rather to have prescribed a procedure by which the existing right could be pursued and the property reclaimed, so long as the foreclosure did not become absolute.

20 There were in the present case, subsequent encumbrancers, namely, another mortgagee and two execution creditors, and if the mortgagee had on that account proceeded to a reference instead of purporting to exercise a power of sale without leave, I am of the opinion that the mortgagor, although not entitled to notice of the reference by reason of her non-appearance, would have been entitled to invoke the equitable jurisdiction of the Court to claim a right to redeem on payment of the amounts found owing on the reference and on such other terms as the Court might fix in view of the default of appearance. If this be so, I do not see how the mortgagee could improve her position by proceeding to a sale under the mortgage without leave when she had crystallized her remedies through a judgment *nisi* which called for a reference. To sell in such circumstances, not by order of the Court nor by its leave, is to defeat what the Court has formally directed.

21 The Court of Appeal would have it that Ontario Rule 460A, introduced as of May 31, 1941 and companion changes in the Rules, have altered the position of a mortgagor by obliging him to file a notice of desire of opportunity to redeem (known as a D.O.R.) if he does not otherwise wish to defend the foreclosure action; failing this (and failing defence), his previous automatic right to redemption is said to be lost. Rule 460A, which became Rule 465 in the 1960 consolidation of the Ontario Rules and which was in force at the material times herein, is as follows:

> Where a defendant by writ in an action for foreclosure or sale desires an opportunity to redeem the mortgaged premises but does not otherwise desire to defend the action, he shall within the time allowed for appearance file and serve a memorandum entitled in the action to the following effect: 'I desire an opportunity to redeem the mortgaged premises', whereupon he shall be entitled to four days notice of the taking of the account of the amount due to the plaintiff and shall have six calendar months from the time of the taking of the account to redeem the mortgaged premises.

This Rule must be read with Rule 467 which makes it clear that the failure to appear or to file a D.O.R. enables the plaintiff to sign judgment for immediate foreclosure, subject to a reference being required as to encumbrancers, and the plaintiff will be entitled to a final order of foreclosure if on the reference no encumbrancer proves a claim.

22 The Rule changes do not appear to have dealt with the case where, as here, a plaintiff does not proceed to final judgment for foreclosure upon a default by the mortgagor and on his failure to file a D.O.R., but instead seeks a judgment

nisi. It is my opinion that such a judgment leaves open the equitable right to redeem, at least until judgment absolute is obtained, and that the plaintiff cannot sell under the power of sale without leave of the Court.

23 I return, too, to the observation previously made that the judgment *nisi* in this case does direct a reference, although the consequences thereof are not spelled out because of the deleted paragraph. The deletion is, however, mere form and the prevailing practice of allowing six months to redeem after the taking of accounts would be applicable.

24 Counsel for the appellant stressed the equities of the present case and, apart from the question of delay, they are clearly with the appellant. I refer to three matters; first, the property, mortgaged for $4,000, was sold to the respondents for $25,500; second, the solicitor, who was in complete charge of the dealings between the appellant and Alice Dale, acted on behalf of the latter to the detriment of the former; and third, there were existing subsequent encumbrancers of whom, apparently, no notice was taken by the solicitor and who were entitled to consideration in the foreclosure proceedings, and certainly, upon the reference directed by the judgment *nisi*.

25 I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of Moorhouse J. with costs to the appellant throughout.

***Judson J.* (*dissenting*):**

26 The appellant Helga Petranik brought an action against Alice Dale, Frederick Parker and Eugene Berwick, claiming a declaration that a $5,000 mortgage on a house and lot known as 62 La Rose Avenue, Etobicoke, Ontario, which was purportedly executed by Mrs. Petranik in favour of Mrs. Dale, was null and void, and that Parker and Berwick, who purchased the property from Mrs. Dale under power of sale in the mortgage, held the property in trust for Mrs. Petranik. Mrs. Dale counterclaimed for the difference between the amount realized on the sale and the amount owing to her on the mortgage and for expenses incurred. Parker and Berwick counterclaimed for damages suffered when a notice of claim registered on title by Mrs. Petranik prevented them from selling 62 La Rose after they had built another home on other property.

27 Moorhouse J., in a judgment dated June 3, 1971, found that the mortgage was valid to the extent of $4000, but that the sale to Parker and Berwick, which took place after Mrs. Dale had obtained judgment *nisi* in a foreclosure action of which Parker and Berwick had notice, was null and void. The defendants Parker and Berwick appealed to the Ontario Court of Appeal which, in a unanimous judgment written by Arnup J.A., reported at [1973] 2 O.R. 217, held that the exercise of the power of sale was not invalid since the mortgagor had not given notice that she desired an opportunity to redeem and the judgment *nisi* did not confer any rights on the mortgagor which could be defeated by a sale. The plaintiff appealed to this Court.

28 Although the case involves *The Mortgages Act*, R.S.O. 1960, c. 245, and the Rules of Practice, R.R.O. 1960, Reg. 396, both of which have been substantially amended, it raises an issue which could affect other properties sold under power of sale within the limitation period of the last ten years: *The Limitations Act*, R.S.O. 1970, c. 246, s. 4.

29 The issue is not merely one of practice, but, as in any mortgage action, one of equity. It is well established that even a final foreclosure order can be reopened if the circumstances warrant such action. It is thus important to inquire into the dealings of the parties though they are complex and reach back many years.

30 The appellant Helga Petranik and her husband Ludwik came to Canada from Germany in 1949 and worked industriously to establish themselves. Mr. Petranik worked on the construction of houses, at first as a carpenter and then as a self-employed contractor. In 1951 the Petraniks built a triplex at 38 Beckett Avenue. They rented two units and lived in the other until 1957 when they moved into a house which Mr. Petranik had built on Hadrian Drive. They stayed there two months until the house was sold and then moved into a house which Mr. Petranik had built at 37 Beckett Avenue. Mrs. Petranik, on the recommendation of a friend at work, consulted Mr. G.A. Howell, a solicitor, about a by-law affecting 38 Beckett Avenue. Mr. Howell had clients willing to invest in mortgages, and the Petraniks came to rely on him for some of the financing for their growing construction business.

31 Unfortunately, the conduct of Mr. Howell's mortgage practice was, in the words of the trial judge, "irresponsible, incompetent or negligent". It appears that as Mr. Petranik needed money, Mr. Howell would have him or Mrs. Petranik execute a mortgage on one of their properties. There is reason for suspicion that some of these mortgages may have been executed in blank to be used as needed. The trial judge did not find that Mr. Howell had acted fraudulently, but he certainly acted improperly, not only on the mortgage transactions where he acted for both parties, but at trial where he represented Mrs. Dale against Mrs. Petranik.

32 One of the mortgages registered against 37 Beckett Avenue was a mortgage for $5,000 in favour of Mrs. Dale, a client of Mr. Howell and the 83 year old mother of Mr. Howell's secretary. On January 11, 1956, Mrs. Dale had advanced $4,000 to Mr. Howell by a cheque marked "Re: Petranik Loan". It was alleged, but not established, that in return she received an unregistered mortgage from the Petraniks on three houses on Hadrian Drive. On January 12, 1958, Mrs. Dale gave Mr. Petranik an additional $1,000 which was added to the mortgage principal. A $5,000 mortgage was then registered against 37 Beckett Avenue. The Petraniks claimed that the $1,000 was not a loan but was part payment for renovations which Mr. Petranik had completed for another client of Mr. Howell. The trial judge accepted this explanation, but since there was evidence that the Petraniks had made payments to Mrs. Dale for interest on a loan of $4,000, he rejected the Petraniks' claim that they had never borrowed money from Mrs. Dale.

33 In May 1958, Helga Petranik purchased municipal lots 62 and 64 La Rose Avenue for $12,800. She paid $3,500 cash and the vendor took back a mortgage for $9,800. Two months later, Mr. Petranik exchanged 37 Beckett Avenue for 50 acres of farmland in Chinguacousy Township. Mrs. Dale's mortgage on 37 Beckett was discharged before the exchange, and in its place Mrs. Petranik executed a mortgage on 62 La Rose in favour of Mrs. Dale for $5,000. This was dated July 12, 1958, but not registered until January 8, 1959. In the meantime, in order to finance the construction of a house on 62 La Rose, Mrs. Petranik arranged through Mr. Howell to mortgage the property to Mr. White for $16,000. This mortgage was executed November 1, 1958 and registered December 11, 1958. On March 10, 1959, a further mortgage was registered against both 62 and 64 La Rose Avenue to secure $3,000 which was purportedly advanced by Richard and Stella Graham, also clients of Mr. Howell. The first mortgage to the vendor was discharged on March 21, 1959, the discharge being registered on April 22, 1959. On September 23, 1960, White assigned part of his mortgage to May E. Wallace. Thus, in 1960, 62 La Rose was mortgaged to White and Wallace for $16,000, to Dale for $5,000, and to the Grahams for $3,000.

34 In July 1961 the Petraniks moved to Chatham, Ontario, where Mr. Petranik worked on a construction project. They rented 62 La Rose to Ivor Andrew who lived there with his family from July 15, 1961 to December 31, 1961. After the Andrews moved out, the house was left vacant. The Petraniks returned from Chatham in the fall of 1961 when the contractor for the project went bankrupt. Since the Andrews were still occupying 62 La Rose, the Petraniks moved into one of the houses Mr. Petranik was building in Oakville.

35 The Petraniks were in a precarious financial position. One of the houses in Oakville was foreclosed and, according to Mrs. Petranik, they had to let it go because they could not afford to redeem it. Mrs. Petranik also volunteered that their cottage was being foreclosed and that she was served with a writ of possession with respect to another Oakville house. Writs of execution amounting to $8,082.81 were registered against the lands of Helga Petranik in 1960 and 1961. Taxes on 62 La Rose were not paid after 1959, no payments were made on the White mortgage after January 1960, and the Dale mortgage was also in default.

36 On May 26, 1961, Mr. Howell wrote to Mrs. Petranik that, because of the continuing default under the mortgages, he would require vacant possession of both 62 and 64 La Rose. The Dale mortgage provided for repayment of principal on July 12, 1961. On July 17, 1961, payments of the interest and principal were both in default and Mrs. Dale, through Mr. Howell, commenced a foreclosure action. Mrs. Petranik denied being served with the specially-endorsed writ, but the affidavit of a sheriff's officer, who had died before trial, indicates that it was served on February 2, 1962. The trial judge expressly made no finding as to service, but as Arnup J.A. pointed out in the Court of Appeal, Mrs. Petranik has

no cause of action unless the writ was served. Arnup J.A. dealt with the case on the assumption of service and his doing so was not disputed in this Court. The writ provided as follows:

> ...and that the mortgage may be enforced by foreclosure. And to recover from you the defendant ..... payment of the amount due under a covenant by (you) ..... in that behalf contained in said Mortgage.
>
> And take notice further that the plaintiff claims to be entitled to recover immediate possession of the mortgaged premises.
>
> And take notice that the plaintiff claims that there is now due for principal money the sum of $5,000.00 and for interest the sum of $384.30 due the 12th day of July 1961.
>
> And that you are liable to be charged with these sums with subsequent interest to be computed at the rate of ten per cent per annum, and costs in and by the judgment to be drawn up, *and that judgment for immediate foreclosure* of your interest in the mortgaged premises *may be entered* unless you desire an opportunity to redeem the mortgaged premises and before the expiration of the time allowed you for appearance you do file in the office within named and serve a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: "I desire an opportunity to redeem the mortgaged premises", and give an address for service, in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff and in default of payment of the amount found due within six calendar months from the time of taking of the account and the drawing up of the judgment your interest in the mortgaged premises may be foreclosed.

Mrs. Petranik was thus given notice that if she desired to defend or to redeem she must take certain steps, as provided in Rule 465 (formerly R. 460A). Mrs. Petranik did not file an appearance or a notice desiring opportunity to redeem, and on March 23, 1962, the Assistant Registrar signed judgment, directed a reference with respect to subsequent encumbrancers, and ordered Mrs. Petranik to deliver up possession of the property. The form of judgment as first drafted provided as follows:

> **Judgment**
>
> Friday, the 23rd day of March, 1962.
>
> UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and *no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed*;
>
> 1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.
>
> 2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that, (subject to the provision of section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.
>
> 3. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

In the judgment as issued, paragraph 2 was struck out and the remaining paragraphs renumber I and II. No explanation was given for this deletion, but it seems clear that it was designed to comply with the possible judgments set out in Rule 472 (formerly R. 467):

472. (1) In an action for foreclosure or sale where the writ has been duly endorsed and the defendant fails to appear or fails to file a notice that he desires an opportunity to redeem the mortgaged premises, the plaintiff may sign judgment for immediate sale or for immediate foreclosure unless a reference is desired as to encumbrancers (Form 104).

(2) If a reference is desired as to encumbrancers, the plaintiff is entitled to judgment with a reference, and, if no encumbrancer, shall prove any claim the Master so certifies, and, upon confirmation of the Master's report, a final order of sale or of foreclosure shall be made.

(3) If upon the reference a subsequent encumbrancer proves a claim, the usual period of redemption shall be granted, but, if the encumbrancer consents, a final order may be made at an earlier date.

(4) In the event of a notice being filed by the defendant desiring an opportunity to redeem the mortgaged premises and no reference as to encumbrancers being required, judgment may be signed and the officer signing it may in simple cases take the account on four days' notice to the defendant. His findings are subject to an appeal to a judge in chambers in the manner prescribed for appeals from the Master. In complicated cases a judgment shall issue directing a reference (Form 103).

(5) In the event of a notice being filed by the defendant desiring an opportunity to redeem the mortgaged premises and a reference being desired as to encumbrancers, judgment may be signed directing a reference, and the account shall be taken by the Master on four days' notice to the person filing the notice (Form 102).

(6) Where the writ has not been personally served, the claim of the plaintiff shall be duly verified by an affidavit which shall be filed with the officer taking the account. (467)

If there had been no subsequent encumbrancers, a final order of immediate foreclosure would have been signed on March 23, 1962 since the mortgagor had not indicated that she desired an opportunity to redeem. However, there were subsequent encumbrancers in this case: the Grahams held a $3,000 mortgage on 62 and 64 La Rose Avenue and there were two execution creditors. According to Mr. Howell, he had purchased the Graham mortgage in 1962 and discharged it insofar as it affected 62 La Rose, but neither the assignment nor the discharge had been registered. A reference was directed to enable the encumbrancers to prove their claims. By virtue of Rule 406 (formerly R. 403), Mrs. Petranik was not entitled to any notice of the reference. Her interest in the equity of redemption was already effectively foreclosed, but others with an interest in the equity were to be given their opportunity to redeem. If, like Mrs. Petranik, they took no further steps, a final order of foreclosure would be issued.

37 The Rules of Practice do not prevail over the principles of equity which govern mortgage actions, and the court retains jurisdiction to exercise its equitable discretion to allow a mortgagor to redeem his property even after a final order of foreclosure is made: Falconbridge, *The Law of Mortgages* (3rd ed., 1942), at pp. 450 ff. If Mrs. Petranik had, through inadvertence or otherwise, failed to file a notice desiring opportunity to redeem when in fact she did desire to redeem and had a substantial interest in the equity to protect, a court might well have reopened the judgment and allowed her a redemption period. However, Mrs. Petranik at no time indicated a desire to redeem the property even after seeking legal advice about her rights. Her slight interest in the equity of redemption did not make it worth her while to redeem and she was not in a financial position to do so.

38 On the basis of the March 23, 1962 judgment, Mrs. Dale obtained a writ of possession, and in April 1962 the writ was executed. If Mrs. Petranik had not been aware of the foreclosure action, she certainly was aware that Mrs. Dale had taken possession. She immediately consulted a solicitor, but took no further action at that time.

39 Mrs. Dale did not proceed with a reference as to subsequent encumbrancers as ordered in the judgment. In May 1962, H.W. Anderson, a real estate broker who was looking for a house for the respondent Berwick, inquired whether 62 La Rose, which was vacant, was for sale. On May 15, 1962, Mr. Berwick offered $23,500 for the house. Mr. Howell's secretary (Mrs. Dale's daughter) advertised the house for sale in the Toronto Star on May 15-18, 1962. Mrs. Dale asked

$26,800 for the property. On May 29, 1962, Mr. Berwick offered $25,500 subject to adjustments and conditional on the vendor agreeing to discharge any existing mortgages or encumbrances. Mrs. Dale accepted this offer. She sold the property by purported exercise of her power of sale under the mortgage which provided that after default of payment for two months she could sell without notice. Amendments to *The Mortgages Act* which provide that a power of sale under a mortgage cannot be exercised without 35 days' notice to the mortgagor and all subsequent encumbrancers did not come into effect until 1964 and thus Mrs. Dale was not required to give notice of the sale.

40 After adjustments, Mrs. Dale received $24,499.66 from Berwick and Parker, who took joint title. She paid $9,100.64 to Mr. White and $10,086.30 to May Wallace to whom White had assigned part of his mortgage. After payment of various expenses associated with the sale, Mrs. Dale received a cheque for $2,250.39.

41 More than two years after the sale, on July 14, 1964, Mrs. Petranik issued a writ against Mrs. Dale, Mr. Berwick and Mr. Parker, claiming a declaration that the mortgage to Mrs. Dale was null and void and an accounting of the proceeds of the sale. Mrs. Petranik also claimed a declaration that Parker and Berwick hold the property in trust for her and filed a *lis pendens* against the lands. No further steps were taken, and on September 27, 1966, the action was dismissed by the Master for want of prosecution and the *lis pendens* vacated. Mrs. Petranik then filed a notice of claim against the property which, on May 30, 1968, Stewart J. ordered vacated. An application to set aside the order dismissing the action for want of prosecution was dismissed on April 9, 1969, but, on appeal from the order vacating the notice of claim, the Court of Appeal reinstated the notice pending commencement by Mrs. Petranik on or before February 3, 1969 of proceedings to reopen the action instituted by her in 1964 or to institute other proceedings. The Court further ordered that if no proceedings had been taken by February 3, 1969, Berwick and Parker could revive their application to vacate registration of the notice of claim. Mrs. Petranik issued the writ in this action on April 28, 1969. The defendants applied to vacate the notice of claim, and on May 28, 1969, Stark J. so ordered. In their statement of defence to this action, Parker and Berwick argued that the action should be dismissed because of the plaintiff's laches, but the trial judge dealt with the case on its merits. No argument was addressed either to the Court of Appeal or to this Court on the question of delay, but when assessing the equities, it is relevant to consider the plaintiff's delay in asserting her claim.

42 The refusal of Mrs. Petranik to remove the notice of claim registered on title prevented Parker and Berwick from selling the property. They had built a house on 30 acres in Campbellville, and planned to sell 62 La Rose. In September 1968, they received an offer to purchase 62 La Rose for $44,000, but because of the notice of claim they could not satisfy the requisitions with respect to title. A subsequent offer from another party also fell through. Finally, Berwick and Parker sold the Campbellville property. They counterclaimed for damages for abuse of process and slander of title, but did not press their claim on appeal.

43 The principal ground on which Mrs. Petranik sought to set aside the sale of the property to Parker and Berwick was that she had not executed a mortgage in favour of Mrs. Dale and had received no consideration for such a mortgage. As indicated above, these allegations were rejected by the trial judge and were not pursued on appeal.

44 The issue on which the case turned at trial and on appeal was whether Mrs. Dale was entitled to sell the property under power of sale in the mortgage or whether this power was suspended by virtue of the judgment signed by the assistant registrar in the foreclosure action. At trial Moorhouse J., relying on a judgment of Farwell J. in *Stevens v. Theatres, Limited*[4], which has been followed in *DeBeck v. Canada Permanent Loan and Savings Co.*[5] and *Marshall et al v. Miles*[6], held that after Mrs. Dale had obtained judgment *nisi* for foreclosure, she could not exercise a power of sale without leave of the court. The trial judge declared that the deed from Dale to Parker and Berwick was invalid, directed that Dale or others may proceed with the reference directed by the judgment *nisi* and ordered that Mrs. Petranik be given notice of the reference. He made certain other declarations with respect to the interest of Parker and Berwick in the moneys they paid on the invalid sale and gave direction as to how accounts were to be taken at the reference. He dismissed both counterclaims without costs. On an appeal taken by Parker and Berwick, the Court of Appeal reversed the trial judgment and held that the sale was valid. In reasoning which I adopt, Arnup J.A. held that since the judgment

nisi in the foreclosure action did not confer any rights on Mrs. Petranik, it did not operate to suspend Mrs. Dale's power of sale under the mortgage.

45 I agree with Arnup J.A. that, as a general principle, a mortgagee can pursue all the remedies available to him, concurrently or in succession. See Falconbridge, *The law of Mortgages, supra*, at pp. 687-88. There are exceptions to this principle, including that specified in what is now s. 40 of *The Mortgages Act*, R.S.O. 1970, c. 279, which provides that once a demand for payment or a notice of intention to exercise a power of sale has been given in accordance with a term of the mortgage, no other proceedings can be taken by a mortgagee without leave of the court before the time limited for payment or sale has expired. A complementary exception was formulated by Farwell J. in *Stevens v. Theatres, Limited, supra*. In that case a mortgagee had brought foreclosure proceedings and a judgment *nisi* had directed that accounts be taken and that the property be reconveyed to the mortgagor on payment of what was found owing. Without proceeding to accounts, the mortgagee sold the property under power of sale in the mortgage. Farwell J. held that the mortgagee was not entitled to sell since the judgment *nisi*, which directed reconveyance on payment, operated for the benefit of the mortgagor as well as the mortgagee. In these circumstances, the mortgagee could not get rid of his action *mero motu* after judgment and could not vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court had directed him to do as a condition of getting the judgment (at pp. 860-61). As Arnup J.A. points out, the essence of this holding is concisely stated at p. 862 where Farwell J. said:

> I hold, therefore, that the power of sale cannot be exercised after the judgment nisi without the leave of the Court, because it prejudices the rights given to the mortgagor under the direction to reconvey.

Farwell J. went on to hold that the power of sale is suspended after judgment *nisi* rather than extinguished and that, accordingly, if the property had been bought by a purchaser for value without notice, he could get a good title under the sale. As Arnup J.A. correctly states, at p. 224, Farwell J. did not suggest that, apart from the terms of the judgment, the mortgagee would be prohibited by law (i.e. in equity) from exercising the power of sale. He was entitled to pursue all his remedies concurrently. The ratio of *Stevens v. Theatres, Limited, supra*, is accurately stated by Falconbridge, *The Law of Mortgages, supra*, at p. 888:

> ...a mortgagee cannot, after the usual order nisi for foreclosure and before the foreclosure is made absolute, exercise his power of sale without the leave of the court, because a sale would prejudice the rights given to the mortgagor by the Court under the direction in the judgment for reconveyance on payment, but the power of sale is suspended only, not extinguished, and a purchaser in good faith without notice may get a good title.

46 In the case at bar, the purchasers, through their solicitor, had notice of the foreclosure judgment when they purchased the property. Whether they have good title thus depends on whether the sale prejudiced rights conferred on the mortgagor by the judgment.

47 It is a well-established principle, embodied in the Rules of Practice, that where a mortgagor desires an opportunity to redeem his property after default, a court of equity will exercise its discretion to enable him to do so, unless his conduct has been such that it would be inequitable to grant the relief he claims. In exercising its equitable jurisdiction a court will protect a mortgagor from harsh or oppressive action by a mortgagee, and when a court has ordered that a mortgagor be given an opportunity to redeem, a mortgagee will not be allowed to circumvent this relief by selling the property under power of sale in the mortgage. Even where there has been no judgment conferring the right to redeem, a court will prevent a sale where the mortgagor genuinely desires to redeem: *Marshall et al. v. Miles, supra*. However, as Arnup J.A. points out, as a result of amendments to the Rules of Practice in 1941, a mortgagor in Ontario did not have an automatic right to redeem. On receipt of a writ in a foreclosure action he must file a notice desiring an opportunity to redeem, or, if he fails to file the notice, appeal to the court to exercise its equitable jurisdiction to allow him to redeem. If the mortgagor fails to take either of these steps, and the judgment *nisi* in the foreclosure action confers on the mortgagor no right to redeem or to obtain a reconveyance on payment of the amounts found owing, the mortgagor is not prejudiced by a sale of the property for a fair price under power of sale prior to a final order of foreclosure.

48 The only right of the mortgagor which is shortened by the sale is that accorded by Rule 491 (formerly R. 485) which enables the defendant in a foreclosure action to stay proceedings by paying the amount due for principal, interest and costs before the final order of foreclosure. The length of time available to the mortgagor in which to make such a payment depends on whether anyone with an interest in the equity of redemption claims an opportunity to redeem. As a practical matter, it is highly unlikely that any of the encumbrancers would have claimed this opportunity in this case since the value of the property did not exceed the amounts owing on the prior mortgages. There was no evidence that the sale price of the house, $25,500, was not a fair price in 1962 for a property on the outskirts of a metropolitan area, serviced by a well and septic tank. In any event, it is clear that Mrs. Petranik was not in a position to take advantage of Rule 491 and does not allege that she was prevented from doing so.

49 It is true that the sale under power of sale could have prevented the subsequent encumbrancers from claiming in the reference and exercising a power to redeem. It was not until 1964 that *The Mortgages Act*, now s. 31 of R.S.O. 1970, c. 279, prevented such prejudice to subsequent encumbrancers by requiring that they be given notice of any sale under power, and not until 1969 that the Rules gave subsequent encumbrancers the same opportunity to redeem as is given to mortgagors. As already noted, however, it seems clear that the subsequent encumbrancers in this case would not have exercised a right to redeem the property, and they have not complained that they were precluded from doing so. Even if their rights were prejudiced, that does not provide grounds for a claim by Mrs. Petranik.

50 Mrs. Petranik was in default under the mortgages, and the property was completely pledged to or claimed by others. When foreclosure proceedings were instituted, Mrs. Petranik was not able nor did she indicate a desire to redeem the property. The judgment *nisi* in the foreclosure action effectively foreclosed her equity of redemption and directed a reference with respect to the interests of subsequent encumbrancers. Without proceeding with this reference, the second mortgagee sold the property under power of sale for a fair price which was sufficient to pay out the first mortgage, costs incurred and half of the second mortgage. The second mortgagee has not sued for the remainder owing except by way of counterclaim in this action which was not forcefully pursued. Looking at the situation as it existed in 1962 when this cause of action arose, it is difficult to see how Mrs. Petranik has been prejudiced. The property has now appreciated greatly and Mrs. Petranik may now be in a position to redeem, but there are no grounds to justify setting aside the sale which took place in 1962. The mortgagee was entitled to pursue alternative remedies. The fact that she had obtained judgment *nisi* in a foreclosure action did not preclude her from exercising her power of sale under the mortgage since the sale did not prejudice any rights asserted by or accorded to Mrs. Petranik in the foreclosure proceeding.

51 I agree completely with the reasons delivered in the Court of Appeal. I would dismiss the appeal with costs.

***Ritchie J.* (*dissenting*):**

52 Like my brother Judson, I agree with the reasons for judgment delivered by Mr. Justice Arnup on behalf of the Court of Appeal for Ontario and would dismiss this appeal with costs.

***Dickson J.*:**

53 I would allow this appeal. In my view, Mrs. Petranik's equity of redemption in the subject property was not extinguished by either the foreclosure proceedings commenced by Mrs. Dale but not completed, or by the purported exercise of the power of sale contained in the mortgage. An equity of redemption is a right of property. Holdsworth (*A History of English Law*, vol. VI, at p. 663) says:

> We have seen that the relief given by equity to the mortgagor originally depended on principles similar to those which underlay the relief given in cases of the breach of a condition, and in cases of penalties; but that, the regularity with which this relief was given, had altered its basis, and caused it to depend, not upon the existence of any supposed hardship, but upon a right belonging as of course to a mortgagor. The result had been to make the mortgagor's equity to redeem a right of property. He had an equitable estate in the land; and, subject to the legal rights of the mortgagee, was, in equity, regarded as its owner.

In *Casborne v. Scarfe*[7] at p. 604-5, Lord Hardwicke said:

> First, an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only but such an estate whereof there may be seisin; the person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

In *Burgess v. Wheats*[8], at p. 225, Lord Mansfield said:

> In the eye of this court Lord Hardwicke thought the equity of redemption is the fee simple of the land.

In *Heath v. Pugh*[9], at p. 360, Lord Chancellor Selborne said that it was sufficient to quote the above passage on the point, and in *Tarn v. Turner*[10], at p. 460, Mr. Justice Kekewich said:

> The Court having decided that the mortgagor has that right to redeem, construes it as really an estate in the land. It is not a legal estate, but what is termed an equitable estate — as much an interest in the land as the real fee simple. It is a fee simple subject to a charge, and is vulgarly styled in legal language the equity of redemption.

An equity of redemption is an equitable estate, which can be sold or quit claimed, and which cannot be clogged or fettered.

54 In the case at bar, Mrs. Dale commenced a foreclosure action for the purpose of extinguishing the interest which, as owner of the equity of redemption, Mrs. Petranik held in the lands mortgaged to Mrs. Dale. Mrs. Dale issued a specially endorsed writ against Mrs. Petranik in the usual form of a writ of foreclosure. The prayer for relief stated that the plaintiff's claim was on the mortgage and continued with notice of a claim of entitlement to immediate possession and a claim for $5,000 principal money and interest. The prayer for relief also gave notice that:

> ...judgment for immediate foreclosure of your interest in the mortgaged premises may be entered unless you desire an opportunity to redeem the mortgaged premises and before the expiration of the time allowed you for appearance you do file in the office within named and serve a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: 'I desire an opportunity to redeem the mortgaged premises', and give an address for service, in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff and in default of payment of the amount found due within six calendar months from the time of taking of the account and the drawing up of the judgment your interest in the mortgaged premises may be foreclosed.

Rule 465 (formerly Rule 460A) of the *Ontario Annual Practice* 1962 provided:

> 465. Where a defendant by writ in an action for foreclosure or sale desires an opportunity to redeem the mortgaged premises but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file and serve a memorandum entitled in the action to the following effect: 'I desire an opportunity to redeem the mortgaged premises', whereupon he is entitled to four days' notice of the taking of the account of the amount due to the plaintiff and has six calendar months from the time of the taking of the account to redeem the mortgaged premises.

Rule 472 (1) and (2) (formerly Rule 467 (1) and (2)) then goes on to provide:

> 472. (1) In an action for foreclosure or sale where the writ has been duly endorsed and the defendant fails to appear or fails to file a notice that he desires an opportunity to redeem the mortgaged premises, the plaintiff may sign judgment for immediate sale or for immediate foreclosure unless a reference is desired as to encumbrancers (Form 104).

(2) If a reference is desired as to encumbrancers, the plaintiff is entitled to judgment with a reference, and, if no encumbrancer, shall prove any claim the Master so certifies, and, upon confirmation of the Master's report, a final order of sale or of foreclosure shall be made.

Form 104, referred to above, is of particular interest. It reads:

FORM 104

Form of Judgment on Praecipe for Immediate Foreclosure or Sale and Orders for Immediate Payment and Delivery of Possession (Rule 472)

Upon reading the writ of summons issued in this action, and an affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed:

1. It is ordered and adjudged (*Where judgment is for foreclosure after* 'adjudged', *add*: 'that the said defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises', *where judgment is for sale, then after the word* 'adjudged', *add* 'that the said premises be sold, with the approbation of the Master, at...').

2. (*If judgment is for foreclosure omit this clause*.) And it is further ordered and adjudged that the purchasers do pay their purchase money into Court to the credit of this action and that the same when so paid in be applied in payment of what is found to be due to the said plaintiff for principal money, interest and costs as computed and taxed by the said Master, and that the balance do abide the further order of the Court.

3. (*Where judgment is for immediate payment, add*: And it is further ordered and adjudged that the defendant ... do forthwith pay to the plaintiff the sum of ... being the amount due to him at the date hereof for principal money, interest and costs.)

4. (*Where judgment is for recovery of possession, add*: And it is further ordered and adjudged that the defendant ... do forthwith deliver to the plaintiff ... or to whom he may appoint, possession of the mortgaged premises, or of such part thereof as may be in the possession of the said defendant.)

Mrs. Petranik failed to appear and failed to give a notice that she desired an opportunity to redeem the mortgaged premises. Judgment was signed directing a reference and ordering Mrs. Petranik to deliver up possession of the property. A draft judgment was presented in the following form:

JUDGMENT

Friday, the 23rd day of March, 1962.

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed;

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that (subject to the provision of

section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

3. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

At the time of signing the judgment, the paragraph numbered "2" was struck out and the remaining paragraphs renumbered "I" and "II".

55 The first thing to observe about the judgment is that it is *not* a judgment for immediate foreclosure. Form 104 states that where judgment is for immediate foreclosure the order shall state "that the said defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises". The form of the judgment which was entered contains no such language. Paragraph II of the judgment as entered directs the delivery of possession but in no way affects the equity of redemption. The taking of possession by a mortgagee does not extinguish the right of the mortgagor to redeem the mortgaged premises. If the judgment as signed had contained the paragraph numbered "2" in the draft, the case would without doubt fall within *Stevens v. Theatres, Limited*[11], but I do not think the question whether Mrs. Petranik retains an equity of redemption in the subject property depends upon the presence or absence of the expunged paragraph in the judgment entered. The crucial issue in this appeal is whether the estate or interest owned by Mrs. Petranik in the mortgaged land was extinguished and if so, when and in what manner. The judgment which was entered did not, nor did it purport to, extinguish that interest. Neither was that interest extinguished by Mrs. Petranik's failure to appear or her failure to give a notice that she desired an opportunity to redeem the mortgaged premises. The passage of Rule 460A and the amendment of Rule 467 (the forerunner of Rule 472), effected a major change in foreclosure practice and procedure in Ontario by authorizing the signing of final judgment for immediate foreclosure unless the defendant filed a memorandum stating that he wished to redeem the property in question. This altered the earlier practice which required the plaintiff to sign interlocutory, not final, judgment. That is the effect of the change. I do not think it can be said that Mrs. Petranik's failure to file such a memorandum extinguished her equity of redemption. The Rule does not say that such is the effect and I very much doubt that ownership of an estate in land can be swept away by a rule of practice. Rules of practice do not prevail over equitable estates. Counsel for the respondent Mrs. Dale, early in his argument submitted that the effect of the amendment to the Rules was to extinguish the right of the mortgagor to redeem upon failure to file a request for an opportunity to redeem. Before his argument concluded, however, he had altered his position and conceded that an attenuated right of redemption continued. I think the concession is correct. The judgment was not an order absolute. An equity of redemption is so intense that even after an order absolute the court on occasion has given the mortgagor the right to redeem: *Campbell v. Holyland*[12].

56 The Rules gave Mrs. Dale the right to enter judgment immediately for final order of foreclosure upon failure of Mrs. Petranik to appear or to give notice. Mrs. Dale did not avail herself of the opportunity to enter final judgment against Mrs. Petranik. She obtained an order for a reference because, no doubt, there were subsequent encumbrances, but whatever may have been her reason, Mrs. Dale obtained a judgment which left unextinguished Mrs. Petranik's equitable estate in the land. Mrs. Dale did not proceed with the reference before the Master; instead, she sold the property to Mr. Parker and Mr. Berwick, purporting to act under the power of sale contained in the mortgage. So far as giving notice of exercising power of sale to Mrs. Petranik, the trial judge, Moorhouse J., had this to say:

> The sale was carried out with little if any notice, it being now alleged Helga [Mrs. Petranik] had abandoned the property, sale was purported to be made without notice.

It is contended that Mrs. Dale was entitled to pursue all remedies available to her, concurrently or in succession. Whether this is so in the present case depends, I think, upon the effect to be given to paragraph "I" of the judgment entered on behalf of Mrs. Dale which, it will be recalled, reads:

I. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

The form of judgment entered on behalf of Mrs. Dale should be read against the form appearing in Marriott, *Practice in Mortgage Actions in Ontario* (2nd. ed.) (1955) at p. 322 which I would like to set out in full:

FORM 20

(Form 96, C.R.) Form of Judgment on Praecipe for Foreclosure with Reference as to Encumbrancers, etc., where the Original Defendants do not File a Notice D.O.R., and Orders for Immediate Payment and Delivery of Possession

(Court and Cause)

...day the ... day of ... 19...

Upon reading the writ of summons issued in this action, and the statement of claim (if any), and an affidavit of service of the said writ on the defendant, and no appearance having been entered, (or, and the defendant having made default in the delivery of the defence) and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed:

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at...

2. (*Where judgment is for immediate payment add*:) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant ... do forthwith pay to the plaintiff the sum of $... being the amount due to him for principal money, interest and costs at the date hereof; and upon payment of the amount due to the plaintiff that (subject to the provisions of section 2 of *The Mortgages Act*) the plaintiff do assign (sic) and convey the mortgaged premises and deliver up all documents relating thereto.

2. (*Or where judgment is for the amount found due by the Master substitute this paragraph for the one above*:) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due him for principal money, interest and costs at the date of the said report and upon payment of the amount due to him that, (subject to the provision of section 2 of *The Mortgages Act*) the plaintiff do assign and convey the mortgaged premises, and deliver up all the documents relating thereto.

3. (*Where judgment is for recovery of possession add*:) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

Judgment signed this ... day of ... 19...

REGISTRAR

The following points might be noted particularly (i) that the form of judgment in the instant case adopted, practically verbatim, the language of the recital and of paragraphs "1" and "3" of Form 20; (ii) that form 20 is a Form of Judgment for Foreclosure; (iii) that it is not a judgment for immediate foreclosure but in the nature of a judgment *nisi*; (iv) that the judgment entered on behalf of Mrs. Dale does not include paragraph "2" of Form 20 ordering immediate payment. Marriott, *supra*, says at p. 76:

> In a combined action for foreclosure, possession and payment, it should be kept in mind that in reality there are three actions and the judgment when entered gives three remedies. If no notice D.O.R. [desire opportunity to redeem] is filed in effect three judgments are obtained, one for immediate foreclosure, one for possession and another for payment.
>
> *Where* a notice D.O.R. is filed and the defendant is given three months to redeem, or *a reference is required as to encumbrancers, the foreclosure action is not concluded and the right to redeem is still outstanding until a final order is obtained*. However, as the other two actions have been completed and the plaintiff has the right to pursue his remedies thereon without regard to the foreclosure action he may at once obtain an execution on the judgment for payment and issue a writ of possession and place them in the Sheriff's hands: *Euclid Avenue Trusts Co. v. Hohs* (1911) 24 O.L.R. 447 at 452.
>
> [The emphasis is mine.]

The effect of the judgment taken out by Mrs. Dale on March 23, 1962 was (i) to leave outstanding Mrs. Petranik's right of redemption until a final order of foreclosure could be obtained; (ii) *not* to take judgment for immediate payment; (iii) to obtain the right of immediate possession.

57 It is contended on behalf of Mrs. Dale that the omission from the judgment of the order for immediate payment (which embodied an express obligation to reconvey on payment) served to distinguish this case from *Stevens v. Theatres, Ltd., supra*, and that in consequence Mrs. Dale was free to disregard the judgment which had been obtained at her behest from the Supreme Court of Ontario ordering a reference to the Master, and free to sell the mortgaged lands by private sale without notice to Mrs. Petranik. With respect, I think that that is taking too narrow a view of what was said by Mr. Justice Farwell in the *Stevens* case. I do not regard *Stevens* as a technical rule. Once the court has given judgment in foreclosure proceedings the mortgagee's power of sale is suspended pending implementation of that judgment. Although there is language in *Stevens* which might suggest that the suspension of the exercise of the power of sale depended upon an obligation to reconvey being expressly set forth in the judgment *nisi*, there is other language which can be read more broadly and as being apposite in the case at bar. I have in mind, for example, the following:

> When the parties have once taken the judgment of the Court neither party, in my opinion, is entitled without the leave of the Court to put it out of his own power, by any act of his own, to obey the judgment of the Court.

Whatever may be the reach of the *Stevens* decision, I am in no doubt that when a mortgagee seeks the aid of the court in the enforcement of a remedy against a mortgagor and engages the court system to the extent of obtaining a judgment of the nature of that obtained by Mrs. Dale, the mortgagee must carry out that judgment or obtain leave of the court to do otherwise. Having resorted to the Queen's justice, he can not resort to his own.

58 I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and Cheshire's *Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

59 I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of Moorhouse J. with costs to the appellant throughout.

Appeal allowed with costs, Judson and Ritchie JJ. dissenting.

Solicitors of record:
Solicitors for the appellant: *Black, Osborne, Black & Bassel*, Toronto.
Solicitor for the respondents, Parker and Berwick: *George T. Walsh*, Toronto.
Solicitor for the respondent, Dale: *G.L. Howell*, Toronto.

Footnotes

1 [1903] 1 Ch. 857.

2 (1907), 12 B.C.R. 409.

3 [1907] 3 O.R. 394.

4 (1903), 1 Ch. 857.

5 (1907), 12 B.C.R. 409 (B.C.C.A.).

6 (1970), 3 O.R. 394 (H. Ct.).

7 (1737), 1 Atk. 603.

8 (1759) 1 Eden. 177.

9 (1881), 6 Q.B.D. 345.

10 (1888), 39 Ch. D. 456.

11 [1903] 1 Ch. 857.

12 [1877] 7 Ch. D. 166.

TAB 6

2007 CarswellOnt 527
Ontario Superior Court of Justice [Commercial List]

Legacy Leather International Inc. v. Ward

2007 CarswellOnt 527, 154 A.C.W.S. (3d) 794

Legacy Leather International Inc. et al. (Plaintiffs / Moving Parties) v. James Ward et al. (Defendants / Responding Parties)

Lax J.

Judgment: February 5, 2007
Docket: 06-CL-6334

Proceedings: additional reasons to *Legacy Leather International Inc. v. Ward* (2006), 2006 CarswellOnt 7348, 24 B.L.R. (4th) 322 (Ont. S.C.J.) [Ontario]

Counsel: Nicholas C. Tibollo for Plaintiffs / Defendants by Counterclaim / Moving Parties
Steven Bellissimo for Defendants / Plaintiffs by Counterclaim / Responding Parties

Headnote

Civil practice and procedure --- Costs — Costs of particular proceedings — Interlocutory proceedings — Motions and applications

Shareholders commenced action in name of company against director of company — Shareholders discovered that shareholders' agreement contained arbitration clause and brought successful motion for stay of action and director's counterclaim — Shareholders sought costs on partial indemnity basis of $10,547.28 including disbursements — Director sought costs thrown away of $236,284.11 including disbursements — Shareholders were awarded $6,500 for fees plus disbursements and GST — Director awarded costs thrown away of $1,500 — Director had failed to discharge onus of identifying which costs were thrown away and which steps in proceedings had been rendered useless by order.

***Lax J.*:**

Endorsement on Costs

1 Legacy Leather International Inc. ("Legacy") carries on business as a manufacturer and distributor of leather furniture and products. The individual plaintiffs are shareholders, directors and officers of Legacy. Legacy commenced an action against James Ward et al. alleging that Ward, while a shareholder, director and officer of Legacy, set up a competing business through three defendant partnerships and a corporation, Emmanuel Collection Inc. The defendants brought an Application that was consolidated within the Legacy action. The parties agreed to treat the Application as an interlocutory motion within the action ("the compliance motion"). On the date fixed for hearing of the compliance motion, Legacy sought an adjournment in order to bring a motion for stay on the basis that the Shareholders' Agreement contained an arbitration clause.

2 I heard the motion for stay on July 6, 2006. In my endorsement released July 7, 2006, I granted the motion and awarded costs of the motion to Legacy and costs thrown away to Ward. I directed counsel that if they were unable to agree on costs, this could be spoken to during the week of July 10, 2006, a date convenient to my schedule. Counsel did not seek an attendance before me during that week and I heard nothing further until October 11, 2006 when I received a letter from Mr. Bellissimo advising me that counsel had been unable to agree on costs and seeking dates to address this. On October 16, 2006, I directed counsel to agree on a schedule for the exchange of written submissions and to deliver these within 30 days. On November 8, 2006, Mr. Bellissimo delivered a Costs Brief that included a Bill of Costs and a

Costs Outline attaching redacted dockets, but neither conformed to Forms 57A or 57B as required by the *Rules of Civil Procedure*. Legacy objected and requested an extension of time to respond and to deliver its costs submissions. Further correspondence followed and on December 5, 2006, I gave further directions and established a revised schedule.

3 I have now had the opportunity to consider the parties' Costs Outlines and submissions.

Motion to Stay

4 Legacy seeks a partial indemnity costs award for the motion to stay of $10,547.28, including disbursements of $459.78. The defendants complain that they requested dockets from Legacy, but did not receive them. The costs regime that came into force on July 1, 2005 requires that every party that intends to seek costs for a step in a proceeding, shall give to every other party involved in the same step, and bring to the hearing, a costs outline conforming to Form 57B: *Rule 57.01(6)*. Form 57B requires the lawyer to certify that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

5 Rule 57.01(5) states:

> After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service.

6 Form 57A requires that copies of the dockets or other evidence be attached to support the claim for fees and that copies of invoices or other evidence be attached to support the claim for disbursements in the Bill of Costs. Arguably, the granting of the motion to stay disposed of the proceeding and the governing Rule is Rule 57.01(5). Nonetheless, in view of the lawyer's certificate forming part of the Costs Outline delivered by Legacy, I am satisfied that I can fairly determine the costs of the motion, although no dockets have been provided.

7 Ward disputes the time claimed as excessive. Mr. Longo's hourly rate at $200 is at the high end of the range for a 2004 call, but in fixing costs, there is no need to settle on an exact hourly rate. I must only be satisfied that the total for fees and disbursements is a fair and reasonable amount to be paid by the defendants for this motion. In my view, that amount on a partial indemnity scale is $6,500 for fees plus disbursements as claimed and applicable GST.

Costs Thrown Away

8 The defendants seek "cost thrown away" of $236,284.11, including disbursements of $6,042.11 on a substantial indemnity scale.

9 Costs thrown away are intended to indemnify a party for steps reasonably necessary to proceed with the action, but which have been rendered useless by the conduct of the other party: *Ernst & Young v. Widecom Group Inc.*, [1997] O.J. No. 4219 (Ont. Gen. Div.); *Royal Bank v. Blatt*, [1991] O.J. No. 688 (Ont. Gen. Div.) (*per* Steele J.), adopting *Nippa v. C.H. Lewis (Lucan) Ltd.*, [1988] O.J. No. 194 (Ont. Assess. O.) (*per* Assessment Officer Conover). Very often, these cases arise where a trial must be postponed. The task for the court is to determine what costs are actually rendered useless or "a complete waste": *Martin v. Glaze Block Products Inc.*, [2003] O.J. No. 1952 (Ont. S.C.J.) at para. 7 (*per* Rutherford J.). Not all preparation is considered to be costs thrown away because some of it will inevitably be of use when the case is tried at a later date.

10 In this matter, an Arbitrator has been selected and preparation for arbitration is underway. Legacy's position is that many, if not all of the same preparatory steps that were taken in the litigation must also be taken in preparation for arbitration and there are no costs thrown away. Ward seeks virtually all of its legal expenses. In addition to the time claimed for Mr. Bellissimo who is solicitor of record (137.5 hours), there is a claim for fees for Mr. Paul Trethewey (254.7 hours) and Mr. Jan Waldin (1.1 hours). There is also a separate claim for fees on behalf of the defendant partnerships, Roger Rai and Legendary Leather House Inc. for Mr. Waldin (125.51 hours) and Mr. Trethewey (109.2 hours).

11 The fees that may be claimed as between party litigants are fees for "any step in the proceeding authorized by the Rules ..." (Part I of Tariff A). Mr. Trethewey is a corporate solicitor for the defendants and his time is not properly claimed as costs thrown away of the action. At no time was he the solicitor of record for Ward or for any other litigant. Mr. Waldin was separate litigation counsel for Mr. Roger Rai, who is a general partner in the defendant partnerships. The submissions explain the separate representation of Rai on the basis that allegations in the Statement of Claim gave rise to "the potential liability of the Rai parties". It has not been explained what this was or how this liability disappeared on April 26, 2006 when the "Rai parties" served a Notice of Change of Solicitors and Mr. Bellissimo became their lawyer. Mr. Bellissimo was the only solicitor of record properly appointed for Ward, his company and his partnerships. I would not allow any of the amounts claimed by Mr. Trethewey, Mr. Waldin, "the Rai parties" or Legendary Leather House Inc.

12 Mr. Bellissimo claims time in the Amended Costs Outline for eight fee items. These must be considered in the context of the steps that were taken in the action.

13 The Statement of Claim in the Legacy action was issued on November 17, 2005 on the regular civil list. Immediately before the Statement of Defence was due, both groups of defendants, then separately represented, served an extensive Demand for Particulars and Request to Inspect Documents. Legacy, with the consent of both groups of defendants, arranged to have the action traversed to the Commercial List and in early January, took out a consent order. A 9:30 appointment on the Commercial List was arranged for February 24, 2006 to schedule the defendants' motions. On the eve of this appointment, the defendants served an Application Record on the plaintiffs. This resulted in Legacy preparing a motion to have the Legacy action and the defendants' Application consolidated and heard at the same time as the defendants' motions.

14 There would appear to have been further 9:30 attendances regarding scheduling and at some point, there was a consent order consolidating the Application and action. Once the Application became an interlocutory motion within the consolidated action, the consolidation motion became unnecessary and was withdrawn. No costs were sought or awarded for this motion. The compliance motion was adjourned for cross-examinations, but none were held.

15 Motion material for the other motions of the Ward defendants was prepared and the parties prepared for and attended on cross-examinations of the affidavits sworn in support of these motions. On June 8, 2006, the parties returned for a 9:30 appointment. On that attendance, the defendants withdrew their motions for particulars and productions. Once again, no costs were sought or awarded. Thus, the cost issues relating to all motions, except the compliance motion, were addressed.

16 The compliance motion was scheduled for hearing on June 12. In the course of preparing for the compliance motion, the plaintiffs appreciated for the first time that the Shareholder's Agreement contained an arbitration clause and sought the consent of the defendants to an order staying the action. When this was not forthcoming, the plaintiffs attended on June 12 and requested an adjournment of the compliance motion in order to bring a motion for stay. The adjournment request was granted and the Ward defendants were awarded costs thrown away of the June 12 attendance, fixed at $500. These costs have been dealt with.

17 Although Mr. Bellissimo delivered extensive submissions in support of an award of costs thrown away, these submissions largely focus on the merits of the dispute between Legacy and Ward, on "the Rai parties" and on Rule 57.01 factors, rather than delineating the steps taken that were rendered useless by my order. Further, it is very difficult to reconcile the submissions with the items listed on the Amended Costs Outline. For example, the submissions delivered on November 8 indicate at p.6 that no costs are claimed for the motions for particulars and productions as these have been resolved. However, the very first item on the Amended Costs Outline is for 27.3 hours of preparation time for these motions. There is also a claim (item 4) for preparation and attendance on cross-examinations for these motions. Similarly, the submissions indicate at p. 12 that there is no claim for preparation of the compliance motion because the preparation will be used in the Arbitration, but 19.9 hours of preparation time is claimed at item 7 on the Amended Costs Outline. Some aspects of the relief claimed in the compliance motion (e.g. appointment of auditor) are also claimed in item 6.

18 The claims for meetings with Ward's bankers (item 5) and settlement meetings between the parties (item 3) are not properly claimed. I would allow a small amount for preparation of Costs Submissions as this can reasonably be regarded as costs thrown away. However, I would not allow this at an hourly rate of $400.00 and I have taken into account that the submissions, although extensive, were confusing and not terribly helpful and that it was very difficult to reconcile the fee items claimed with the submissions. The only other item I have been able to identify on the Amended Costs Outline that can reasonably be considered to be costs thrown away is the several court attendances before June 12, which were all scheduling attendances. This must represent a very small amount of time as the parties were attending in any event to schedule the other motions, which were ultimately withdrawn without costs.

19 The onus was on Ward to establish the steps that were necessary in the action, to identify which costs were thrown away and to show that those steps have been rendered useless by my order. By and large, he has failed to discharge this onus. I have not attempted to do a detailed docket analysis, as this is not my function. Doing the best I can with the material I have been given, I would award $1,500 for costs thrown away. No disbursements have been claimed on the Amended Costs Outline. The Bill of Costs delivered on November 8 on behalf of Ward and Emmanuel, lists disbursements of $3,954.84. No attempt has been made to identify those that are properly claimed as "thrown away", although some, such as filing fees, must be. Again, doing the best I can with the material that has been provided to me, I fix the disbursements thrown away at $1,500, for a total award of $3,000 plus applicable GST. The payment of both costs awards is to be deferred pending the final determination of the Arbitration.

Order accordingly.

CHINA MACHINERY ENGINEERING CORPORATION	and	2284649 ONTARIO INC., et al.	
Applicant		Respondents	Court File No.: CV-18-591534-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF THE RESPONDENTS

MILLER THOMSON LLP
40 King Street West
Suite 5800
Toronto, Ontario
M5H 3S1, Canada

Kyla Mahar LSO#: 44182G
Tel: 416.597.4303 / Fax: 416.595.8695

Gregory Azeff LSO#: 45324C
Tel: 416.595.8695 / Fax: 416.595.2660

Lawyers for the Respondents, 2284649 Ontario Inc., 2270613 Limited Partnership and 2270613 Ontario Inc.