CITATION: CHIEF EXECUTIVE OFFICER OF THE FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO v. FIRST SWISS MORTGAGE CORP., 2024 ONSC 5866
COURT FILE NO.: CV-23-00696362-00CL
DATE: 20241115

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ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

APPLICATION UNDER SECTION 37 OF *THE MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT, 2006*, S.O. 2006, c. 29, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED

BETWEEN:	
CHIEF EXECUTIVE OFFICER OF THE FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO	*Reeva M. Finkel*, for the Borrowers of the First Swiss Mortgage Corp. mortgage which was assigned to Olympia Trust Company
Applicant	*Meghan A. Harrogate*, for RSP account holder, William Loucks
– and –	
FIRST SWISS MORTGAGE CORP.	*Thomas Gray*, for the Receiver for First Swiss, KSV Restructuring Inc.
Respondent	*Daniel Szirmak*, for Olympia Trust Company
	HEARD: May 13, 2024

REASONS FOR DECISION

OSBORNE J.

Relief Sought

1. The Borrowers, Calogero Sferrazza and Carmela Romano, move for an order:

a. discharging the mortgage on a residential property owned by the Borrowers at 251 Savoline Boulevard, Milton, Ontario (the "Property") that was registered by First Swiss Mortgage Corp. ("First Swiss") in 2019 (the "Mortgage");

b. declaring that the Mortgage has been paid, and directing the Land Registry Office to discharge the Mortgage; and

c. awarding them their costs of this motion from Olympia Trust Company ("Olympia") and the beneficiary William Loucks ("Loucks") who has directed Olympia to refuse to sign the Discharge of Mortgage.

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Background

2. First Swiss was registered under the *Mortgage Brokerages, Lenders and Administrators Act*, 2006, S.O. 2006, c. 29 ("*MBLAA*") until May 4, 2023, when its mortgage brokerage licence was revoked. First Swiss was a private mortgage lender. It lent funds typically secured by second mortgages on residential properties in Ontario and British Columbia. When it approved a mortgage application, First Swiss would raise funds from one or more investors, and in some cases it advanced the funds to the borrower and registered a mortgage on the subject property. First Swiss earned an upfront fee and/or a spread on the interest charges on the mortgages.

3. On March 15, 2023, First Swiss was assigned into bankruptcy. The Chief Executive Officer of the Financial Services Regulatory Authority of Ontario ("FSRA") brought this Application for, among other things, the appointment of a Receiver pursuant to section 37 of the *MBLAA* and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*").

4. The Application to appoint the Receiver was precipitated by complaints made to the FSRA by certain investors, including allegations that First Swiss:

a. had not made registrations on title in connection with funds advanced by investors for specific mortgages;

b. had discharged mortgages that had been funded by investors without their knowledge and without funds being paid to them; and

c. was not current in making interest payments to investors.

5. The Receiver was appointed by court order made March 17, 2023. Its powers were subsequently expanded by court order dated May 19, 2023. The principal purposes of the receivership were to allow the Receiver to investigate allegations of wrongdoing against First Swiss and its principals by investors, and to take possession and control of the property of First Swiss to maximize recoveries for investors and other creditors.

This Motion

6. This motion arises as a result of conduct by First Swiss that is consistent with the allegations that precipitated the receivership in the first place. The Borrowers here paid out the Mortgage in full to First Swiss. First Swiss had assigned the Mortgage to Olympia, but when the Mortgage was paid out, First Swiss did not remit the funds to Olympia. Since Olympia and the investors who bought the Mortgage (or at least one of those investors) were not paid out, they have refused to consent to the discharge.

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7. In short, this motion is a dispute between different parties about who should bear the loss arising out of the misappropriation of the funds by First Swiss.

8. The Borrowers rely on the Affidavits of the following individuals and the exhibits thereto:

a. Carmela Sferrazza (one of the Borrowers) sworn December 29, 2023;

b. Lisa Comtois (an employee of First Canadian Title) sworn December 28, 2023;

c. Eleanora Salerno ("Salerno") (a licenced mortgage broker acting for the Borrowers) sworn January 3, 2024; and

d. Melissa Thurston (also an employee of First Canadian Title) sworn January 10, 2024.

9. The motion is opposed by Olympia and one of the two investors who purchased the Mortgage, Loucks. Loucks and Olympia rely on the following evidence:

a. Loucks' Affidavit sworn February 9, 2024, together with Exhibits thereto;

b. An expert report tendered by a lawyer, Robert B. Aaron, and delivered under cover of his Affidavit sworn February 8, 2024; and

c. The Affidavit of Olympia employee Kelly Revol ("Revol") sworn February 14, 2024, together with Exhibits thereto.

10. The Receiver for the regulator, the FSRA, agreed the discharge was fair and reasonable but takes no position on this motion.

11. For the reasons that follow, the motion is granted.

Detailed Facts and Analysis

First Swiss was the Agent of Olympia for the 2014 Mortgage and the 2019 Mortgage

12. The Borrowers, the moving parties, borrowed the sum of $107,990 from First Swiss on September 20, 2019. That debt was secured by the Mortgage registered on the same day against title to the Property (the Borrowers' residence) ranking in second priority to an existing first mortgage.

13. The Mortgage reflected a principal owing equal to the debt: $107,990, and an interest rate of 12.99%. The Mortgage had a term of one year with the last payment date on which the entire balance was due on October 1, 2020. Standard Charge Terms were described as 200033. As is typical, those Standard Charge Terms entitled the Borrowers to a discharge after payment of all amounts due.

14. Five days later, on September 25, 2019, First Swiss assigned the Mortgage to Olympia, and registered a transfer of charge for consideration of two dollars. This was done without notice to or knowledge of the Borrowers.

15. Thereafter, and unaware of the assignment of the Mortgage, the Borrowers continued to make all mortgage payments to First Swiss.

16. Approximately one year later, on September 29, 2020, the Borrowers completed a refinancing of the Property with the Toronto Dominion Bank (“TD”). The Borrowers obtained a new first mortgage from TD in the amount of $485,000. They used those funds to pay out both the prior ranking first mortgage and the second ranking (First Swiss) Mortgage at issue here.

17. The Borrowers first learned that First Swiss had assigned the Mortgage to Olympia in connection with the TD refinancing. Their mortgage broker, Salerno, arranged for the TD refinancing for the Property, which included both the first mortgage in favour of Computershare and the second ranking Mortgage that is the subject of this motion. Salerno had been involved throughout the life of the Mortgage; she had also been involved in obtaining the Mortgage for the Borrowers in 2019.

18. When the original loan was advanced and the Mortgage registered in 2019, Salerno dealt with the Vice President of Credit and Underwriting at First Swiss, Yana Papanyan ("Papanyan"). Papanyan requested various documents from Salerno to complete the transfer of funds. Salerno delivered those documents, First Swiss advanced the funds, and the Mortgage was registered. It had a one-year term with the due date of October 1, 2020.

19. In advance of that maturity, in September of 2020, Salerno set about to arrange for refinancing. As she had done the previous year, Salerno contacted Papanyan.

20. First Canadian Title ("First Canadian") was the proposed title insurer for TD, the new mortgagee. First Canadian conducted a routine title search that reflected the transfer of the Mortgage to Olympia as noted above.

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21. As a result, on September 19, 2020[1], and to facilitate the TD refinancing, Salerno contacted Papanyan at First Swiss to inquire as to who (as between First Swiss and Olympia) would provide the payout statement required. Papanyan, the lead underwriter for First Swiss, responded on September 21, 2020 to the effect that the request for a payout statement must be sent to First Swiss. That request for a payout statement, effective October 1, 2020, was made of First Swiss on behalf of TD (as the new mortgagee) by TD's agent, First Canadian, on October 1, 2020.

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22. Salerno's evidence is that she advised Melissa Thurston, then a Title Officer with First Canadian, to advise that the payout statement was to be requested from First Swiss and not Olympia. On September 28, 2020, Salerno wrote again to Papanyan advising that the title officer (i.e., Thurston) was insisting that the mortgage had been transferred to Olympia. Salerno's evidence is that she spoke with Thurston a few days later and Thurston confirmed she had spoken with Papanyan who had confirmed that Olympia and First Swiss were affiliated, and that First Swiss took care of all payout statements.

23. Salerno understood that all mortgage payments had been made to First Swiss, and therefore it was in the usual course of business as a mortgage broker to deal with the servicing agent who had been collecting all payments, despite the transfer on title.

24. This is consistent with the evidence of Lisa Comtois of First Canadian who was the Lead Officer involved in the Mortgage. She, too, understood that First Swiss and Olympia were related. Among other things, she states the following in her affidavit:

a. the same solicitor acted for both First Swiss and Olympia when the Mortgage was assigned from the former to the latter in 2019;

b. the consideration for the assignment was two dollars;

c. the solicitor's address was the same as that of First Swiss; and

d. the payout statement ultimately provided reinforced her firm belief that First Swiss and Olympia had a relationship because the statement, issued by First Swiss, stated that an Acknowledgement and Direction was to be addressed to Olympia.

25. Finally, Comtois states that it was common in her many dealings with mortgage administrators over her career with First Canadian to place mortgages on title in favour of an administrator, and it was common to pay out those mortgages to the administrator. Similarly, she

[1] The Notice of Motion refers to September 19, 2019, but I am satisfied that this is a typographical error, and the reference should be to 2020.

states that it was standard to receive payout statements from the administrators or agents of the mortgage.

26. On October 2, 2020, First Swiss provided the Borrowers with the mortgage payout statement reflecting a payout amount of $108,389.73 and stated that: “Funds are payable to First Swiss Mortgage Corp. by wire transfer ONLY. Below please find the wire instructions to our account.” The statement included wire instructions to that same effect, in the name of First Swiss.

27. The Borrowers’ funds were paid to First Swiss on October 6, 2020, as directed.

28. Almost three years later, on March 17, 2023 (as noted above), the Receiver was appointed over the property of First Swiss. Initially, and upon reviewing the books and records of First Swiss, the Receiver requested of the Borrowers (and all other First Swiss mortgagors) that all payments due and owing to First Swiss be remitted to the Receiver. Upon confirming that the Mortgage had already been paid out, however, the Receiver confirmed same to the Borrowers and consented to a discharge of the Mortgage. Olympia, however, did not.

29. On March 30, 2023, the Borrowers received a Notice of Default from (or on behalf of) Olympia, alleging that the Mortgage had gone into default on January 3, 2023, and advising that if full payment was not made, Olympia would commence legal action.

30. It was then discovered by the Borrowers that although the payout funds had been received by First Swiss approximately three years earlier, First Swiss had failed to remit that payout amount to Olympia and instead continued to send (fictitious) monthly payments to Olympia purportedly in respect of the Mortgage, until the end of 2022, notwithstanding that the Mortgage had, according to its terms, come due and matured in October, 2020. When those payments to Olympia ceased to be made, and shortly thereafter First Swiss was placed into Receivership, Olympia sent the Notice of Default.

31. The Receiver does not oppose the relief sought on this motion. However, it advised the Borrowers that since the Mortgage had been transferred to Olympia, the Land Registry Office required that the Discharge be provided by Olympia.

32. When the draft Discharge was sent to Olympia with proof of payment, it refused to execute the Discharge on the basis that, as a bare trustee, it required the consent of both beneficial investors who had bought the Mortgage.

33. There are two such investors, William Loucks and Alex Bernard. Of the original principal amount of the Mortgage, Loucks’ investment was $65,990, and Bernard’s investment was the balance, being $42,000. Bernard has consented to the discharge and the relief sought by the Borrowers on this motion; Loucks has not.

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34. Loucks' position, joined completely by Olympia, is that the Borrowers paid the funds to First Swiss through their own error and no fault of his. Since Olympia did not receive the funds[2], Loucks maintains that he is not required to consent to the Discharge.

35. The principal submission of Loucks is that the Borrowers (or their agents) deviated from what Loucks submits are "standard best practices" for discharging mortgages in Ontario by:

a. choosing to accept a payout statement signed by First Swiss, rather than obtaining a statement directly from Olympia;

b. choosing to wire funds to First Swiss without verifying with Olympia that First Swiss had authority to accept those funds; and

c. choosing to wire the funds without obtaining a signed direction authorizing the discharge of the mortgage to be registered immediately upon receipt of the payment.

36. The Borrowers take the position that they paid First Swiss in full and are entitled to a discharge since First Swiss was entitled and authorized to issue a payout statement and sign the discharge, as it had done previously. Moreover, they argue that, to the extent that the consent of Olympia was required, First Swiss acted as the agent of Olympia and bound its principal. I agree.

37. Reliance on previous conduct of the parties flows from an earlier mortgage on the same Property registered in 2014. The Mortgage that is the subject of this motion was not the first mortgage transaction involving First Swiss and the Borrowers. Nor was it the first mortgage of the Borrowers to be transferred or sold by First Swiss.

38. Five years earlier, in 2014, Borrowers obtained a loan for $85,000 from First Swiss. First Swiss registered a second mortgage against Property on January 21, 2014 (the "2014 Mortgage").

39. Two days later, on January 23, 2014, a transfer of charge was registered from First Swiss to Olympia. As with the Mortgage at issue here, Olympia held the 2014 Mortgage in trust for an investor.

40. The 2014 Mortgage was discharged approximately nine months after it had been registered, on September 3, 2014. In the declaration associated with that discharge, the Vice President, Loan Servicing and Administration, confirmed: "This document is not authorized under Power of

[2] Olympia did continue to receive monthly payments on the mortgage from First Swiss following the TD refinancing in 2020 for approximately two years through to 2022, so at a minimum those amounts would have to be credited against the balance owing in any event.

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Attorney by this party. The party giving this discharge is the original chargee and is the party entitled to give any effective discharge".

41. The Borrowers submit that First Swiss and Olympia worked together, First Swiss had authority to act on behalf of Olympia in receiving mortgage payment funds, and by dealing directly with the Borrowers without any constraints or limits on its authority imposed by Olympia. They base that submission on the 2014 Mortgage generally, and specifically the manner in which it was discharged in favour of the Borrowers upon payout by First Swiss notwithstanding the fact that it had been assigned to Olympia as bare trustee for an investor. Again, I agree with this submission.

42. The evidence of the Borrowers with respect to the 2014 Mortgage is supported by the evidence of their mortgage broker and First Canadian.

43. In 2014, as in 2019, the Borrowers made all required mortgage payments, including the payout of principal, to First Swiss. As noted above at para. 21, in 2020, the Borrowers' broker, Salerno, contacted the lead underwriter for First Swiss, Papayan. Papayan advised Salerno that First Swiss handled all administration, including payouts, and that Salerno was required to send a request on behalf of the Borrowers for the payout statement to First Swiss, which Salerno did.

44. After Salerno discovered that there had been a transfer of charge in favour of Olympia registered on title, Papayan continued to insist that, notwithstanding the transfer, First Swiss had the authority to deal with all administration matters. Salerno on behalf of the Borrowers complied, and as directed addressed the payout statement request to Olympia (on which First Canadian, acting on behalf of TD, insisted), care of the address of First Swiss.

45. That payout statement required funds be made payable to First Swiss. First Swiss provided wire instructions. The Borrowers paid the funds to First Swiss in accordance with those instructions.

46. It is not contested that the Borrowers paid the amount in accordance with the payout statement, and that the amount was sufficient to pay out the Mortgage principal and all accrued interest in their entirety.

47. The Borrowers submit that First Swiss and Olympia Trust are in fact related, and that First Swiss had actual and apparent authority to act as an agent of Olympia. They point to the fact that the 2014 Mortgage reflected First Swiss as lender. Two days later, that mortgage was transferred to Olympia Trust for consideration of (only) two dollars. Olympia held that mortgage in trust for an RRSP investor just as it did with respect to the Mortgage at issue here.

48. When the 2014 Mortgage was discharged approximately nine months later, on September 3, 2014, the formal Discharge was executed by First Swiss, not by Olympia, and the circumstances are precisely analogous to those surrounding the Mortgage that is the subject of this motion.

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49. The Borrowers submit that First Swiss had the authority to act on behalf of Olympia Trust, and in fact did so with respect to the 2014 Mortgage discharge. They submit that First Swiss and Olympia were working together, and that First Swiss had the authority to act on behalf of Olympia and deal directly with the Borrowers as the agent and administrator of Olympia. Finally, the Borrowers submit that by accepting the payout funds, the actions of First Swiss bound Olympia Trust.

50. First Swiss was the Borrowers' only point of contact, including in respect of all payments, the payout statement and payout funds. First Swiss even provided wire instructions to receive the payout funds, and the funds were delivered in accordance therewith on October 6, 2020.

51. As noted above, the Borrowers were not notified until March 30, 2023, almost three years later, that Olympia had not received the funds paid by the Borrowers to First Swiss. Even then, that notification came by way of a demand letter in respect of the alleged default as of January 3, 2023.

52. Also as noted above, Olympia and the investors were aware of the maturity of the Mortgage in 2020: that was clear according to its terms. It was only a one-year mortgage. Yet Olympia and the investors (including Loucks) received and accepted monthly payments for almost two years thereafter without question or inquiry. Even on this motion, neither Olympia nor Loucks offered any explanation for this.

53. In his affidavit, Loucks himself acknowledged the October 2020 date of maturity and the fact that he "actively received" deposits of interest-only payments on a monthly basis until those payments "suddenly stopped" in or around February, 2023. Notwithstanding his acknowledgement of the October, 2020 maturity date, his affidavit does not explain why he never questioned the fact he continued to receive monthly payments for two years thereafter.

54. The only evidence on behalf of Olympia is that of Revol, the Executive Vice President, Mortgages, Investment Account Services. While Revol's affidavit speaks to general practices at Olympia, it makes no reference whatsoever to Olympia receiving mortgage payments for almost two years after the Mortgage matured according to its term, nor to why it did so without inquiry.

55. There are no written agreements between Olympia and First Swiss which would explain and define the nature of the relationship between those two parties, if it was not one of agency. Yet, that evidence is completely absent from the record.

56. There are, however, two relevant agreements directly between Loucks and First Swiss as described below.

57. Loucks opened a self-directed RSP account with Olympia. The intention was to use it to invest in mortgages with First Swiss in respect of which Olympia would be a bare trustee and Loucks a beneficial owner.

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58. I pause to observe that this fact alone is inconsistent with the submission that there was no relationship whatsoever between the investors in First Swiss, whatever it may have been. On the contrary, and by Loucks' own admission, the very purpose of his account with Olympia was to facilitate investments in First Swiss mortgages.

59. In respect of each First Swiss mortgage into which Loucks invested, he executed both a Mortgage Loan Servicing Agreement and a Trust and Beneficial Ownership Agreement. Loucks acknowledges that the Mortgage Loan Servicing Agreement was valid during the material times.

60. The parties to the Mortgage Loan Servicing Agreement are Loucks and First Swiss (not Olympia). That Agreement provides, in relevant part, that the "Servicer" shall issue statements to the borrower, issue payout demands, and demand, receive and collect all loan payments, and "execute and deliver on the Owners' behalf any documents required to exercise any rights or duty which an Owner may have under any Loan or Deed of Trust …"

61. The "Servicer" is First Swiss. Loucks is an "Owner". The Agreement further provides that "the Owners derive their beneficial ownership of Loans by the terms of a trust agreement … between the Servicer as Bare Trustee and the Owners as Beneficiary …" and that "the Servicer will act on behalf of the Owners in the capacity as manager and administrator of the Loans".

62. The Trust and Beneficial Owner Agreement is consistent with the Mortgage Loan Servicing Agreement in all material respects. The parties to the Trust and Beneficial Owner Agreement also are Loucks and First Swiss (again, not Olympia).

63. The Trust and Beneficial Owner Agreement provides that First Swiss as Trustee agreed to manage and administer the Mortgages on behalf of and for the benefit of the Beneficial Owner (Loucks). Loucks agreed to indemnify and hold harmless First Swiss and its successors in respect of all costs, damages, expenses, claims, proceedings and demands in respect of the Mortgages.

64. Moreover, and pursuant to the Trust and Beneficial Owner Agreement, Loucks as Beneficial Owner "hereby ratifies, confirms and authorizes the acquisition, preparation or execution by the Trustee … of any and all documents or instruments which have heretofore or may hereafter be provided relating to any of the Mortgages".

65. Loucks understood all of this. He is a Certified Professional Accountant and describes himself as "the managing partner at the largest CPA firm in the Municipality of Chatham-Kent for many, many years". He says that his "understanding of financial institutions and the operation of trust accounts is strong".

66. Accordingly, I am satisfied that First Swiss was entitled and authorized to act on behalf of Loucks. As noted above, the two agreements to which Loucks was a party at the relevant time were with First Swiss, not Olympia. Their terms are clear.

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67. Ironically, as noted there are no written agreements between Olympia and First Swiss. Olympia's evidence, in the Revol Affidavit, is that Olympia is "an order taker with respect to its clients' Self-Directed Accounts" and further that when Olympia accepts the transfer of a mortgage into its name, it does not notify the borrowers and is not required to do so.

68. While Olympia facilitates the discharge of mortgages for which it is registered, "the exact process that Olympia Trust follows in this regard differs depending on the context." Olympia further acknowledges that a mortgage administrator or agent like First Swiss may be authorized to collect mortgage payments from a borrower.

69. The Revol affidavit makes no reference whatsoever to either of the two Agreements referenced above to which its investor, Loucks, was a party. The Revol affidavit makes no reference to the express authority that Loucks grants in those Agreements authorizing First Swiss to issue statements to the Borrowers and collect all loan payments, among other things. The Revol affidavit offers no explanation as to how its position on this motion that First Swiss had no authority, apparent or actual, can succeed as against the express terms of those two Agreements.

70. Finally, the Revol Affidavit makes no reference to the fact that, in connection with the 2014 Mortgage, First Swiss had represented that it had authority to discharge that 2014 Mortgage to these same Borrowers and for the same Property (other than to simply state that the 2014 Mortgage was discharged without the knowledge or authorization of Olympia), and nor did Olympia notify the Borrowers that any payout request had to be made to Olympia (either in respect of the 2014 mortgage or this Mortgage).

71. For all of these reasons, I am satisfied that First Swiss was the agent of Loucks for relevant purposes.

72. Even if Loucks and First Swiss had not been parties to the two agreements, an agency relationship may be created by the conduct of the parties, even without anything having been expressly agreed as to terms of remuneration, etc. The assent of the agent may be implied from the fact that the agent has acted intentionally on behalf of another and may be implied where the circumstances clearly indicate that the principal has given authority to another to act on his or her behalf: GHL Fridman, *Canadian Agency Law*, 3rd ed. (Markham: LexisNexis, 2017) ("Fridman") at §2.10 and 2.12.

73. In addition, a principal may ratify the earlier actions of an agent, even if previously unappointed, upon which the agent is treated as having been authorized at the time the act was performed: *Hunt v. TD Securities Inc. (2003)*, 66 OR (3d) 481, at paras. 67-68.

74. Valid ratification requires three elements:

a. the agent whose act is sought to be ratified must have purported to act for the principal;

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b. the agent must have had a competent principal at the time the act was done; and

c. the principal must have been legally capable of doing the act himself at the time of the ratification.

See *John Ziner Lumber Ltd., v. Kotov* (2000), 137 OAC 177, at para. 29.

75. A principal is bound by the acts of its agent acting within the scope of its actual or apparent authority: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727, at para. 101.

76. Actual authority may arise from explicit authorization through an agreement for a particular purpose, or from implied authority for actions that do not have explicit consent but are necessary by reasonable implication. When the agent has actual authority, but it is subject to limitations, the onus is on the principal to prove that the limitations were conveyed to the third party who relied on the agent: *Kohn v. Devon Mortgage Ltd*., 1985 ABCA 10, ("*Kohn*") at para. 3. Here, that onus was on Loucks.

77. In particular, a mortgage administrator may be deemed to have actual or apparent authority conferred by a principal if there is evidence showing that the mortgage administrator was dealing with all aspects of the mortgage. Courts will consider factors such as the agent's direct involvement in negotiating the mortgage, its exclusive communication with the third party, and the placement of the agent by the principal as the designated contact for mortgage matters. A principal cannot escape from liability where a principal enables an agent to provide third parties with payout documents consistently with apparent authority respecting administration of the mortgage, and without alerting third parties to any limitation on the authority of that agent: *Toronto-Dominion Bank v. Currie*, 2017 ABCA 45, ("*Currie*") at paras. 6 – 7.

78. The observations of the Court in *Currie* at paragraph 12 are particularly apt to the circumstances of this case, given what occurred with the 2014 Mortgage and the Mortgage at issue here:

> Secondly, Currie knew that Fuoco was providing payout statements, and did nothing to stop him or to advise third parties that Fuoco was exceeding his authority. Currie knew this from the fact that Fuoco had sent the first payout statement to him, asking for his endorsement. Currie did not, at that point, admonish Fuoco for exceeding his authority by dealing with payout statements. He did not tell Fuoco that Currie personally had to sign any payout statements. Most importantly, no such limitations on Fuoco's authority were conveyed to the Craigs, Peddie or TD Canada Trust: *Kohn v Devon Mortgage* at para. 3. Currie enabled Fuoco to continue to provide these third parties with payout documents consistently with his apparent authority respecting administration of the

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> mortgage, without alerting these third parties to any limitation on Fuoco's authority. In all the circumstances, the better inference is that Fuoco had actual authority to issue payout statements. At the least, Fuoco had ostensible authority to do so. [Emphasis in original]

79. As in *Currie*, the initial financing and Mortgage were negotiated by a licenced mortgage broker (i.e., First Swiss) through whom all of the contact and communications were conducted. When the mortgage matured, the mortgagors (i.e., the Borrowers) paid over funds sufficient to entitle them to a discharge. The funds were misappropriated by the mortgage broker (i.e., First Swiss). The mortgagee (i.e., Loucks) denied authorizing the broker to receive any payments directly on his behalf. The Court in *Currie* held that the authority of the broker to deal with the mortgage was evident from his direct participation in the original transaction, his exclusive communication with the mortgagors, and the designation of the broker by the mortgagee as the primary contact for mortgage matters.

80. Here, and to the extent that Olympia's consent was required, it ratified the actions of First Swiss through acquiescence and its activities. Olympia allowed and authorized First Swiss as its mortgage agent to collect payments and to deal with the Borrowers. Moreover, that authorization was completely consistent with the express authorization of Loucks, the beneficial owner of (a proportion of) the Mortgage for whom Olympia acted only as a bare trustee.

81. While Olympia's affiant, Revol, asserts that Olympia did not authorize its mortgage administrators to independently respond to a payout statement or effect the mortgage discharge and that Olympia retains that authority which it is not delegated without express consent, again, there is no evidence of any agreement between Olympia and First Swiss to this or any other effect.

82. On the contrary, Revol states in her affidavit at paragraph 14 that "while there was no specific agreement between Olympia Trust and First Swiss setting out Olympia Trust's requirements pertaining to the discharge of First Swiss-sourced mortgages, these requirements were consistent with its general mortgage discharge requirements." The absence of such an agreement is remarkable in the circumstances of this case where there was such a close relationship, over many years and relating to many mortgages, between First Swiss and Olympia. As noted above, investing in First Swiss' mortgages was the very purpose for Loucks' Olympia self-directed RSP account in the first place.

83. In her affidavit, Revol also speaks to those general practices of Olympia referred to above relating to mortgage discharge requirements (see paras. 7 – 11). Revol states that while a mortgage administrator or agent "like First Swiss" "may be authorized" to collect mortgage statements from the borrower and pass them on to Olympia, that does not authorize them to independently respond to a payout statement request or effect the discharge of the mortgage, which authority it does not delegate without its express and specific consent.

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84. Yet, as stated above, that is exactly what happened with respect to the 2014 Mortgage. It is also exactly what is contemplated in each of the two Agreements between Loucks and First Swiss. In this regard, Revol states simply that "[the 2014 Mortgage] is not representative of Olympia Trust's discharge practices and requirements pertaining to First Swiss-sourced mortgages."

85. In my view, the bald statement, again in the absence of any agreement between First Swiss and Olympia, that the manner in which the 2014 Mortgage was discharged (by First Swiss, allegedly without the consent or agreement of Olympia) is not consistent with its general practice, is not sufficient.

86. To the extent that the statements may be accurate of Olympia, they are not consistent with the terms of the two Agreements between Loucks and First Swiss, the most relevant excerpts of which are reproduced above. In my view, and in addition to the clear terms of those Agreements including the express authority given to First Swiss, the evidence relevant to the discharge of the 2014 Mortgage amounts to apparent authority for First Swiss to consent to the discharge on behalf of Olympia.

87. I reject the submission of Loucks that the Servicing Agreement cannot be relied on by the Borrowers since (and despite Loucks signing that Agreement with First Swiss as he acknowledges), there is no evidence that the Borrowers or their agents were aware of the Servicing Agreement at the time of the TD refinancing.

88. This submission is, in essence, a submission that there was in fact actual authority (which a plain reading of the Agreements reflects), but the Borrowers cannot rely upon that authority even in the face of the apparent authority arising from the discharge of the 2014 Mortgage, because the Borrowers did not have a copy of the agency agreement (i.e., the Servicing Agreement) at the time.

89. To the express knowledge of Loucks, Olympia's only involvement was that of bare trustee and order taker. Loucks' agreement is with First Swiss. Olympia never administered the mortgage, collected payments from the Borrowers or indeed had any interaction or communication with the Borrowers at all. To the contrary, its position was that it had no obligation to have any communication with them (i.e., even to advise them of the assignment of the mortgage or seek their consent). There was no limitation on the authority of First Swiss in respect of the administration of the Mortgage; there was not even a written agreement between those two parties.

90. All of that is consistent with the Declaration of Trust governing the relationship between Olympia and Loucks, which specifically references at Article 30 "your properly authorized agent". In this case, that properly authorized agent of Loucks was First Swiss.

Loucks' Reliance on the Sealed Contract Rule

91. Given my findings with respect to both actual and apparent agency powers, the sealed contract rule relied upon by Loucks and the caselaw related thereto is of no assistance.

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Statutory Requirement for Notice of the Assignment of the Mortgage

92. As stated above, it is not disputed that Olympia did not provide notice of the assignment of the Mortgage to the Borrowers. To be effective, express notice in writing of the assignment must be given to the mortgagor: s. 53(1) of *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34.

93. Loucks submits that, notwithstanding the statutory requirement, the Court has equitable discretion to grant relief from that failure and conclude that the assignment is valid as against the original mortgagor and that registration of the assignment on title is legal notice: *Hanna v. Fercan Developments Inc.*, 2012 ONSC 5776, at para. 70.

94. Olympia and Loucks should have noticed, or did notice and elected to stay silent and continue to accept, that the monthly payments (I make no determination as to which it was) for almost two years after the mortgage had matured and was not renewed. They could and should have contacted the Borrowers at that time to demand payout as was due upon maturity, in doing so would have put the Borrowers on notice of the assignment and brought the whole issue to light.

95. In my view, and whether or not Olympia and Loucks had a legal obligation to take some action following the maturity of the one-year closed term Mortgage, the fact that they did not do so is a factor that weighs against the exercise of equitable discretion in their favour.

96. Finally in this regard, I cannot accept the submission of Loucks (factum, para. 50) that equity favours his position since the Borrowers have not suffered a loss in the circumstances. He argues that the Borrowers suffered no loss since the refinancing of the TD mortgage did in fact occur. That submission is incongruent with Loucks' fundamental position necessitating this motion in the first place: he will not consent to the discharge of the Mortgage unless and until he is paid out his principal and interest in full, in circumstances where it is uncontested that the Borrowers have already paid all principal and interest owing.

97. I recognize that this is a difficult case, since, in a very real sense, the dispute is between two parties affected by the misappropriation of funds at the hands of First Swiss. In my view, and for all of the reasons expressed above, equity does not support the relief sought by Loucks in the particular circumstances of this case.

Expert Opinion Evidence as to Mortgage Administration Best Practices

98. Given my findings above, I have found the expert report of Robert Aaron to be of no assistance here. To be admissible, expert evidence must meet all four elements of the *Mohan* test for admissibility:

a. relevant;

b. necessary to assist the trier of fact;

c. not in conflict with any exclusionary rule; and

d. tendered by a properly qualified expert.

See *R. v. J.(J.-L.),* 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 33-36.

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99. In my view, the proposed expert evidence is not necessary, with the result that I need not consider the other three elements, nor any gatekeeping function, such as was set out by the Court of Appeal in *R. v. Abbey*, 2009 ONCA 624 at para. 76.

100. Mr. Aaron is a very experienced lawyer, and indeed one with significant expertise in real estate, but he is not a mortgage administrator. Most fundamentally, his opinion, even if accepted, does not address the express Agreements by Loucks authorizing First Swiss to provide payout statements, accept all mortgage payments and take other actions on his behalf. Nor does it address any of the circumstances regarding the discharge of the 2014 Mortgage which, as I have noted above, inform the consideration of the circumstances regarding the Mortgage at issue on this motion.

101. Rather, his evidence is to the effect that there are no regulations that specify the process to be followed during a mortgage advance when a prior private mortgage is to be discharged in Ontario, but that "best practices" have evolved, and they would have required (among other things) consent from Olympia in these particular circumstances.

102. Given my factual findings as set out above, the proposed opinion evidence, and particularly Mr. Aaron's ultimate opinion (which the Borrowers submit amounts to advocacy for a result) that: "[B]y allowing [First Canadian] to pay out the mortgage to a stranger to the property, without any written authorization from the registered lender, TD is the source of its own wrongdoing and must bear the consequences", is not necessary in the context of this dispute as between Loucks and the Borrowers as that concept is considered in *J-L*.

Jurisdiction: Determination of the Motion within the Receivership Proceeding

103. Finally, Loucks submits that this Court lacks the jurisdiction to determine this matter. Clearly, the Superior Court has the jurisdiction to determine such matters, but the submission here is that it ought not to be determined as a motion within the First Swiss receivership and rather as a separate action or application since neither he nor Olympia are parties to the receivership proceeding in that neither has a debtor creditor relationship with First Swiss.

104. I reject the submission for a number of reasons.

105. First, the hearing date for this motion was fixed by order of Steele J. dated November 30, 2024. The parties filed aide memoires and made submissions with respect to the objection of Olympia to the matter being scheduled within the receivership proceeding. Steele J. concluded, based on the limited information material, that the motion appeared to be related to the

[receivership] proceedings, and that the motion would be scheduled, but that the issue could be raised before the judge hearing the motion.

106. No appeal or challenge was taken from that decision.

107. I agree with the preliminary conclusion of Steele J. that the matter was properly brought within the receivership proceeding. Indeed, this Application arises entirely out of that receivership proceeding in that it was brought by the FSRA, the regulatory authority engaged specifically to address matters, flowing from the misconduct leading to the suspension of the mortgage brokerage licence for First Swiss.

108. First Swiss, as the Respondent in the Application, was and is a relevant and necessary party. Documents in its possession, control or power, as well as the conduct of its representatives, were and are centrally relevant to the matters to be determined, and the consent of First Swiss to the relief sought (or opposition thereto) was entirely within the carriage of the Receiver, on behalf of First Swiss.

109. Second, as noted above, the only two Agreements to which Loucks was a party were with First Swiss.

110. Finally, if the investors wish or wished to seek recovery for their losses from their contractual counterparty, First Swiss, such claims would necessarily have to be brought and prosecuted as creditor claims within the receivership proceeding. That is the very purpose of that proceeding.

111. It would have been entirely inefficient, impractical and unwieldy to have this proceed as a matter outside the receivership proceeding.

112. I do not accept the submission of Loucks that "the Borrowers are mis-using the FS receivership proceeding to shift their own error-induced loss onto Mr. Loucks and Olympia". To the extent that I understand the submission, the issue on this motion, properly briefed and argued as it was, has not resulted in the shift of any onus of proof or ultimate liability whatsoever. Rather, the issue was briefed and argued as it would have been in the context of a separate application.

113. I similarly reject the submission of Loucks that he ought not to be classified as a creditor in the First Swiss Receivership requiring him to file a claim, *qua* creditor, to recover the funds paid to First Swiss. He expressly asserts (at para. 80 of his factum) that "the Borrowers are creditors of FS". That is completely inconsistent with his principal submission and position on this motion that the Borrowers are in fact creditors of his, and not First Swiss, as a result of the assignment which he maintains is valid.

114. In addition, and as noted above, any claim he may assert against First Swiss should, in my view, be brought in the receivership proceeding in any event. The very purpose of that (and any receivership) proceeding is to identify, call for, and then evaluate all such claims, and then

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distribute whatever assets remain in the estate of First Swiss in accordance with proven claims and priorities, all in an orderly, transparent manner that is fair to all creditors.

115. Second, there is no prejudice or unfairness worked on any party, and in particular, Loucks, by the manner in which this matter proceeded. Loucks (and all affected parties), were given a full opportunity to participate, respond to the motion, file materials, and cross-examine on affidavits filed by other parties if considered to be necessary. Loucks and Olympia filed materials, including the expert report referred to above, as well as evidence of fact witnesses, and had the opportunity to fully present their respective positions.

116. Finally in this regard, Loucks submits that TD and First Canadian are necessary parties with the result that this motion is premature. I disagree. The record on this motion includes the evidence of the two employees of First Canadian involved with this matter. If the investors wished (or wish) to advance a claim against either of those two entities, they were and are free to do so (subject to limitations issues). The stay granted in the receivership proceeding had no application to those parties.

117. The other investor (Bernard) does not oppose the discharge and declined to participate, although he had the ability to do so. When the matter came on for hearing, it was fully briefed. No party, and particularly Loucks, requested an adjournment or the ability to file further materials, add parties or take other steps. In my view, Loucks is in precisely the same situation he would be in if the matter had proceeded outside the receivership proceeding.

Claim is not Statute Barred

118. Finally, I am satisfied that the relief sought is not statute barred as a result of the expiry of the two-year limitation period found in the *Limitations Act,* and that the ten-year limitation period (provided for in both sections 23(1) and 43(1) of the *Real Property Limitations Act*, R.S.O. 1990 c. L.15) applies: see *The Equitable Trust Company v. Marsig*, 2012 ONCA 235, at para. 27, where the Court of Appeal for Ontario observed that: "Put simply, the *Limitations Act, 2002* was enacted to deal with limitation periods other than those affecting real property." See also *Fulton v. 802048 Ontario Ltd*., 2012 ONSC 3215 at para. 25. In my view, the position of the Borrowers and their prayer for relief in the form of a discharge is not based on a claim of negligence.

119. In any event, and even if I am in error with respect to the applicable limitation period, the relevant date of discovery and discoverability was no earlier than the date on which the Borrowers received the Notice of Default on March 30, 2023, with the result that the applicable limitation period had not expired.

Result and Disposition

120. The Borrowers have been successful on the motion. They are presumptively entitled to their costs.

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121. Pursuant to s. 131 of the *CJA*, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

122. Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

123. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 24-26.

124. Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

125. The Borrowers seek their costs from Olympia and Loucks and have submitted a Costs Outline that reflects actual costs of $53,104.16, substantial indemnity costs of $48,008.75 and partial indemnity costs of $34,981.88.

126. Loucks has also submitted a Costs Outline and Bill of Costs reflecting that, if successful, he would seek substantial indemnity costs of $50,401.07, or partial indemnity costs of $32,760.70.

127. Olympia has submitted a Costs Outline reflecting full costs of $43,214.59, substantial indemnity costs of $38,893.14 and partial indemnity costs of $25,928.75.

128. All amounts are inclusive of disbursements and HST.

129. In my view and having considered all of the Rule 57 factors as applied to this case, there is no basis to award costs on the elevated scale of substantial or full indemnity, and costs should be awarded on a partial indemnity scale.

130. The motion was opposed by both Loucks and Olympia. The other investor for whom Olympia was a trustee (Bernard) consented to the discharge of the mortgage. Olympia made separate submissions, but largely adopted the position and evidence of Loucks.

131. A fair and equitable costs award in favour of the Borrowers is $30,000 inclusive of fees, disbursements and HST. That amount is payable to the Borrowers by Loucks as to $20,000 and Olympia as to $10,000 within 30 days.

132. Order to go in accordance with these reasons.

Osborne J.

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