CITATION: FirstOntario Credit Union Limited v. Nagra et al., 2024 ONSC 3398
COURT FILE NO.: CV-23-81784
DATE: 2024-06-13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
FirstOntario Credit Union Limited Applicant	H. Reininger, counsel for the Applicant
- and -	
Kanwaljot Nagra, Nelson Campos	M. Kestenberg, counsel for Kanwaljot Nagra and Nelson Campos
And	
Jeffrey W. Lem, Director of Titles and Deputy Director of Land Registration Respondents	J. Sydnor, counsel for Jeffrey W. Lem, Director of Titles and Deputy Director of Land Registration
	HEARD: May 24, 2024

REASONS FOR DECISION ON APPLICATION

The Honourable Justice M. Valente

Overview

[1] This application is an appeal from the decision and order of the Director of Titles, dated May 3, 2023 (the 'Decision'), deleting the Applicant's charge (the 'FO Charge') from title of the lands municipality known as 200 Stinson Street, No. 318, Hamilton, Ontario (the 'Property').

[2] Pursuant to s.26 of the *Land Titles Act*, RSO 1990, c. L. 5 ('*LTA*'), an appeal of a decision or order of the Director of Titles is to this court and the appeal shall be by way of a new trial.

[3] On November 29, 2016, the Applicant registered the FO Charge as a first charge against the title of the Property. As at the date of the registration of the FO Charge, Kevin Carmichael ('Carmichael') was the registered owner of the Property.

[4] On December 7, 2016, the Land Registry Office deleted 23 instruments from the property identification number assigned to the Property. Included in these instruments was the FO Charge which was mistakenly deleted by the Land Registry Office.

[5] The FO Charge was deleted from title without the registration of a discharge of charge instrument or any reference to the registration number of the discharged FO Charge.

[6] On April 23, 2020, Carmichael entered into an argument of purchase and sale to sell the Property to the Respondent, Kanwaljot Nagra ('Nagra'), and Nagra secured a private mortgage financing commitment from the Respondent, Nelson Campos ('Campos') to assist with his purchase of the Property.

[7] Each of Carmichael, Nagra and Campos retained independent counsel to complete the proposed purchase and financing transactions. Nagra retained Gurpreet Jassal ('Jassal') and Campos retained Irving Snitman ('Snitman').

[8] Jassal and Snitman each conducted title searches of the Property which indicated that the FO Charge had been deleted from title and that there were no registered encumbrances against the Property.

[9] On August 12, 2020, Carmichael transferred the title of the Property to Nagra and Campos registered a first charge against the Property (the 'Campos Charge').

[10] The unchallenged evidence of Jassal is that at no time prior to the August 12, 2020 transfer of ownership of the Property to his client, Nagra, did he have any knowledge that Carmichael had an outstanding mortgage obligation to the Applicant. Likewise the uncontroverted evidence of Snitman is that at no time prior to the registration of the Campos Charge did he know that the Applicant had any

interest in the Property. Moreover, Snitman's evidence is "[h]ad [he] been alerted to any prior registered mortgages against the Property, [he] would not have advanced the net mortgage proceeds to Mr. Jassal and authorized him to pay the net mortgage proceeds to Carmichael's lawyer, absent a discharge of any prior registered mortgages".

[11] There is no evidence to suggest that prior to the completion of the August, 2020 purchase and financing transactions either Nagra or Campos had knowledge that the Applicant had an interest in the Property.

[12] Subsequent to the transfer of the Property to Nagra and the registration of the Campos Charge, Carmichael continued to make payments under the FO Charge until April, 2022.

[13] In May, 2022 the Applicant caused a search of the Property's title and discovered that the FO Charge had been deleted, the Property had been sold to Nagra and that the Campos Charge was in a first secured position.

[14] On May 10, 2022, the FO Charge was reinstated on the title of the Property in first position by the Land Registry Office at the request of the Applicant (the "Reinstatement Order"). The Reinstatement Order, made pursuant to s.158(2) of

the *LTA*, provides that the FO Charge had been "deleted from the instrument pool in error without a Discharge".

[15] In or about June, 2022, counsel for the Applicant contacted Jassal to advise that the FO Charge had been reinstated on title to the Property, the FO Charge was in default and the Applicant would be pursuing recovery of its debt from Nagra as purchaser of the Property.

[16] Further to proceedings initiated by Nagra and Campos to set aside the Reinstatement Order and delete both it and the FO Charge from title to the Property, a written hearing was held by the Director of Titles pursuant to s.57(2) of the *LTA*.

[17] After considering the evidence and submissions of the parties and conducting his own independent investigation, the Director of Titles released the Decision on May 3, 2023.

[18] In the Decision, the Director of Titles framed the issue before him as a competition between: (a) a *bona fide* purchase for value and his mortgagee and (b) a *bona fide* prior mortgage whose interest in the Property was lost through no action of its own.

[19] After determining that the FO Charge was inadvertently deleted in error by a Land Registry Office staff member and rejecting the Applicant's arguments that counsel for Nagra and Campos had constructive notice that the FO Charge was mistakenly discharged and that it was incumbent upon the lawyers for Nagra and Campos to conduct further inquiries, the Director of Titles concluded that the reinstated FO Charge should be deleted from title.

Expert Opinions

[20] The Applicant relies in part on the opinion of Robert Aaron ('Aaron'). Nagra and Campos obtained the opinion evidence of Sidney Troister ('Troister') in response to the opinion of Aaron (the 'Troister Opinion'). The expertise of Aaron and Troister in matters of real property law are conceded by the parties.

[21] Aaron opined on the issue of the standard of care that was required with respect to a title search conducted by the lawyers for Nagra, as purchaser, and Campos, as lender (the 'Aaron Opinion'). In Aaron's opinion, any lawyer searching title for a purchaser or lender is required to identify any unusual features in or red flags on the parcel register and the failure to investigate any such features may result in a failure to meet the required standard of care.

[22] Based on the circumstances of this case where the FO Charge was deleted without reference to the discharge of charge instrument and any reference to the registration number of the discharged FO Charge, it is the opinion of Aaron that Jassal and Snitman were alerted to red flags on title and should have investigated the circumstances surrounding the deletion of the FO Charge. Aaron concluded that in his view, the lawyers' failure to recognize the red flags and to further investigate the issue amounts to a failure to meet the required standard of care.

[23] On the other hand, it is Troister's position the Aaron Opinion "imposes an unreasonable and unrealistic standard on both of the lawyers who acted on the relevant transactions". Troister opines that lawyers are entitled to and do rely on the accuracy of the land registry records and if the land titles record of title indicates that the title is free of a mortgage incumbrance, then barring fraudulent activity, the title of the property is as it is reflected on the parcel register. In sum, in Troister's view, Jassal and Snitman did as any reasonable lawyer would have done in Ontario: they searched the title of the Property and properly relied on the title register.

Position of the Parties

[24] The position of the Applicant is threefold. The Applicant argues that because of the admitted error of the Land Registry Office in deleting the FO

Charge, this court has the discretion to order rectification of the parcel register by reinstating the FO Charge on title in its original first priority position. In the alternative, the Applicant submits that by virtue of the red flags on title as described in the Aaron Opinion, the Respondents had notice of its unregistered interest in the Property, and therefore cannot rely on the doctrine of indefeasibility of title to shield them from the Applicant's priority secured position. In the further alternative, the Applicant urges this court to consider any entry, omission or delay error made by the Land Registry Office in making an entry in the register as an exception to the doctrine of indefeasibility of title.

[25] The Respondents submit that the doctrine of indefeasibility of title is a complete response to the Applicant's position, and on that basis, the appeal should be dismissed. They submit that it is well-established law that absent fraud or actual notice amounting to fraud, both a *bona fide* purchaser and mortgagee for value take the land free and clear of unregistered claims. It is clear, the Respondents argue, that based on the evidence Nagra is a *bona fide* purchaser without notice and Campos is likewise a *bona fide* mortgagee without notice. The Respondents further submit that any discretionary powers of this court to rectify title are subject to the provisions of the *LTA* which provide that their rights cannot be defeated by rectification in circumstances where they were strangers to the FO Charge transaction.

Analysis

[26] Although I have considered the Aaron Opinion and the Troister Opinion, my decision relies on neither to any significant extent. Because lawyers, Jassal and Snitman, owed no duties to the Applicant, whether their conduct fell below the standard of care owed to their respective clients is of little to no assistance to the Applicant. Secondly, whether the Respondents had sufficient notice of title irregularities to cause them, through their lawyers, to make further enquiries respecting the Applicant's unregistered interest is irrelevant to the analysis for reasons that will become clear later in my decision.

[27] In support of its position that rectification is the appropriate remedy to reinstate that FO Charge on title, the Applicant has referred me to three decisions: *TD Bank v. Rehmtulla*, 2017 ONSC 4237 ('*Rehmtulla*'), *Berdeklis v. David Terry Associates Inc.*, 2017 ONSC 3209, and *Macor v. Grama*, 2019 ONSC 6706, decisions of this court, all of which I have considered. In particular, I agree with Gibson, J. in *Rehmtulla* that the common law test for rectifying a contract as established in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, is not binding on this court in the context of an application under the *LTA* (at para 27). I also am of the mind that because rectification is an equitable

remedy, this court has a wide discretion to fashion a remedy in appropriate circumstances.

[28] This court's discretionary powers to rectify title is, however, subject to ss.159 and 160 of the *LTA*.

[29] Section 159 states:

> 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.

[30] Section 160 states:

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

[31] Both of these provisions of the *LTA* make clear that the court's rectification powers are "[s]ubject to any estates or rights acquired by registration under this Act". The "estates or rights acquired by registration under this Act" are generally set out in s.78(4) of the *LTA* which provides that an instrument is effective when

registered “according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.”.

[32] The limitation imposed by ss.159 and 160 of the *LTA* to the court’s discretionary power to rectify title is grounded in the doctrine of indefeasibility of title. In *Durrani v. Augier*, 2000 CanLII 22410 (ONSC) (‘*Durrani*’), Epstein, J. (as she then was) explained the restriction on the court’s discretion in this way at para 49:

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

(as quoted with approval by the Divisional Court in *Wonderland Power Centre Inc. v. Post and Beam on Wonderland Inc.,* 2022 ONSC 2237 (‘*Wonderland*’) at para 47)

[33] It is an undisputed fact that Nagra is a *bona fide* purchaser for value and Campos is a *bona fide* mortgagee for value.

[34] Three principles form the doctrines of indefeasibility of title and embody the philosophy of the land titles system. The Divisional Court *per curiam* in *1168760 Ontario Inc. v. 6706037 Canada Inc.,* 2019 ONSC 4702 (‘*1168760 Ontario*’), at para 14 describes these three principles as follows:

- The minor principle, whereby the register is the perfect minor of the state of the title;
- The curtain principle, which holds that the purchaser need not investigate past dealing with the land, or search behind the title as depicted in the register; and
- The insurance principle, whereby the state guarantees the accuracy of the register and compensates any person who suffers loss as a result of an inaccuracy.

[35] By adopting into practice the three principles of the concept of indefeasibility of title, the land titles regime in this province “‘provide[s] the public with security of title and facility of transfer’ by setting up a register and guaranteeing that the person shown as the registered owner is the legal owner, subject only to registered incumbrances and enumerated statutory exceptions” (see: *1168760 Ontario*, at para 13).

[36] The Divisional Court points out in *Wonderland*, at para 41, that:

> Rectification of registered interests after purchase by a third party is of particular concern because of the importance of the reliability and integrity of the land registry to all aspects of land law and conveyancing. Certainty to critical to conveyancing.

[37] There are two exceptions to the doctrine of indefeasibility of title. They are fraud and actual notice of an unregistered instrument (see: *Stanbarr Services Limited v. Metropolis Properties Inc.*, 2018 ONCA 244 (‘*Stanbarr*’)).

[38] The Applicant concedes that the first exception, fraud, has no application to the facts of this case.

[39] The question then becomes did either or both of the Respondents have actual notice of the unregistered FO Charge? The Applicant would answer this question in the affirmative by virtue of the red flags identified in the Aaron Opinion which ought to have caused the Respondents’ lawyers to undertake further investigations that would have resulted in the discovery of the Applicant’s unregistered interest. In essence, the Applicant’s position is that in this case, constructive knowledge is equivalent to actual knowledge.

[40] The Court of Appeal in *Stanbarr*, however, disagrees. Writing for the unanimous Court, Hourigan, J.A. unequivocally states at para 26 that because notice is an exception to the indefeasibility of title doctrine, it is to be strictly

construed, and for the reason, constructive notice is not one and the same as actual notice:

> Our courts insist on actual notice of a defect. Actual knowledge means just that; the party must actually know about the defect. It is not sufficient that it has become aware of facts that may suggest it should make enquiries…Thus, the factual analysis in considering a notice argument is limited to a consideration of what the party knew, not what it could have known had it made inquiries.

For this reason, the Court of Appeal is clear that whether a party received sufficient information to put them on inquiry and a consideration of what steps the party took to investigate the situation "is wholly irrelevant to the actual knowledge analysis" (see: *Stanbarr*, at para 28).

[41] While it is agruable whether the Respondents, through their lawyers, had constructive knowledge of the unregistered FO Charge, the undisputed evidence is that they did not have actual knowledge of the Applicant's unregistered interest. Because the concepts of actual and constructive knowledge are not to be blurred, and as a result, Nagra is a *bona fide* purchaser for value without actual notice, and for his part, Campos is a *bona fide* mortgagee for value without actual notice of the unregistered FO Charge, I find that I am unable to order rectification pursuant to ss.159 or 160 of the *LTA* to restore the first priority position of the Applicant.

[42] In these circumstances, the Applicant would have this Court find that an entry made in error by the Land Registry Office in the register is a further exception to the doctrine of indefeasibility of title. In my opinion, there is no juristic reason for any such exception given the assurance principle upon which the concept of indefeasibility of titles is founded. Pursuant to this principle, the state guarantees the accuracy of the register and compensates anyone who suffers loss as a result of its inaccuracy through the establishment and maintenance of the Land Titles Assurance Fund (the "Fund").

[43] In *Durrani*, Epstein, J. (as she then was) describes the working of the Fund in this way at para 79:

> …First, the person wrongfully deprived of an interest in land by reason of an entry on the register is entitled to recover what is just from the party responsible for the wrong. Where the individual wrongfully deprived of land is unable to recover just compensation paid out of the Fund. Such a claim must be made to the Director of Titles and the liability of the Fund for compensation and the amount of compensation shall be determined by the Director subject to a right of appeal.

[44] The Applicant submits that it is deprived from seeking compensation from the Fund because in this instance no discharge of charge instrument was registered on title, and for that reason, there is no "entry on the register" entitling it to a potential recovery. I disagree. The deletion of the FO Charge by the Land Registry Office is an entry on the register as described in *Durrani*. Should the

Applicant exhaust its efforts against Carmichael and find itself in a position where it has not been made whole, it is entitled to seek compensation from the Fund. To facilitate any such claim by the Applicant to the Fund, the Director of Titles states in the Decision that the adjudicating tribunal will accept his finding of fact that the FO Charge was inadvertently deleted by the Registry Office staff.

Disposition

[45] For the above reasons, the application by way of an appeal of the decision and order of the Director of Titles, dated May 3, 2023, is dismissed.

Costs

[46] I strongly encourage the parties to agree on this issue of costs. In the unfortunate event that they are unable to do so, however, the party seeking costs shall deliver cost submissions within 15 days of the release of this decision and the responding party shall deliver responding submissions within 10 days of receipt of the party seeking costs. Reply submissions, if any, are to be delivered within 5 days of receipt of the responding party's submissions. The initial and responding submissions are not to exceed 3 pages double spaced excluding offers to settle and authorities. Any reply submissions are not to exceed 2 pages. All submissions are to be sent to my attention via judicial assistant,

HamiltonSopinka.SCJJA@ontario.ca. I confirm that I have the parties' respective bills of costs.

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Justice M. Valente

Released: June 13, 2024

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