Court File No. CV-24-00716511-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

MAPLEVIEW DEVELOPMENTS LTD., PACE MAPLEVIEW LTD and 2552741 ONTARIO INC.

Respondents

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

BOOK OF AUTHORITIES
(Motion Returnable September 17, 2024)

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TO: **SERVICE LIST**

LIST OF AUTHORITIES

Cases

1. *561861 Ontario Ltd. v. 1085043 Ontario Inc*., 1998 CarswellOnt 2935 (Ont Gen Div)

2. *Mutual Trust Co. v. Creditview Estate Homes Ltd.*, 1994 CarswellOnt 312 (ON SC)

Secondary Sources

3. Donald Lamont, *Lamont on Real Estate Conveyancing*, 2nd Edition, (Toronto: Thomson Reuters Canada, 2020)

4. Justice Leonard Ricchetti, Timothy J. Murphy, *Construction Law in Canada* (Toronto: LexisNexis Canada, 2010)

TAB ONE

1998 CarswellOnt 2935
Ontario Court of Justice (General Division) [In Bankruptcy]

561861 Ontario Ltd. v. 1085043 Ontario Inc.

1998 CarswellOnt 2935, [1998] O.J. No. 2925, 66 O.T.C. 305, 81 A.C.W.S. (3d) 218

In the Matter of the Proposal of 1085043 Ontario Inc., c.o.b. as The Boundary Golf Club

In the Matter of the Construction Lien Act R.S.O. 1990, c. C.30

561861 Ontario Ltd., o/a Robert Excavating, Plaintiff and 1085043 Ontario Inc., Surendra Gera, in Trust, 1168696 Ontario Inc., Dorothy Mae O'Byrne, Leo Gauthier and Madeleine Gauthier, Defendants

Chadwick J.

Judgment: July 10, 1998
Docket: Ottawa 091528, 97-CV-138

Counsel: *Craig M. Bater*, for 1085043 Ontario Inc.
P. Roderick Brooks, for BDO Dunwoody.
Christopher A. Moore, for Dorothy O'Byrne.
Ronald Price and *John J. Callan*, for the Lien Claimants.

***Chadwick, J.*:**

1 The defendant Dorothy Mae O'Byrne in action no. 97-CV-138 brings a motion to determine her status as mortgagee and the priority of her mortgage in relation to the construction lien claimants and other claimants in the proposal of 1085043 Ontario Inc.

2 In a previous decision dated June 20, 1997, on a matter brought by Dorothy O'Byrne's brother, Angus O'Byrne, I set forth the facts relating to the Angus O'Byrne's sale of the farm land to 1085043 Ontario Inc.. The purpose of the sale was for the development of the Boundary Golf Course.

> 3 Dorothy O'Byrne loaned her brother Angus O'Byrne $100,000. in order that he could purchase his estranged wife's interest in their matrimonial property. The matrimonial property consisted of lands, farm house and barn. Angus O'Byrne gave to his sister a first mortgage on that property, the mortgage was registered on September 13, 1991.

> 4 As a result of the transfer by Angus O'Byrne spouse to Angus O'Byrne there was a merge of the titles of the matrimonial home with the adjacent 200 acres of land owned by Angus O'Byrne.

5 The mortgage provided to Dorothy O'Byrne described the farm house, barn and lands and did not include the 200 adjacent acres. Based upon the affidavit evidence of Dorothy O'Byrne, both she and her brother was under the understanding that the mortgage would attach all of the lands owned by Angus O'Byrne.

> 6 Angus O'Byrne entered into negotiations with the principals of 1085043 Ontario Inc. for the purpose of selling his lands to them for the construction of a golf course. The agreement called for the payment of $800,000. to Angus O'Byrne and set out various payment dates.

7 The final $100,000. would be paid by the reconveyance to Angus O'Byrne of the original farm house and barn and other lands not comprising the 160 acres of the golf course land. The reconveyance to him was to be free and clear of all encumbrances. It would appear that 1085043 Ontario Inc. was to pay out Dorothy O'Byrne as part of the consideration with Angus O'Byrne.

8 On the closing of the transaction, the 1991 mortgage of Dorothy O'Byrne was discharged and the land was conveyed to the numbered company and a first mortgage by the numbered company to Desjardins and a second mortgage to Dorothy O'Byrne. Both mortgages called for partial discharge with respect to all lands other than the 160 acres, comprising the golf course, without requirement for any payments to be made on account of those mortgages.

9 In 1995 the numbered company arranged a new first mortgage in the amount of $550,000. and Dorothy O'Byrne signed a postponement agreement. It was her understanding the monies would be used to pay her brother and that she in turn would receive payment from her brother.

10 In 1996, constructions liens were registered against the golf course and Dorothy O'Byrne was named as defendant in the lien action. She was under the mistaken belief that she would be liable to the lien claimants for monies owing to them.

11 In the latter part of 1996 or early 1997, Dorothy O'Byrne retained a solicitor, Anna Sundin.

12 BDO Dunwoody Limited had been appointed as trustee and interim receiver and Mr. Roderick Brooks was acting as counsel to the trustee. Ms. Sundin on behalf of her client, Dorothy Mae O'Byrne wrote to the trustee's counsel on January 9, 1997 with reference to the O'Byrne mortgage and stated in part as follows:

> After discussions with my client her position is that she has not been paid and is still owed the money but that the debtor is Angus O'Byrne and not the golf course and she will deal directly with her brother and discharge the mortgage from the golf course property.

13 This position was reflected in the proposal which was filed on March 10, 1997.

14 A vesting order was issued on April 4, 1997 and the vesting order was with the consent of counsel acting on behalf of the various parties. The vesting order set out the encumbrances, lien claimants, and all other parties having an interest in the subject land. The vesting order was approved by Anna Sundin, counsel on behalf of Angus O'Byrne and Dorothy O'Byrne. The vesting order did not recognize any encumbrance by Dorothy O'Byrne or any monies owing to her.

15 Dorothy O'Byrne's mortgage remained on title against the golf course until a vesting order was made in April 1997 discharging all encumbrances.

16 The applicant's position is that as a result of s.70, 71 and 73 of the *Registry Act*, R.S.O. 1990, c.R.20, the mortgage of Dorothy O'Byrne was registered on title and therefore provides notice to all persons concerned with the property.

17 In addition, under the provisions of the *Construction Lien Act* R.S.O. 1990, c.C.30 a mortgage was registered prior to any liens therefore the applicant claims that they stand ahead of the lien claimants. The relevant provisions of s.78(1) of the *Construction Lien Act* provides as follows:

> Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.
>
> . . . . .
>
> All conveyances, mortgage or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,
>
> (a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

. . . . .

18 Counsel for the applicant relies upon equitable principles and argues the lien claimants and others cannot benefit as a result of Mrs. O'Byrne's mistake in discharging her mortgage. Counsel for the applicant relies upon a number of decisions which confirms the court's ability to intervene to prevent unjust enrichment by one party.

19 In particular, counsel relies upon the decision in *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 43 R.P.R. (2d) 137 (Ont. C.A.). In that case, Central Guaranty Trust was a first mortgagee on the property and by mistake they registered a discharge of the mortgage even though the mortgage loan had not been repaid. Dixdale held a second mortgage on the property, that mortgage went in default and the property was subsequently sold under power of sale. Dixdale became aware of Central Guaranty's discharge shortly before it executed the agreement of purchase and sale. Central Guaranty brought an application for a declaration that they had an equitable interest in the sale proceeds to the extent of the money owing on its erroneously discharged first mortgage. The decision of the trial judge was appealed by Dixdale.

20 On appeal, Laskin J.A. found that Central Guaranty were negligent in discharging their mortgage but that this negligence did not disentitle them to relief.

21 Laskin J.A. applied the principles in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) and *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.). In *Sorochan*Dixon C.J.A. stated at p.44:

> In Pettkus and Rathwell, the Court outlined three requirements that must be satisfied before it can be said that an unjust enrichment exists. These include:
>
> (a) an enrichment;
>
> (b) a corresponding deprivation; and
>
> (c) the absence of any juristic reason for the enrichment.

22 Counsel on behalf of the lien claimants argues that the provisions of the *Land Registration Reform Act* and *Land Titles Act* provides upon registration of discharge the mortgage debt has been discharged.

23 I am satisfied on the evidence before me that Mrs. O'Byrne did not advance any funds as required by s.78(3) of the *Construction Lien Act* and as such would not be entitled to priority over the lien claimants.

24 The mortgage registered on title reflects the agreement she had with her brother Angus O'Byrne and did not benefit the land in question. There were no monies advanced by her, all monies had been advanced on the prior mortgage in 1991 which was subsequently discharged.

25 The facts in this case can be distinguished from *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* on the basis that there was no mistake. It was confirmed by Dorothy O'Byrne's solicitor when she wrote to counsel for the trustee confirming that the mortgage was not against the golf course lands but was a debt owed by her brother. This was also confirmed when her counsel consented to the vesting order which excluded Dorothy O'Byrne's mortgage. On the facts in this case Dorothy O'Byrne would not meet the equitable principle test.

26 Application is therefore denied. There will be no order as to costs.

Motion dismissed.

TAB TWO

1994 CarswellOnt 312
Ontario Court of Justice (General Division)

Mutual Trust Co. v. Creditview Estate Homes Ltd.

1994 CarswellOnt 312, [1994] O.J. No. 2209, 28 C.B.R. (3d) 208, 41 R.P.R. (2d) 217, 50 A.C.W.S. (3d) 688

MUTUAL TRUST COMPANY v. CREDITVIEW ESTATE HOMES LIMITED

Adams J.

Heard: September 26, 1994
Judgment: October 4, 1994
Docket: Doc. RE 3979/94

Counsel: *S. Dewart*, for applicant/moving party.
J.M. Wortzman, for responding party.

***Adams J.*:**

1 This is an application by The Mutual Trust Company ("Mutual Trust") for a declaration that a Certificate of Pending Litigation registered by the Respondent Creditview Estate Homes Limited ("Creditview") against title to the lands and premises at 4211 Sawmill Valley Drive, Mississauga (the "property") is subordinate to a mortgage over the property in favour of Mutual Trust. The property is a single family dwelling. It was purchased by Isam Nakib Shamas ("Mr. Shamas") and his wife Bushra Yousis Shamas ("Ms. Shamas") on December 8, 1988, for $296,000. They took title as joint tenants. When they purchased the property, Mr. and Ms. Shamas granted a first mortgage to Scotia Mortgage Corporation for $220,000 and on April 23, 1990, they granted a second mortgage to the Bank of Nova Scotia in the amount of $15,000 as collateral security for a line of credit (the "Scotiabank mortgages").

2 Creditview is the landlord of a shopping centre and leased space to Mr. Shamas' son, Rames Shamas ("Rames"). Creditview alleges that Mr. Shamas agreed to indemnify it for any loss resulting from a breach of the lease by Rames. Creditview also alleges that Rames breached the lease in or about January 1991 and that Mr. Shamas became liable on his indemnity agreement.

3 By instrument registered March 19, 1991, Mr. Shamas transferred his interest in the property to Ms. Shamas. There was no consideration for this transfer. Creditview has two actions pending. The first is against Rames for damages arising from his alleged breach of the shopping centre lease in January 1991 and against Mr. Shamas on his indemnity agreement. The statement of claim was issued June 7, 1991. The second action is against Mr. and Ms. Shamas for a declaration that the conveyance of the property from Mr. and Ms. Shamas jointly to Ms. Shamas alone in March 1991 is a fraudulent conveyance which hinders, defeats and delays Mr. Shamas' creditors, including Creditview. This statement of claim was issued February 28, 1992. In the second action, Creditview obtained an order for the issuance of a Certificate of Pending Litigation which was registered against title to the property on March 2, 1992 (the "C.P.L."). At that time, the property was still subject to the Scotiabank mortgages securing an aggregate principal amount of $235,000.

4 In September 1992 Mutual Trust refinanced the property and in particular advanced $228,863.37 to discharge the Scotiabank mortgages. The Mutual Trust mortgage is in the amount of $229,500. It bears an interest rate of 6.75%. While it indicates a balance due date of October 1, 1997, an amendment registered December 14, 1992, alters that date to October 1, 1993.

5 Joey Poonai was the solicitor who acted for Mutual Trust on the refinancing of the property. He was called to the bar approximately seven months before he acted on the refinancing transaction. Poonai's title search in September of 1992 disclosed Creditview's C.P.L. Poonai inquired of the mortgage broker who had arranged the Mutual Trust refinancing and was mistakenly

advised that the litigation either had been or was about to be settled and that the C.P.L. would be "cleared up". Poonai relied on this information and registered both the new first mortgage in favour of Mutual Trust and the discharges of the Scotiabank mortgages without either confirming that Creditview would subordinate to Mutual Trust or obtaining an assignment of the Scotiabank mortgages.

6 I am satisfied that the money advanced by Mutual Trust under its mortgage was used to discharge the Scotiabank mortgages. Therefore, due to Poonai's inadvertence, Creditview's C.P.L. is now registered prior to the Mutual Trust mortgage financing on the property.

7 When Creditview registered its C.P.L. on title, the property was already subject to the Scotiabank mortgages securing the aggregate principal amount of $235,000. The interest payable under the $220,000 first mortgage was 11.75% per annum. This mortgage became due on January 1, 1994. The interest rate on the $15,000 collateral mortgage was the Bank of Nova Scotia prime lending rate plus 2% per annum. As noted, the Mutual Trust replacement financing consists of a single mortgage of $229,500 bearing an interest rate at 6.75% per annum.

8 This application is not about the merits of Creditview's actions against the Shamas family. Mutual Trust has no direct knowledge of or interest in those proceedings.

9 It is submitted by counsel for Mutual Trust that the equitable doctrine of subrogation permits the Mutual Trust mortgage to enjoy priority over Creditview's C.P.L. notwithstanding that the subject property is registered in Land Titles. Creditview submits that the application is untimely in that a C.P.L. does not constitute a charge on lands. Thus, Mutual Trust should await the disposition of Creditview's two actions. Alternatively, Creditview submits that the doctrine of equitable subrogation is either not applicable to lands under the Land Titles regime or does not apply to these facts.

10 I am satisfied the motion is timely and entitled to succeed.

11 *Gordon v. Snelgrove*, [1932] O.R. 253 (H.C.) makes clear that where a third party pays off a first mortgage with a view to becoming a first mortgagee of a property, the third party, in default of evidence to the contrary, is entitled in equity to stand, as against the property, in the shoes of the first mortgagee. This equitable doctrine has been held not to be precluded by the terms of the *Registry Act*. Nor, in my view, is its applicability dependent on that statute. Section 60 of the *Registry Act*, R.S.O. 1990, c. R.20 provides:

> 60(1) Where a mortgage has been paid off by any person advancing money by way of a new mortgage on the same land and the mortgage so paid off or the discharge thereof is held by the mortgagee making the new loan, the discharge of the mortgage so paid off shall be registered within six months from the date thereof, unless the mortgagor has authorized, in writing, the retention of the discharge for a longer period.
>
> (2) The registration does not affect the right, if any, of the mortgagee who may have paid off such mortgage, the assignee, or any person claiming under the mortgagee, by purchase or otherwise, to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid.

12 In *Gordon v. Snelgrove*, supra, at p. 256 Sedgewick J. held that this provision did not "stand in the way" of applying equitable doctrine of subrogation. He did not say the doctrine's survival depended on the provision's wording. Indeed, it is my view the provision appears to have been enacted out of an abundance of caution in order to make clear that the registration of a discharge does not affect the application of the doctrine. I say this because the repeal of common law or equitable rights generally requires express language and no such language is contained in the *Registry Act*.

13 The fundamental principle underlying the equitable doctrine of subrogation is one of fairness in light of all of the circumstances. Within this principle is an understanding that no injustice is done by the appropriate subrogation of a party to the rights of original mortgagees. Thus Street J. in *Brown v. McLean* (1889), 18 O.R. 533 (H.C.) at p. 536 stated:

I think, however, that the plaintiff here is entitled upon the ground of mistake to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he paid to discharge their mortgages. It is clear beyond question that he would not have discharged these mortgages had he been aware of the existence of the defendant's *fi. fa.* He would either have refused to make the advance altogether, or he would have had the mortgages assigned to himself instead of discharging them.

It is equally clear that the defendant has not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position.

14 *Brown v. McLean*, supra, and *Coupland Acceptance Ltd. v. Walsh*, [1954] 2 D.L.R. 129 (S.C.C.) established that the doctrine is not confined to matters of priority between mortgages but applies as well to the relationships between mortgages and other prejudicial instruments such as mechanics' liens and executions. *Abell v. Morrison* (1890), 19 O.R. 669 (C.A.) also held that subrogation is possible notwithstanding an intermediate change in ownership of the land and the fact that a third party is therefore claiming subrogation to a mortgage where the mortgagor named in that instrument is not the mortgagor who gave a mortgage to the third party. This is because the equity of subrogation affixes to the land in relation to which the third party advanced the mortgage funds. Further, it is not determinative that the entire situation arises because of the negligence of the party claiming subrogation. See *Brown v. McLean*, supra, at p. 537. In fact, the doctrine is usually called into play because of a mistake or inadvertence. Accordingly, it is not enough to point to negligent conduct to defeat the doctrine's application. The issue remains one of fairness between the affected parties having regard to all of the circumstances.

15 In view of the doctrine's purpose, I believe it should apply to the relationship between a mortgage and a C.P.L. While I accept that the latter document does not create an estate or interest in land, a C.P.L. is notice that an estate or interest is claimed by the party bringingthe action. It is unlikely any prudent solicitor would certify a title as marketable when subject to such a notice. Indeed, the marketability of a subsequent instrument such as the Mutual Trust mortgage is immediately affected. In effect, subsequent interests are rendered subservient to the rights of the parties in the litigation and in this sense a C.P.L. is akin to a registered execution or construction lien. Therefore, I am satisfied that the moving party's mortgage is sufficiently and immediately prejudiced by the C.P.L. to trigger the purpose and application of subrogation.

16 Finally, I do not accept that the *Land Titles Act*, R.S.O. 1990, c. L.5 has abolished the doctrine of subrogation. The absence of a provision like s. 60 of the *Registry Act* does not determine the issue. As I have indicated, that section appears to have been enacted out of an abundance of caution. In *Re Church*, *(*sub nom. *Church v. Hill)* [1923] S.C.R. 642 at p. 644, Anglin J. held that equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and that equitable interests in such lands may be created and will be recognized and protected. See also *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262 (C.A.) at p. 265. Similarly, in rejecting the argument that the *Land Titles Act* in Ontario abrogated the principle of actual notice because of the statute's silence, Spence J. in *United Trust Co. v. Dominion Stores Ltd.* (1976), 71 D.L.R. (3d) 72 (S.C.C.) at p. 98 stated:

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

17 Section 159 of the *Land Titles Act*, supra, provides:

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

18 This provision acknowledges the power in a court to respond to this motion subject to the provision's opening words. In law Mutual Trust does not rely upon the registration of its mortgage in claiming priority over Creditview to the extent of the mortgage monies advanced.Rather Mutual Trust relies upon its equitable right to stand in the place of the mortgagees of the Scotiabank mortgages which mortgages were registered in priority to Creditview's C.P.L. and in respect of which Mutual Trust advanced its funds. See *Coupland Acceptance Ltd. v. Walsh*, supra, at p. 131. As a matter of equity, title did not revert to the owner or owners of the land on the discharge of the Scotiabank mortgages. Instead, the original mortgagees and the owner or owners if necessary hold title in trust for Mutual Trust to the full extent of the monies it advanced to pay off the Scotiabank mortgages. For this reason, Mutual Trust is entitled in law to rely on the earlier registrations of the Scotiabank mortgages notwithstanding their purported discharge.

19 Creditview is not prejudiced by the subrogation of Mutual Trust to the Scotiabank mortgages. It could not have prevented the refinancing from going ahead. If Creditview had refused to voluntarily subordinate to the replacement financing, Mutual Trust could have required Scotiabank Mortgage Corporation and the Bank of Nova Scotia to convey their mortgage debts and their first and second ranking interest in the mortgaged property. See *Mortgages Act*, R.S.O. 1990, c. M.40, s. 2(1), (2). The Mutual Trust mortgage does not exceed the aggregate amount of the Scotiabank mortgages. The interest rate is less and, if relevant, the term is not materially different. Moreover, Creditview's actions against Mr. and Ms. Shamas are not affected. The equity invoked by Mutual Trust affixes to the land and is not dependent on the validity of the transfer between Mr. and Ms. Shamas. The latter individuals will not be benefitted by a declaration in favour of Mutual Trust. I note that Mr. Shamas is a guarantor to the Mutual Trust mortgage and, if Creditview is successful in setting aside the transfer of the property to Ms. Shamas, Mr. Shamas will be in the same position as a mortgagor to that mortgage. Dismissing the motion, however, seriously prejudices Mutual Trust and weakens the enforceability of its claims against Mr. and Ms. Shamas. In my view, it is not sufficient to say that Mutual Trust has recourse against Mr. Poonai. The instant proceeding is a more summary and, I think, fairer manner of rectifying the situation. There is no justification, on these facts, for according Creditview a position that amounts to a windfall due to the inadvertence of someone else.

20 Accordingly, an order will go requiring the Registrar of Land Titles for the Land Titles Division of Peel (No. 43) to amend the Parcel Register for the Lands to record a declaration that the Creditview C.P.L. is subject to Mutual Trust's right of subrogation to the Scotiabank mortgages to the full extent of the Mutual Trust mortgage funds paid to discharge the Scotiabank mortgages.

21 In the circumstances, there will be no order as to costs.

Application allowed.

TAB THREE

Lamont on Real Estate Conveyancing, 2nd Ed. § 23:35

Lamont on Real Estate Conveyancing, 2nd Edition
Donald H.L. Lamont

Part V. Remedies and Mortgages

Chapter 23. Mortgages

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§ 23:35. Subrogation

Before leaving the subject of mortgages, the equitable right of subrogation was recently commented on in a trio of cases heard together before the Court of Appeal which fully commented on subrogation: Mutual Trust Co. v. Creditview Estate Homes Ltd. (1997), 34 O.R. (3d) 583, 12 R.P.R. (3d) 1 (Ont. C.A.), Midland Mortgage Corp. v. 784401 Ontario Ltd. (1997), 34 O.R. (3d) 594, 12 R.P.R. (3d) 14 (Ont. C.A.), and Armatage Motors Ltd. v. Royal Trust Corp. of Canada (1997), 34 O.R. (3d) 599, 12 R.P.R. (3d) 19 (Ont. C.A.).

> The fundamental principle underlying the equitable right of subrogation is one of fairness for a lender who renews, replaces, refinances or amends its mortgage or gives a new mortgage, or for a new lender who inadvertently or by mistake does not realize that there was already a mortgage, writ of execution, construction lien or certificate of *lis pendens* subsequent to the mortgage which was going to be replaced or paid off out of the proceeds of the *new* mortgage. By subrogation the mortgagee of the new mortgage is entitled in priority for the part of the amount advanced to pay off the outstanding mortgage or mortgage with interest at the original rate.

The doctrine of equitable subrogation was examined by Justice Trimble in Toronto-Dominion Bank v. Yousefie, 2016 ONSC 5991, 2016 CarswellOnt 17644, 80 R.P.R. (5th) 154, [2016] O.J. No. 5780 (S.C.J.), at paras. 21 to 28, additional reasons 2016 CarswellOnt 17645 (S.C.J.):

> **The Doctrine of Equitable Subrogation.**
>
> > 20 The doctrine of equitable subrogation, generally, is a discretionary equitable remedy invoked when a person discharges the obligation of another, but having done so, has no right of action against the debtor to enforce the debt the person has paid. It is a principle of fairness, invoked where it is prejudicial not to do so, and in doing so there is no prejudice to others.
>
> 21 The principle of equitable subrogation began with two cases. The first is *Brook's Wharf & Bull Wharf Ltd. v. Goodman Brothers*, [1936] 3 All E.R. 696 (Eng. C.A.), a case of bailment. Lord Wright put the principle succinctly when he said:
>
> > Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount. see *Toronto-Dominion Bank v. Yousefie*, 2014 ONSC 2003 (S.C.J.), and 2014 ONSC 561.
>
> 22 In real estate transactions, the principle arose from *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866 (Eng. Ch. Div.), in which Parker, J. said at p. 877:

> … where a third party, at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgage of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee.
>
> 23 The seminal case in Ontario considering equitable subrogation in a real estate transaction is *Midland Mortgage Corp. v. 784401 Ontario Ltd.*, [1997] O.J. No. 3257, 34 O.R. (3d) 594 (Ont. C.A.). In that case, *Midland* advanced a mortgage but required a postponement agreement from two existing mortgagees which was given. *Midland* later advanced further funds, on condition of another postponement agreement. This agreement was not done. When *Midland* discovered that it did not have priority, it moved for a declaration.
>
> 24 The Court of Appeal applied the *Crosbie-Hill* principle, expanding it to apply not only to third parties, but to a first mortgagee who renews, replaces, refinances, amends or increases his mortgage. In a decision released concurrently, the Court of Appeal applied the principle to properties in land titles: see *Mutual Trust Co. v. Creditview Estate Homes Ltd.* (1997), 34 O.R. (3d) 583 (Ont. C.A.).

25 From *Midland*, citing the passage from *Crosbie-Hill*, equitable subrogation requires that the claimant satisfy five criteria:

> a. At the request of the first mortgagor,
>
> b. The claimant pays off the first mortgage,
>
> c. With a view to becoming himself a first mortgagor of the property,
>
> d. Absent any contrary intention,
>
> e. He stands in the shoes of the first mortgagor.
>
> 26 The second *Midland* criterion deserves further discussion. It says that the third party, in making its payment, "pays off" the existing first mortgage. This is in keeping with the law of subrogation, generally, which arises in the insurance context. At common law, absent specific wording in a policy of insurance, before the doctrine of subrogation arises, the insurer must fully indemnify the insured, thereby discharging the obligation of the tortfeasor. Until the insured is completely indemnified, the insurer is not subrogated to the insured's interest. The same principle applies to equitable subrogation in the context of a real estate transaction.
>
> 27 Equitable subrogation, like any other principle of equity is a discretionary remedy. It is not mandatory. A party seeking it must have clean hands. Therefore, where a lender caused the loss through its own negligence, equitable subrogation will not be granted. Where the loss arose because of the conduct or negligence of the lender's solicitors, the lender's hands are not unclean.
>
> 28 Finally, equitable subrogation is a remedy imposed in equity to prevent unjust enrichment. It is not a right of action. Where the party seeking equitable subrogation has an alternate remedy, such as a claim in contract or in tort against the wrongdoer, equitable subrogation will not be granted. [footnotes omitted]

Where the bank held a first mortgage on a property that was later sold under power of sale, and the mortgagor's law firm was required to pay part of the mortgagor's obligation under the mortgage, arising from fire insurance proceeds that were misappropriated by the mortgagor, the firm was an unsecured creditor, and could not claim it was subrogated to the bank's interest. In Toronto-Dominion Bank v. Yousefie, 2016 ONSC 5991, 2016 CarswellOnt 17644, 80 R.P.R. (5th) 154, [2016] O.J. No. 5780 (S.C.J.), additional reasons 2016 CarswellOnt 17645 (S.C.J.), the bank held a first mortgage on a property owned by

the defendant Y, which had three other mortgages. The first mortgage was registered on May 4, 2010. The mortgaged property was damaged, substantially by fire in September, 2011. Y and his spouse retained the applicant law firm to act on his behalf in their claim with the property insurer. The claim was settled and on September 14, 2012, the insurer paid to the law firm $473,506 for the property damage claim. The insurer paid the funds to the law firm on the instruction that they be paid to Y, his spouse and the bank, as co-payees. This was required by the insurance contract since there was a standard mortgage payee endorsement on the policy. On September 14, 2012, Y's solicitor drew a trust cheque for the insurance proceeds payable to Y, his spouse and the bank. On March 19, 2013, Y advised the solicitor that the trust cheque had become stale-dated, and later misplaced, and the ultimate replacement trust cheque inadvertently omitted the bank as co-signee. Y and his spouse cashed the cheque, and the money disappeared. The bank brought an application for an order that the law firm pay to the bank the insurance proceeds. The law firm made such payment, but Y has not repaid the firm. The law firm claimed that it had priority over the bank's equitable mortgage, and the remaining three mortgages. The law firm brought an application seeking an order that it was subrogated to the bank's interest as first mortgagee. The law firm's application was dismissed.

In *Toronto-Dominion Bank v. Yousefie*, the law firm was not subrogated to the rights and interests of the bank's first mortgage. The firm was an unsecured creditor. The bank's equitable mortgage and the other three mortgagees were to be paid in order of their priority, and according to their mortgage documents. The firm shared in any undistributed proceeds thereafter along with any other unsecured creditors. The firm was not subrogated to the bank's position as first mortgagee. Firstly, the five criteria required to make a successful claim for equitable subrogation were not present. Secondly, the bank was not unjustly enriched by the firm's payment; it received only what it was entitled to from Y. Thirdly, the firm caused the loss by paying the insurance proceeds to Y, without making the bank a co-payee. The firm was caught by the application of the clean hands doctrine. Fourthly, the firm had alternate remedies and had exercised them. It had obtained judgment against Y and his spouse. No authority was given for the proposition that equitable subrogation should be applied where the judgment creditor could not enforce the judgment against the judgment debtor. The firm misapplied the concept of prejudice in equitable subrogation. Allowing the firm to stand in priority of bank's first mortgage, in effect said that it should be paid for its loss, and the priority of the remaining registered mortgagees should be postponed to the extent of the firm's interest. The firm suffered no prejudice in bearing the loss it caused. On the other hand, the bank and the mortgagees would suffer great prejudice if the firm's payment stood with the priority of the bank's first mortgage. The firm was not subrogated to the priority of the bank's first mortgage. The bank and the other three mortgagees were entitled to share in the net proceeds of the sale in accordance with their priority and their mortgage documents.

Equitable subrogation was not available even if the second mortgagee was mistaken as to the priority of its charge where the second mortgagee was aware of the first mortgagee's charge prior to the refinancing, and as first mortgagee would be severely prejudiced if her security were relegated to second position. In L-Jalco Holdings Inc. v. MacPherson, 2017 ONSC 4055, 2017 CarswellOnt 10043, 138 O.R. (3d) 330, 85 R.P.R. (5th) 333 (S.C.J.), the mortgagee held a second mortgage on M's property. M told her that he was planning to refinance, and asked her if she would postpone her mortgage to give the new mortgagee priority. The mortgagee refused to do so. M's company then gave a mortgage to the plaintiff, and the first mortgage was paid out. The plaintiff's president claimed that he believed the plaintiff was to have a first mortgage on the property. When M's company defaulted on the plaintiff's mortgage, power of sale proceedings were commenced without notice to the mortgagee, and the property was sold. The mortgagee signed a discharge prior to closing in the belief that the property was being sold in the ordinary course of business. Part of the proceeds were paid into court, and then replaced by a letter of credit from the plaintiff. In an action against the mortgagee, the plaintiff relied on the principle of equitable subrogation to assert that its charge had first priority. The mortgagee counterclaimed for recovery of the sum secured by the letter of credit. The mortgagee moved for summary judgment. The motion was granted; the action should be dismissed and the counterclaim should be allowed. The doctrine of equitable subrogation was usually called into play because of a mistake or inadvertence. It provided a remedy if, as a result of an error, a lender lost or was denied a priority for which it had bargained. The plaintiff was not entitled to the remedy of equitable subrogation as it was aware of the mortgagee's prior charge and knowingly took the risk of not addressing that charge. Even if the plaintiff was mistaken as to the priority of its charge, equitable subrogation would not be available as the plaintiff knew about the mortgagee's mortgage prior to the refinancing and as the mortgagee would be severely prejudiced if her security were relegated to second position.

The right of subrogation is not precluded by inadvertence, mistake or negligence of the party claiming subrogation, nor because the property is in land titles.

Two earlier cases were cited in support: Brown v. McLean (1989), 18 O.R. 533 (Ont. H.C.) and Coupland Acceptance Ltd. v. Walsh (1953), [1954] 2 D.L.R. 129 (S.C.C.).

In the third case before the Court of Appeal, Armatage Motors Ltd. v. Royal Trust Corp. of Canada (1997), 34 O.R. (3d) 599, 12 R.P.R. (3d) 19 (Ont. C.A.), the majority refused subrogation as it would have unfairly prejudiced the second mortgagee which had acted on the basis it was in priority to the new mortgage. There was a strong dissenting judgment.

Where a mortgage contravened the *Planning Act* as the mortgagor owned a parcel of land adjacent to the mortgaged property, the mortgage commitment letter did not give rise to an equitable mortgage, even though the mortgagor did not hold the abutting land when the letter was signed. However, the lender was entitled to rely on the doctrine subrogation to recover monies advanced to pay municipal taxes, and to discharge prior mortgages. In Elias Markets Ltd., Re (2005), 77 O.R. (3d) 461, 2005 CarswellOnt 3865 (S.C.J.), the lender loaned money to the mortgagor, to be secured by a mortgage registered on certain land. After the loan agreement was made, but prior to registration of the mortgage, the mortgagor amalgamated with two related companies, one of which owned parcels of land adjacent to the mortgaged property. As a result, the mortgage contravened the *Planning Act.* The amalgamated company made an assignment in bankruptcy, an interim receiver was appointed, and the property was sold. The interim receiver applied to the court for directions as to how the proceeds were to be distributed. The lender argued that, despite the mortgage security being void by reason of the contravention of the *Planning Act*, it had an equitable mortgage entitling it to all of the proceeds. An equitable mortgage could not arise upon acceptance of the commitment letter unless a planning consent was obtained, because to hold otherwise would permit a contravention of the statute. On the other hand, there was ample authority for the proposition that a mortgagee who paid off earlier encumbrances was entitled to be subrogated to the payee's priority position over other claimants. The equitable remedy of subrogation was based on fairness and the prevention of unjust enrichment.

When the mortgage proceeds were used to pay existing liabilities of the property owner, the property owner will be enriched if he, she or it is not required to repay the funds used to extinguish those pre-existing debts. In the circumstances, the court will apply the doctrine of equitable subrogation to require the property owner to pay the mortgagee the value of the benefit received as a result of the discharge of a prior existing liability. The fundamental principle underlying the doctrine of equitable subrogation is fairness. No injustice is done by the appropriate subrogation to the rights of the original mortgagee. Even where the subsequent mortgage is found to be invalid due to the fraudulent activities of the person who arranged the mortgage, the property owner will be ordered to pay the mortgagee the value of the benefit the property owner received as a result of the disbursement of the loan proceeds to discharge an existing liability. In pursuing a judgment based on equitable subrogation under those circumstances, there would be an issue whether any rights under the mortgage were abrogated, and an election had been made in treating the mortgage as invalid: J.A. MacFarlane Engineering Co. v. Chetti, 2009 CarswellOnt 389 (S.C.J.).

The equitable doctrine of subrogation allows one party to stand in the shoes of another, and advance any claims that the original party may have had against another party. As soon as a surety has paid to the creditor what is due to the creditor under the guarantee, it is entitled, unless it has waived them, to be subrogated to all rights possessed by the creditor in respect of the debt. In the case of a mortgage, the doctrine of subrogation applies only in a situation where there is a payment that in effect discharges the earlier mortgage in circumstances where fairness justifies that the payor stand in the shoes of the first mortgagee as if it had taken an assignment. The right of a party to seek such equitable relief is always subject to the equitable maxim of "He who comes into equity must come with clean hands": Gerrow v. Dorais, 2010 CarswellAlta 1752, 34 Alta. L.R. (5th) 112, [2011] 3 W.W.R. 320, 96 C.L.R. (3d) 215 (Q.B.) at paras. 8-18.

Under the doctrine of subrogation, all of the circumstances must be balanced, and the court must be satisfied that no injustice will be done through the substitution of one party in the place of another via a subrogation arrangement. In Gerrow v. Dorais, 2010 CarswellAlta 1752, 34 Alta. L.R. (5th) 112, [2011] 3 W.W.R. 320, 96 C.L.R. (3d) 215 (Q.B.), a numbered corporation purchased three commercial properties, borrowing money from the Alberta Treasury Branch (ATB). This indebtedness was

comprised of various demand notes. C Inc. and another company, respectively, entered into mortgage agreements with the numbered corporation with respect to two of the properties. The general security agreements were filed by the lenders, with ATB also registering its collateral mortgages. The numbered corporation transferred title to two of the properties to HP Inc. and HL Inc., respectively, with the transfers taking place as rollover agreements. HP Inc. and HL Inc. executed guarantees of the numbered corporation's indebtedness to ATB. MD was the sole shareholder and director of the numbered corporation, HP Inc., and HL Inc. After MD died, the monthly mortgage payments on all three properties were not made, and ATB commenced foreclosure actions. C Inc. commenced a foreclosure action on its mortgage. A receiver was appointed for the purpose of examining the affairs of MD, and the defendant companies, including HB Inc. and HL Inc., to determine what assets might be available to satisfy the outstanding claims against the defendants, MD and various companies owned by him. An order *nisi* was granted in three ATB foreclosure actions, and the properties were sold. ATB indebtedness was fully repaid. An issue arose as to whether the receiver was entitled, by subrogation, to step into the position of ATB in regard to the payment made by HP Inc. to ATB pursuant to its guarantee. Motions were brought involving the respective rights of the court appointed receiver and various secured creditors. It was determined that the rollover agreement and attending transfers offended the *Statute of Elizabeth (Fraudulent Conveyances Act)*, such that the transaction was declared void; HP Inc. was therefore denied the right of subrogation. The relationship of MD to the numbered corporation and HP Inc. raised two of badges of fraud: grossly inadequate consideration, and the close relationship between the parties to the conveyance. Sufficient suspicious circumstances existed, coupled with the close relationship, to raise a *prima facie* case justifying inference of the intent to defraud. To permit HP Inc. to be subrogated to the amount in question in priority to the secured creditors would be inequitable.

Equitable subrogation was not available even if the second mortgagee was mistaken as to the priority of its charge where the second mortgagee was aware of the first mortgagee's charge prior to the refinancing, and as the first mortgagee would be severely prejudiced if her security were relegated to second position. In L-Jalco Holdings Inc. v. MacPherson, 2017 ONSC 4055, 2017 CarswellOnt 10043, 138 O.R. (3d) 330, 85 R.P.R. (5th) 333 (S.C.J.), affirmed 2018 ONCA 488, 2018 CarswellOnt 8207, 92 R.P.R. (5th) 1 (C.A.), the mortgagee held a second mortgage on M's property. M told her that he was planning to refinance, and asked her if she would postpone her mortgage to give the new mortgagee priority. The mortgagee refused to do so. M's company then gave a mortgage to the plaintiff, and the first mortgage was paid out. The plaintiff's president claimed that he believed the plaintiff was to have a first mortgage on the property. When M's company defaulted on the plaintiff's mortgage, power of sale proceedings were commenced without notice to the mortgagee, and the property was sold. The mortgagee signed a discharge prior to closing in the belief that the property was being sold in the ordinary course of business. Part of the proceeds were paid into court, and then replaced by a letter of credit from the plaintiff. In an action against the mortgagee, the plaintiff relied on the principle of equitable subrogation to assert that its charge had first priority. The mortgagee counterclaimed for recovery of the sum secured by the letter of credit. The mortgagee moved for summary judgment. The motion was granted; the action should be dismissed and the counterclaim should be allowed. The doctrine of equitable subrogation was usually called into play because of a mistake or inadvertence. It provided a remedy if, as a result of an error, a lender lost or was denied a priority for which it had bargained. The plaintiff was not entitled to the remedy of equitable subrogation as it was aware of the mortgagee's prior charge and knowingly took the risk of not addressing that charge. Even if the plaintiff was mistaken as to the priority of its charge, equitable subrogation would not be available as the plaintiff knew about the mortgagee's mortgage prior to the refinancing and as the mortgagee would be severely prejudiced if her security were relegated to second position. The plaintiff appealed, and its appeal was dismissed.

In *L-Jalco Holdings Inc. v. MacPherson*, once the defendant proved that her mortgage was registered in priority to the plaintiff's, the motion judge was correct to impose the burden on the plaintiff to prove entitlement to equitable subrogation. On the findings, the motion judge was entitled to make, the plaintiff went ahead with the loan knowing that the defendant's mortgage stood in priority, and that she would not postpone her interest. Crucial testimony from M that he advised the plaintiff's lawyer that the defendant would not agree to postpone her mortgage was not contradicted. Moreover, the plaintiff was seeking subrogated priority over the defendant for a mortgage that was more than double in value to the first mortgage, and that carried a much higher interest rate than the mortgage it replaced. There were cogent and proper reasons for the motion judge's decision to reject the request for a remedy that would leave the defendant with nothing.

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TAB FOUR

(1) Building Mortgage

Construction Law in Canada

Justice Leonard Ricchetti, Timothy J. Murphy (Contributors)

CHAPTER 12 CONSTRUCTION LIENS

IV. PRIORITIES

A. Mortgage Priorities

(1) Building Mortgage

A building mortgage is defined as a mortgage taken by a mortgagee "with the *intention* to secure financing of an improvement".[1] Liens arising from the improvement have priority over a building mortgage to the extent of any deficiencies in the holdbacks required to be retained by the owner under Part IV of the Act. This exposure to a lender can be onerous but the limitation is, in a practical sense, approximately 10 per cent of the value of the work done on the improvement.

The apparent misconception on the part of some lenders is that the risk is 10 per cent of monies advanced by a lender. This is clearly not the case. The holdback and, therefore, the deficiency in the holdback has no relation to the amount of money advanced. A lender must view the project in all its components to properly assess the lending risk, as liens will relate to all improvements to the project from beginning to end.

The priority of liens is not affected by the registration date of the building mortgage or the date of any advances. This extends not only to mortgages taken to secure advances to finance improvements, but also to mortgages taken out to repay a building mortgage.

A "building mortgage" lender can protect itself by:

- ensuring that proper margins are maintained;
- obtaining personal guarantees/collateral security from the owner;
- implementing a Financial Guarantee Bond or Lien Holdback Deficiency Bond;
- having a project monitor to ensure compliance with the Act (but a lender must be careful that it does not become "owner" under the Act);
- policing holdbacks by advancing only 90 per cent of the funds or by advancing 100 per cent of the funds and requiring borrower to deposit 10 per cent of each advance with the lender to be held as security to fund holdback obligations. Since the funds must be advanced, it is not sufficient for a lender to maintain a "notional holdback" where advances are reduced by 10 per cent in each instance unless the lender understands that these unadvanced 10 per cent funds may have to be paid to lien claimants to satisfy the holdback obligations of the owner; or
- using "take out financing" to repay its mortgage at the end of the project, provided that the certification provisions of the Act have been complied with (s. 32(l)) in regard to substantial performance and that the liens have expired in regard to finishing the work.

The lender must realize that the owner's obligation for the holdback is ongoing, and the holdback deficiency can remain an issue up until the project is completed and all lien rights have expired.

Footnote(s)

1 CLA, s. 78(2).

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

KINGSETT MORTGAGE CORPORATION	**and**	**MAPLEVIEW DEVELOPMENTS LTD., PACE MAPLEVIEW LTD. and 2552741 ONTARIO INC.**
Applicant		Respondents

Court File No.: CV-24-00716511-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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