Court of King's Bench of Alberta

Citation: Toronto-Dominion Bank v Lukus Developments Inc, 2024 ABKB 490

Date: 20240812
Docket: 2303 00075; 2301 03667
Registry: Edmonton; Calgary

Between:

Docket: 2303 00075
Registry: Edmonton

The Toronto-Dominion Bank

Plaintiff

- and -

Lukus Developments Inc, Dominic Eugene Urban also known as Dominic Urban and Kelsi Bree Urban also known as Kelsi Urban

Defendants

- and –

Dominic Urban and Kelsi Urban

Applicants

- and -

Enright West Ltd,
Enright Monterra G.P. Ltd, as general partner for and on behalf of Enright Monterra Limited Partnership

Third Party Respondents

And Between:

Docket: 2301 03667
Registry: Calgary

Enright Monterra G.P. Ltd, as general partner for and on behalf of Enright Monterra Limited Partnership

Plaintiff

- and -

2101705 Alberta Inc and Lukus Developments Inc

Defendants

Reasons for Decision of the Honourable Justice EJ Sidnell

Introduction

[1] Dominic and Kelsi Urban are personal guarantors of a corporate debt owed by Dominic Urban's company, 2101705 Alberta Ltd (the Borrower). The Urbans seek to be released from the mortgage they granted in relation to their residence (the Guarantor Mortgage) as security for their obligations as guarantors.

[2] Lukus Developments Inc (Lukus), also owned by Dominic Urban, purchased four undeveloped bare land condominium units from Enright Monterra GP Ltd, as general partner for, and on behalf of, Enright Monterra Limited Partnership (Enright Monterra) in a project known as MonTerra, located in Rocky View County, Alberta.

[3] The Borrower and Lukus are related companies, and both are in the business of residential homebuilding. Lukus transferred its interest in units 86, 153, 154, and 166 to the Borrower. Each of those four units had an unpaid vendor's lien registered against it in favour of Enright Monterra.

[4] The Borrower obtained a loan (the Jovica Debt) from Jovica Property Management Ltd and 373624 Alberta Ltd (collectively, Jovica) to construct homes on the units.

[5] The Jovica Debt was eventually guaranteed by Lukus and Dominic and Kelsi Urban. Dominic and Kelsi Urban entered into guarantees with Jovica (each a Guarantee) and granted Jovica the Guarantor Mortgage.

[6] In addition, the Borrower entered into numerous security agreements relating to the Jovica Debt, including a mortgage in favour of Jovica on units 86, 154, and 166 (the Jovica Mortgage). The Jovica Mortgage was not registered against unit 153. Enright Monterra postponed its vendor's liens to the Jovica Mortgage and obtained a contractual right from Jovica to purchase the Jovica Debt and related security.

[7] After the Borrower defaulted on its obligations to Jovica, Enright Monterra exercised its right to purchase the Jovica Debt and Jovica assigned its security to Enright Monterra, including the Jovica Mortgage, the Guarantees, and the Guarantor Mortgage. Even though Enright Monterra exercised its rights to obtain the Jovica Debt and related security, I will continue to refer to the Jovica Debt and Jovica Mortgage.

[8] On March 31, 2023, a receiver was appointed for units 86, 153, 154, and 166 (the Receiver) under a Consent Receivership Order.

[9] The Receiver sold units 86 and 166 to the respondent Enright West Ltd (West) under two Asset Purchase and Sale Agreements (each an APA), which sales were approved by the Court under two Amended Sale and Vesting Orders (each a SAVO), granted November 14, 2023. West is related to Enright Monterra.

[10] Patrick McFetridge, the representative of Enright Monterra and West, said that the Jovica Mortgage continues to be registered against unit 154, which at the date of his affidavit, had not been sold.

[11] The Urbans seek to have the Guarantor Mortgage discharged from the title to their residence on the basis that:

(a) When West purchased units 86 and 166 with the Jovica Mortgage encumbrance on title, West assumed responsibility for the underlying Jovica Debt because:

  (i) West assumed all liabilities and waived all rights and remedies against the Urbans that were not expressly reserved in the APAs, and since there was no express reservation of a right of contribution against the Urbans, the APAs must be interpreted against the drafter and therefore there is no right of contribution against the Urbans.

  (ii) The APA "Purchase Price", the APA waiver provision in article 5.2(c) (the Waiver Provision), the Receiver's Certificate evidencing the closing of the sale of units 86 and 166, and the SAVOs, collectively operate to make the allocation of the Jovica Mortgage *res judicata*, which precludes Enright Monterra from revisiting the allocation the Jovica Mortgage between units 86, 154, and 166.

  (iii) The APAs contain an entire agreement clause and must be interpreted to allocate all responsibility for the Jovica Debt and Jovica Mortgage to West.

(b) Under the APAs, West indemnified the Urbans precluding any claim against them, and s 10(1)(a) of the *Law of Property Act*, RSA 2000, c L-7 (*LPA*) allows the Urbans to rely on the APAs even though they are not parties to them.

(c) Enright Monterra accepted West to replace the Urbans, and this resulted in a novation by which the Urbans are released from the Jovica Debt.

(d) The Jovica Debt has changed so drastically that it would be inequitable to enforce the Urbans' Guarantees.

[12] For the reasons that follow, I dismiss the Urbans' application. In arriving at this conclusion, I have considered the following issues:

Issue 1: Who are the "Vendors" under the APAs?

Issue 2: Did West assume all responsibility for the Jovica Debt under the APAs and waive all claims against the Urbans?

Issue 3: Did the APAs grant the Urbans, the Borrower and Lukus an indemnity relating to the Jovica Debt?

Issue 4: Were the Borrower, Lukus and the Urbans released from their obligations by novation?

Issue 5: Would it be inequitable for the Urbans to remain responsible for the Jovica Debt?

Issue 1: Who are the "Vendors" under the APAs?

[13] The meaning of the term "Vendors" under the APAs arises in several elements of the Urbans' submissions. However, I do not accept the Urbans' submission that "Vendors" refers to the Borrower and Lukus because such an interpretation is too broad and is not compatible with the Consent Receivership Order and the APAs.

[14] The Consent Receivership Order declared the Receiver to be the receiver of the Borrower's and Lukus' interests in: (1) units 86, 153, 154, and 166; (2) current and future assets, undertakings and properties pertaining to, relating to, or used in connection with, units 86, 153, 154, and 166; and (3) all books and records, rights, renewal rights, contracts, agreements, licences or permits in relation to units 86, 153, 154, and 166. When I refer to the Receiver being the receiver of the units, I am referring to all of the interests in the units as described in this paragraph.

[15] The Receiver was granted the authority to sell the units, subject to the approval of the Court.

[16] The Receiver was not appointed receiver and manager of the business of either the Borrower or Lukus.

[17] The APAs state that the definition of "Vendors" relates to each of the Borrower and Lukus:

> ... by and through its court appointed receiver and manager, B. Riley Farber Inc., in its capacity as court appointed receiver and manager of certain assets, properties and undertaking of [the Borrower and Lukus] ...

[18] The "Vendors" are the Borrower and Lukus by and through the Receiver in its capacity as receiver of the units.

[19] The Receiver is limited by the Consent Receivership Order to being the receiver of the units and has no authority, or mandate, to be the receiver or manager of the business of the Borrower and Lukus. The "Vendors" are not the Borrower and Lukus as the companies were not put into receivership.

[20] As discussed in Kevin P McElcheran, *Commercial Insolvency in Canada*, 4th ed (Toronto: LexisNexis Canada, 2019) at ¶4.170, traditionally, courts authorize:

(a) receivers to "take control of the assets" for the purpose of liquidation; and

(b) receivers and managers to operate or manage a business "to assist creditors in the enforcement of their claims".

[21] Even though some of the documentation uses both "receiver" and "manager" to describe the role of the Receiver, the Consent Receivership Order limited the Receiver's appointment to being the receiver of the units. The Consent Receivership Order authorized the Receiver to sell the units but did not authorize the Receiver to be the manager of any entity. The Receiver's mandate only extends to the units and does not extend to the business of the Borrower and Lukus. As a court-appointed receiver, the powers of the Receiver are limited by the terms of the Consent Receivership Order: see McElcheran at ¶4.96.

[22] The term "Vendors" under the APAs means the Receiver in its limited role of receiver of the Borrower's and Lukus' interests in the units. Therefore "Vendors" does not refer to a business, rather to the Receiver's interest in the units. As such, the "Vendors" have no business, no directors and officers, and no employees.

Issue 2: Did West assume all responsibility for the Jovica Debt under the APAs and waive all claims against the Urbans?

[23] I find that West did not assume all responsibility for the Jovica Debt under the APAs and did not waive all claims against the Urbans. To reach this conclusion, I have considered the following sub-issues:

2.1: Did West assume the Jovica Mortgage under the APAs?

2.2: Did West assume both the Jovica Mortgage encumbrance and the obligation to pay the Jovica Debt?

2.3: Does the implied covenant set out in s 58 of the *LTA* obligate West to pay the Jovica Mortgage and to indemnify the Borrower for any Jovica Debt liability?

2.4: Conclusion

2.1: Did West assume the Jovica Mortgage under the APAs?

[24] I agree with the Urbans that West assumed the Jovica Mortgage encumbrance by executing the APAs.

[25] West purchased units 86 and 166 and under s 2.1 of the APAs covenanted to pay the "Purchase Price":

> ... [T]he Purchaser agrees to purchase and accept the [unit] from the Vendors, at and for the Purchase Price, subject to and in accordance with the terms and conditions of this [APA] and the [SAVO].

[26] Under s 3.1 of the APAs, the Purchase Price is made up of three parts, including the Jovica Mortgage:

> The purchase price to be paid, by the Purchaser to the Vendors for the Property shall be the aggregate of, and shall be paid as follows:

(a) by the payment of $ • ... ;

(b) by the assumption of the Jovica Mortgage ... ; and

(c) by the assumption of the Debtors' Lien Indebtedness,

(collectively, the "Purchase Price").

[27] The amount of the payment was not disclosed to this Court.

[28] Units 86 and 166 purchased under the APAs included certain "Permitted Encumbrances". The Jovica Mortgage was a Permitted Encumbrance under both the APAs and the SAVOs. The Jovica Mortgage was registered against the title of units 86 and 166 and assumed by West when it purchased those units.

2.2: Did West assume both the Jovica Mortgage encumbrance and the obligation to pay the Jovica Debt?

[29] The Urbans submit that by assuming the Jovica Mortgage under the APAs that West took full responsibility for the Jovica Mortgage and the underlying Jovica Debt.

[30] West asserts that, under the APAs, it assumed the registration of the Jovica Mortgage encumbrance but did not assume the underlying responsibility to pay the Jovica Debt.

[31] Applying an objective interpretation to the APAs, I find that only the Jovica Mortgage encumbrance was transferred to West and no obligation for the Jovica Debt was transferred to West.

2.2.1: What is the objective interpretation of the APAs?

[32] The Urbans acknowledge that if their interpretation of the APAs is accepted, then transfer from the Borrower and Lukus to West of the responsibility for the Jovica Debt and the payment of the Jovica Mortgage would be inadvertent. The position of the Urbans does not align with an objective interpretation of the APAs.

[33] West submits that Mr. McFetridge's answers, when he was cross-examined on his affidavit, demonstrate that West did not intend for the APAs to transfer responsibility for the Jovica Debt to West. The parties to the APAs were the Receiver and West. Because contractual interpretation is an objective exercise, the factual matrix consists only of objective facts known to the parties at or before the time of contracting: Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis Canada, 2020) at ¶2.3.5. I find that Mr. McFetridge's evidence regarding West's intention to not transfer responsibility for the Jovica Debt has not been shown to be an objective fact.

[34] In ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 46, Rothstein J, ushered in a modern contract interpretation approach which "directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract".

[35] These surrounding circumstances can "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" without overwhelming the words of the agreement: ***Sattva*** at para 57.

[36] Interpreting the APAs as transferring only the Jovica Mortgage encumbrance without transferring responsibility for the underlying Jovica Debt is supported by the circumstances surrounding the APAs:

(a) three of the Borrower's four units were collateral for the Jovica Debt, and the Jovica Mortgage was registered against units 86, 154, and 166 to secure the Jovica Debt;

(b) the four units, 86, 153, 154, and 166, not the business of the Borrower, were put into receivership; and

(c) the Receiver sold units 86 and 166 to West under the APAs, which were approved by the SAVOs, and none of which mentioned the Jovica Debt.

[37] Because the Jovica Mortgage was registered against units 86, 154, and 166, and West purchased only units 86 and 166, West did not purchase all of the lands subject to the Jovica Mortgage. There is no agreement by West to assume the Jovica Debt, which would necessarily affect unit 154.

[38] In addition, the Receiver, as receiver of the units, did not have the authority to transfer the Jovica Debt, a corporate responsibility of the Borrower and Lukus.

[39] Under the APAs, West agreed to assume the Jovica Mortgage encumbrance but there was no agreement that West would take on the obligation for the Jovica Debt, and the APAs do not mention the Jovica Debt. Furthermore, the APAs do not transfer any obligation to West to make payments under the Jovica Mortgage. All the APAs do is transfer units 86 and 166 to West subject to the Jovica Mortgage encumbrance. As a result, although the Jovica Debt is secured by the Jovica Mortgage, the Jovica Debt was not assumed by West and West did not take on any responsibility to pay the Jovica Mortgage. Further, the APAs do not mention the Urbans, or their Guarantees, and West did not replace the Urbans as guarantors of the Jovica Debt.

[40] When interpreted objectively, the APA demonstrates that West only assumed the Jovica Mortgage registration. I will discuss two examples from the APA.

[41] First, when the definitions of "Debtor's Lien Indebtedness" and "Jovica Mortgage" are contrasted, the different breath of the obligations can be seen:

(a) the definition of "Debtors' Lien Indebtedness" includes the assumption of "all liabilities, obligations, and indebtedness of [the Borrower and Lukus] to Enright Monterra ... under or in connection with: [specified instruments]"; whereas,

(b) the definition of "Jovica Mortgage" refers to "the mortgage registered against the Certificate of Title".

[42] The Debtors' Lien Indebtedness includes all liabilities whereas the Jovica Mortgage only includes the registration of the Jovica Mortgage and makes no reference to the underlying liability, the Jovica Debt. West's assumption of the Debtor's Lien Indebtedness included acceptance of both the encumbrance of the liens on title and responsibility for the debts secured by those liens. The assumption of the Jovica Mortgage is not as encompassing and is only related to the registration against title.

[43] Second, the APAs define "Jovica Mortgage" as being the "mortgage registered" against title for each unit purchased, rather than the overarching mortgage registered against units 86,

154, and 166. Referring to the registration against title is consistent with West contracting to accept only the Jovica Mortgage encumbrance against units 86 and 166 because an obligation to pay the Jovica Mortgage would have involved unit 154 but there is no mention of unit 154 in the APAs.

[44] The Urbans' reliance on the entire agreement provision in article 15.6 of the APAs does not assist them as it is effective only between the "Purchaser", West, and the "Vendors". As noted at paragraph [22], the "Vendors" means the Receiver of the units.

[45] The APAs cannot be interpreted as having transferred responsibility for the Jovica Debt (and therefore payment of the Jovica Mortgage) to West because that would be contrary to the objective intention of the Receiver and West, as evidenced by the APAs, and the authority granted to the Receiver under the Consent Receivership Order.

2.2.2: Did Enright Monterra's failure to allocate the Jovica Mortgage as between the units affect the Urbans' obligations?

[46] The Urbans submit that because Enright Monterra did not allocate the responsibility for payment of the Jovica Mortgage between units 86, 154, and 166, before the sale of two of those units to West, once the sales closed, Enright Monterra had no right to allocate the responsibility for the Jovica Mortgage among the units. The Urbans further assert that if the Jovica Mortgage was only allocated to units 86 and 166, which West purchased, then West would be entirely responsible for the Jovica Mortgage and unit 154 would not be subject to the Jovica Mortgage.

[47] The Urbans' submission fails because I have found that West did not assume the obligation to pay the Jovica Mortgage or the Jovica Debt under the APAs, rather West purchased units 86 and 166 subject to the Jovica Mortgage encumbrance without taking responsibility for it. Because West never assumed responsibility for the Jovica Debt, allocation of the Jovica Mortgage among the units before the sale of units 86 and 166 is irrelevant.

[48] The responsibility to pay the Jovica Debt, secured by the Jovica Mortgage, was not transferred from the Borrower and Lukus to West. The Borrower and Lukus remain responsible for the Jovica Debt, and the Urbans remain guarantors of the Jovica Debt.

[49] The Urbans also submit that the provisions of the APAs and SAVOs bar Enright Monterra from allocating the Jovica Mortgage as between the units after the sale, on the basis of *res judicata*. *Res judicata* relates to both issue estoppel and cause of action estoppel: see concurring reasons of Wakeling JA, ***Anglin v Resler***, 2024 ABCA 113 at para 173.

[50] In relation to issue estoppel, the Urbans acknowledge that allocation of the Jovica Mortgage was not dealt with in the SAVOs. However, the Urbans assert that because submissions were made regarding the allocation of the Jovica Mortgage when the SAVO application was heard, that the omission of the allocation issue from the SAVOs implies that it was dealt with to the prejudice of Enright Monterra and West. I disagree. The omission of a decision on any Jovica Mortgage allocation in the SAVO is some evidence that the issue was not decided and is not *res judicata*. The Urbans have not met the burden of proof on issue estoppel.

[51] In relation to cause of action estoppel, there was no action dealing with the allocation of the Jovica Mortgage amongst the units. Therefore, this action is not *res judicata*.

2.2.3: Did West's assumption of the Jovica Mortgage under the APAs release and waive the Urbans from their Guarantee obligations?

[52] The Urbans submit that because the Receiver and West entered into the APA, they were released from their Guarantees and their obligations to pay the Jovica Debt were waived.

[53] The Urbans rely on s 10(1)(a) of the *LPA* to assert that they can benefit from the APAs without being a party to them. However, all that section provides is that a contract is valid and enforceable even if one of the parties enters into an agreement with that party and some other person. It must still be demonstrated that an agreement was entered into with that other party.

[54] I find that the Urbans have not been released and their obligations for the Jovica Debt have not been waived.

[55] First, the Urbans base their submission on the premise that West assumed liability for the payment of the Jovica Mortgage and the Jovica Debt, which I found it did not.

[56] Second, the Urbans assert that because there was no reservation of a right of contribution against the Urbans, the APAs must be interpreted against the drafter (i.e. not the Urbans) and in a manner that results in West having no right of contribution against the Urbans for the Jovica Mortgage. I disagree.

[57] It is true that the APAs, to which the Urbans are not a party, do not include any right of contribution from the Urbans in relation to the Jovica Mortgage. Further, the APAs do not address the responsibility for the underlying Jovica Debt.

[58] The absence of a right of contribution against the Urbans in the APAs is only relevant if it is found that West accepted responsibility for the Jovica Debt that would require payment of the Jovica Mortgage. Because West never accepted responsibility for the Jovica Debt or payment of the Jovica Mortgage, it would have no reason to seek a right of contribution from the Borrower, Lukus, or the Urbans.

[59] Further, the Urbans are guarantors of the Jovica Debt. The Jovica Debt is owed by the Borrower to Enright Monterra. Neither the Receiver nor West have the authority to release the Urbans from their Guarantees. This point also ties into the Urbans' submission on the Waiver Provision.

[60] Third, I find that the Urbans cannot rely on the Waiver Provision that states that West:

> "waives all rights and remedies ... against the Vendors or any Vendor Entity in respect of the Property or the Transaction or any representations or statements made ... or information or data furnished ..."

[61] The Urbans assert that they are included in the definition of "Vendor Entity" because:

(a) in the case of Dominic Urban, he is a director of the Borrower and Lukus; and

(b) in the case of Kelsi Urban, she is an employee of Lukus.

[62] However, as discussed above, the "Vendors" means the Receiver of the units. Although the definition of "Vendor Entity" in the APAs includes the "Vendors and their Representatives" and "Representatives" includes directors, officers and employees of the Vendors, the Vendors have no directors, officers, or employees.

[63] Neither the Borrower nor Lukus are "Vendors" under the APAs. In addition, neither of the Urbans are a "Vendor Entity" and they cannot personally benefit from the Waiver Provision.

[64] The Urbans' submission that they were the beneficiaries of the Waiver Provision rests on their interpretation that the "Vendors" of the units were the Borrower and Lukus, as represented by the Receiver. However, these companies are not in receivership; the receivership only extends to the units. Kelsi Urban's employment contract with Lukus falls outside the scope of the Receiver's appointment. The Receiver has no power to assign work tasks to Kelsi Urban and has no obligation to pay Kelsi Urban's wages. In the same vein, the Receiver does not work with Dominic Urban on the management of the Borrower and Lukus because the Receiver has not been appointed as manager of those entities. As a result, the Urbans are not beneficiaries of the Waiver Provision.

[65] Even if the Urbans were beneficiaries of the Waiver Provision, which I have found they were not, neither the Receiver nor West have the authority to waive the Urbans' Guarantees of the Jovica Debt owed to Enright Monterra.

[66] I find that the Urbans were not released from their obligations under their Guarantees, and the APAs did not operate as a waiver of their obligations as guarantors of the Jovica Debt.

2.3: Does the implied covenant set out in s 58 of the *LTA* obligate West to pay the Jovica Mortgage and to indemnify the Borrower for any Jovica Debt liability?

[67] On its face, s 58 of the *Land Titles Act*, RSA 2000, c L-4 (*LTA*) sets out an implied covenant that a purchaser shall (1) pay the mortgage; and (2) indemnify the seller for any liability under the mortgage.

[68] In ***Carnahan v Builders Capital 2019 Ltd***, 2023 ABCA 270 at para 12, the Court of Appeal noted that the implied covenant relates only to the personal action against the seller and does not affect the property rights against the lands. The implied covenant allows the mortgagee to enforce the mortgage against the seller, personally, and, at the same time, does not undermine the mortgagee's right to enforce its security in the land.

[69] Section 59(1) of the *LTA* allows the s 58 implied covenant to be negatived or modified by express declaration. Here, there was no express declaration in the APAs or SAVOs to negative the s 58 implied covenant.

[70] The drafter of the SAVOs appears to have not followed the recommendation of the Court of Appeal to expressly address any equitable exception to s 58 of the *LTA* when the SAVOs were obtained: ***Carnahan*** at para 27.

[71] However, the interpretation of s 58 of the *LTA* goes beyond its express wording. Because of its equitable origins, there are recognized exceptions to the implied covenant that s 58 embodies: that the purchaser will pay the mortgage and indemnify the seller for any liability relating to it. This was explained in ***Carnahan*** at para 14, with emphasis in the original, where the Court of Appeal referred to several of the equitable exceptions, the first of which is relied on by West:

> the transferor transfers less than his or her entire interest in the land or <u>transfers only some of the land charged by the mortgage</u> ...

[72] The Jovica Mortgage contains both a covenant by the Borrower to pay a debt and an agreement giving the mortgagee (first Jovica, later Enright Monterra) a security interest in units 86, 154, and 166. The Jovica mortgagee thus receives two rights:

(a) first, to take action against a person (an *in personam* right) on the covenant against the Borrower; and

(b) second, to take action in relation to the property (an *in rem* right) to seize or sell units 86, 154, and 166.

[73] In most cases, the covenant to pay the debt and the acceptance of the security interest in the property are bundled, and those rights are typically transferred together. Indeed, in Bryan A Gardner et al, eds, *Black's Law Dictionary*, 11th ed (St. Paul, MN: Thomson Reuters, 2019) "assumption of a mortgage or trust deed" is defined as:

> The acquisition of real property coupled with the assumption of personal liability for debt secured by that property.

[74] Here, units 86 and 166 were transferred under the APAs and approved by the SAVOs. Because the Jovica Mortgage was registered against units 86, 154, and 166, the sale of units 86 and 166 resulted in transfers of only some of the land charged by the Jovica Mortgage. The evidence is that unit 154 is still in the hands of the Receiver. Therefore, the exception arising when the transferor transfers only some of the land charged by the mortgage applies: ***Carnahan*** para 14. I find that the s 58 implied covenant does not apply.

2.4: Conclusion

[75] I find that West assumed the registration of the Jovica Mortgage as an encumbrance against units 86 and 166 under the APAs and SAVOs but did not assume the underlying responsibility for the Jovica Debt or payment of the Jovica Mortgage. The Borrower and Lukus were not released from their obligations to pay the Jovica Debt and the Jovica Mortgage. Further, the Urbans were not released from their Guarantee obligations, and their Guarantees were not waived.

Issue 3: Did the APAs grant the Urbans, the Borrower and Lukus an indemnity relating to the Jovica Debt?

[76] The Urbans submit that West agreed to indemnify them against any damages arising from the inaccuracy of West's representations or warranties in the APAs, from West breaching any of its covenants under the APAs, and from West's failure to pay when due, or otherwise discharge, its obligations under the APA. I disagree.

[77] Because I have found that the Urbans are not parties or beneficiaries of the APAs and West never accepted responsibility for the Jovica Debt or payment of the Jovica Mortgage, it is not strictly necessary to address this issue. In addition, this case falls squarely into one of the equitable exceptions to s 58 of the *LTA*, and therefore the sale of the units to West did not contain an implied covenant indemnifying the Borrower or the Urbans. However, I will address this issue in the event that I have erred in the findings set out above.

[78] The Urbans rely on the indemnity clause set out in article 10.2 of the APAs:

> The Purchaser hereby indemnifies the Vendors and their respective Representatives, and saves them fully harmless against, and will reimburse or

> compensate them for, any damages arising from, in connection with or related in any manner whatsoever to:
>
> > (a) the inaccuracy of its representations or warranties, or breach of its covenants in this [APA];
> >
> > …
> >
> > (c) the Purchaser's failure to pay when due and perform and discharge the Assumed Liabilities in accordance with their terms.

[79] The "Assumed Liabilities" referred to in clause 10.2(c) are defined in the APAs as:

> > (i) all Liabilities relating to the [unit] arising on or after the Closing Date; …

[80] First, even if the Urbans are beneficiaries of the APAs, there were no express representations or warranties given by West that the Urbans suggest are inaccurate. In relation to a breach of a covenant, I have found that West made no agreement to take on the Jovica Debt or pay the Jovica Mortgage. There are no express covenants in the APAs that the Urbans suggest have been breached, rather they rely on the submission that the APAs inadvertently transferred the Jovica Debt liability and Jovica Mortgage payment obligation to West. The Urbans have provided no authority for the proposition that an obligation arising by implication, if found to exist, could give rise to an indemnity for a breach of a covenant when there is no express covenant.

[81] Second, the APA indemnity arises in relation to a failure to perform and discharge liabilities "arising on or after the Closing Date". The Jovica Debt and Jovica Mortgage arose before the Closing Date. The definition of "Assumed Liabilities" does not clearly transform these previously existing liabilities into new liabilities arising on or after the Closing Date.

[82] Third, the APA indemnification is for reimbursement: ***Addison & Leyen Ltd v Fraser Milner Casgrain LLP***, 2014 ABCA 230 at para 22. To access a right to reimbursement, a party must first make a reimbursable payment. If the Urbans are correct that West accepted responsibility for the Jovica Debt and agreed to indemnify the Urbans against any damages arising from its non-payment of the Jovica Mortgage, the Urbans' right to indemnity could not be used to compel West to pay the Jovica Mortgage. Rather, the Urbans could only seek reimbursement by West for any payment the Urbans made towards the Jovica Mortgage, or any damages the Urbans suffered as a result of West not paying the Jovica Mortgage. The Urbans have no evidence of any payments made or damages incurred.

[83] Fourth, even if the Urbans had a right of indemnification, indemnification is not equivalent to a discharge of the Urbans' obligations under the Guarantees. The release conditions are set out in articles 2.2 and 2.3 of the Guarantees:

> > 2.2(b) Nothing but payment and satisfaction in full of the Obligations or an express release of this Guarantee by the Lenders shall release the Guarantor from the Guarantor's obligations under this Guarantee.
> >
> > . . .

> 2.3(b) The liability of the Guarantor shall continue and be binding ... both before and after default hereunder, until all the Obligations are fully paid and satisfied, and regardless of:
>
> > (i) whether any other Person or Persons shall become in any other way responsible to the Lenders for, or in respect of all or any part of the Obligations;
> >
> > (ii) whether any such Person shall cease to be so liable ...

[84] The Guarantees continue to bind the Urbans until the Jovica Debt and Jovica Mortgage are satisfied or until Enright Monterra grants them a release from the Guarantees. Clause 2.3(b)(i) provides that the Guarantees continue to be binding on the Urbans even if responsibility for the Jovica Debt or Jovica Mortgage became the responsibility of any other party.

[85] In conclusion, the Urbans were not beneficiaries of the APAs, and West did not grant them any indemnity. Even if the Urbans were covered by the APA indemnity clause, any indemnity would only be available after the Urbans had satisfied the Jovica Mortgage, which they have not done.

Issue 4: Were the Borrower, Lukus and the Urbans released from their obligations by novation?

[86] The Urbans submit that Enright Monterra accepted West in place of the Borrower as debtor, and Lukus and the Urbans as guarantors, by novation. The Urbans rely on the three-part test set out in ***National Trust Co v Mead***, 1990 CanLII 73 (SCC), [1990] 2 SCR 410 at 427.

[87] ***Mead*** addressed the application of novation in a mortgage context. The majority described novation as a trilateral agreement which extinguishes an existing contract and creates a new contract with different parties. The assent of the mortgagee is crucial because the mortgagee can no longer look to the original debtor for any default and may only rely on the replacement debtor. In the absence of the express agreement of the mortgagee (here, Enright Monterra), "the court should be loath to find novation unless the circumstances are really compelling": ***Mead*** at 427.

[88] While a court may look at the surrounding circumstances to determine whether novation has occurred, "the burden of establishing novation is not easily met": ***Mead*** at 427. Further, at 427, the majority reiterated the three-part test for determining whether novation has occurred:

1. The new debtor must assume the complete liability;
2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

[89] Enright Monterra submits that novation has not occurred because the APAs do not contemplate extinguishment of the Jovica Debt. Further, Enright Monterra asserts that there are no surrounding circumstances which demonstrate that Enright Monterra intended to release the

Borrower from the Jovica Debt, or the Urbans from their Guarantees, or Lukus from its guarantee. I agree that no novation has occurred in this case.

[90] The Urbans position fails at the first step of the ***Mead*** test. I have already found that West did not take on responsibility for the Jovica Debt when it assumed the Jovica Mortgage encumbrance. Further, no new debtor has assumed the "complete liability" for the Jovica Debt.

[91] Even if West had accepted responsibility for the Jovica Debt, the circumstances here do not meet the evidentiary burden of the ***Mead*** test. The cases surveyed in ***Mead***, at 428 to 430, illustrate how compelling the circumstances must be for a court to find a novation over the objections of the creditor. The circumstances of this case are not analogous. Indeed, there is no evidence that Enright Monterra, as creditor, or West, as purported debtor, had any objective or subjective intention of novating the Borrower out of its obligation for the Jovica Debt, the Urbans out of their obligations under the Guarantees, or Lukus out if its guarantee obligation. The Urbans' suggest that the novation is an unintended consequence of the documentation and the relationship between Enright Monterra and West. I do not accept the Urbans' interpretation of the documents or their assessment of the circumstances of this case. I find that the Urbans have not met their evidentiary burden to show that there has been a novation.

Issue 5: Would it be inequitable for the Urbans to remain responsible for the Jovica Debt?

[92] The Urbans submit that the nature of the debt secured by the Guarantees has changed so drastically as a result of the APAs and SAVOs that equity demands they be released from the Guarantees. The Urbans rely on the equitable principle that a material change to a debt, without the consent of the guarantor, will release the guarantor: ***Manulife Bank of Canada v Conlin***, 1996 CanLII 182 (SCC), [1996] 3 SCR 415. This equitable principle is based on the premise that a material change to the underlying debt will result in a change in the guarantor's risk: ***Manulife*** 422.

[93] The Urbans claim that West's acceptance of responsibility for the Jovica Debt means that the Guarantees now secure a debt obligation between the related businesses of Enright Monterra and West and that the Jovica Debt has materially changed. The Urbans submit that there is now a "theoretical risk" that West will default on the Jovica Debt to facilitate enforcement of the Guarantees. The Urbans also assert that they never consented to any alteration of the Jovica Debt.

[94] Enright Monterra responds that there is no inequity in holding the Urbans to their Guarantees because the Urbans, not West, received the benefit of the funds advanced to create the Jovica Debt. Enright Monterra also relies on the Receiver's conclusions that the Borrower and Lukus failed to use third party purchaser deposits for the construction of homes on the units to demonstrate that equity cannot aid the Urbans.

[95] I find that there is no equitable reason to release the Urbans from their Guarantees.

[96] First, West did not take responsibility for the Jovica Debt, and the APAs did not change the nature of the obligations secured by the Guarantees. The Urbans submit that West's purported responsibility for the Jovica Debt changes the Jovica Debt from an arms-length commercial loan to a loan between related companies. The Urbans did not cite any authority for the proposition that such a change is a material change as contemplated by the ***Manulife*** test. Further, even if West accepted full or partial responsibility for the Jovica Debt, the Urbans have

not shown that such acceptance resulted in a material change that increased the risk to the Urbans.

[97] Second, the Urbans' "theoretical risk" is based on the assumption that Enright Monterra has a "strong incentive" to have West default on the Jovica Debt and Jovica Mortgage because it would be better to collect under the Guarantor Mortgage than require West to pay. This submission recognizes that there was no subjective intention on Enright Monterra's part to have the Receiver transfer the obligation for the Jovica Debt and payments under the Jovica Mortgage to West. I have also found that there was no objective intention for such a transfer. However, even if West did take on the Borrower's obligations, the risk for the guarantors would not change. The Borrower has already defaulted. If West took on the obligations and then defaulted on the Jovica Debt and Jovica Mortgage, West's default would not change the overall circumstances for the Urbans.

[98] Third, the Urbans contend that they opposed the approval of the APAs at the applications for the SAVOs and therefore did not consent to any changes to the Jovica Debt. However, the Urbans overlook that they have consented to changes to the Jovica Debt in the Guarantees. As noted above at paragraph [83], the Urbans agreed that their liability as guarantors would continue regardless of another person becoming responsible or such person ceasing to be liable for the Jovica Debt. Further, article 5.1 of the Guarantees expressly permits the obligations of the guarantors to be altered. Because alterations are authorized by the terms of the Guarantees, the Urbans cannot now contest any alterations: ***Manulife*** at 424.

Conclusion

[99] The Urbans' application is dismissed.

[100] This matter was set on the Commercial List by an order granted by an applications judge. When counsel were asked about how this matter was scheduled, they indicated that because a decision of an applications judge would likely be appealed, it was more efficient for them to go directly to a hearing before a justice. That type of strategy is contrary to King's Bench General Practice Note 2, effective January 1, 2023. Furthermore, this matter is not one that should have been on the Commercial List at all, and its placement there is contrary to both the current and the previous Commercial Practice Note 1. Counsel are expected to comply with all Practice Notes. These contraventions may be addressed in cost submissions.

[101] If the parties are unable to agree to costs, then any one of the parties may write to me, no later than 30 days after the issuance of this decision, with a proposal for addressing costs which has been canvassed with all parties.

Heard on the 7th day of March, 2024 and the 19th day of April, 2024.
Dated at the City of Calgary, Alberta this 12th day of August, 2024.

E.J. Sidnell
J.C.K.B.A.

Appearances:

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Nathan Stewart
for the Third Party Respondents

Kaitlin Ward
for the Receiver