

Court of King's Bench of Alberta

**Citation: 2361841 Alberta Ltd v Cunningham High Performance Execution Team Corp,
2023 ABKB 711**

Date: 20231213
Docket: 2201 03276
Registry: Calgary

Between:

2361841 Alberta Ltd.

Applicant

- and -

**Cunningham High Performance Execution Team Corp., Cunningham AAA Land
Investment Limited Partnership, Jordan Giustini, Wanda McArthur, Brava Holding and
Investment Corp., Brava Development Corp., Bijal Patel Professional Corporation, Patrick
Lee**

Respondents

**Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby**

Introduction

[1] 2361841 Alberta Ltd. (“2361841”) applies to the Court for a direction varying an Order of Justice Wilson (the “Wilson Order”) concerning the priority of instruments registered against certain lands (the “Cunningham Lands”) and a direction that money held in Court be paid out to 2361841 in respect of a mortgage on the Cunningham Lands held by 2361841 (the “2361841

Mortgage”). Bijal Patel Professional Corporation (“BPPC”) and Patrick Lee (“Lee”) oppose the application on the grounds that certificates of *lis pendens* (the “CLPs”) that they registered against the Cunningham Lands have priority over the 2361841 Mortgage.

[2] 2361841’s application raises the question of whether a party that advances funds in respect of certain lands when certificates of *lis pendens* exist on title to the lands gains priority if the certificates of *lis pendens* are improperly discharged prior to the registration of a mortgage securing the advanced funds even if a subsequent court order restores the certificates of *lis pendens*.

Background

The Real Estate Project, Financing, and CLPs

[3] On December 21, 2018, a mortgage in the amount of \$1,300,000 (the “Paragon Mortgage”) was registered against the Cunningham Lands by Paragon Capital Corp. Inc. (“Paragon”).

[4] The Court of Appeal set out some of the relevant background facts in *Patel v Cunningham High Performance Execution Team Corp*, 2022 ABCA 323 at paras 2-14:

[2] The legal issue on appeal, addressing the discharge of certificates of *lis pendens* by a court, is narrow, but some background to the broader litigation can provide useful context. That background is set out briefly below.

[3] August 2018 - The appellants/plaintiffs, Bijal Patel Professional Corporation (Patel) and Patrick Lee (Lee), each invest \$250,000 to become limited partners in Cunningham AAA Land Investment Limited Partnership (Cunningham LP), a limited partnership formed in August 2012 to purchase and develop two pieces of land into a residential condominium project (Project Lands).

[4] March 3, 2020 – A mortgage granted by Cunningham LP to Brava Development Corp in the amount of \$831,331 is registered against title to the Project Lands as the second mortgage (Brava Mortgage).

[5] September 18, 2020 - Patel commences an action (2001-11044 – Patel Action) against Cunningham LP, its general partner, and Jordan Giustini, a director of the general partner (the respondents) alleging various causes of action including breach of contractual, statutory, equitable, common law, good faith and fiduciary duties and gross negligence. A certificate of *lis pendens* is issued in the Patel Action certifying that a claim has been made to “to enforce, *inter alia*, an interest in [the Project Lands] Pursuant to a Statement of Claim issued on September 18, 2020” (Patel CLP).

[6] October 5, 2020 – the Patel CLP is registered against the title to the Project Lands.

[7] October 28, 2020 - Lee commences an action (2001-13188 – Lee Action) against the respondents alleging various causes of action including breach of contractual, statutory, equitable, common law and fiduciary duties, gross negligence, negligent misrepresentation, and unjust enrichment.

[8] November 20, 2020 – An Amended Statement of Claim is filed in the Patel Action adding Brava Holding and Investment Corp and Brava Development Corp (Brava Defendants) as defendants. Giustini is a director of both of the Brava Defendants. It is alleged that Giustini executed a mortgage for \$831,331 on behalf of Cunningham Corp in favour of an alleged loan advanced by Brava Development Corporation, which mortgage was transferred to Brava Holding, and that the Brava Mortgage and transfer are not *bona fide* and are fraudulent, void, voidable or invalid.

[9] December 16, 2020 – The respondents apply in the Patel Action to discharge the CLP on an emergency basis on the grounds that it is preventing a potential sale of the Project Lands and that Patel does not have “a claim giving rise to a CLP – a legal interest in the Project Lands” as it was registered in breach of the limited partnership agreement. The Brava Defendants are not listed as applicants in this application.

[10] January 5, 2021 – A certificate of *lis pendens* is issued in the Lee Action certifying that a claim was made “to enforce, *inter alia*, an interest in [the Project Lands] Pursuant to an Amended Statement of Claim issued on January 5, 2021” (Lee CLP). The Lee CLP was registered against title to the Project Lands, although the date of registration is not clear from the materials.

[11] January 15, 2021 – An Order is granted in the Patel Action (Patel Order) authorizing the respondents to proceed to sell the Project Lands and providing that upon confirmation that the sale is proceeding Patel would provide a discharge of the Patel CLP and the net proceeds of sale after payout of the first mortgage would be held in trust pending written agreement of the parties or further court order.

[12] February 17, 2021 – A Consent Order is granted in the Lee Action authorizing the respondents to proceed to sell the Project Lands and providing that upon confirmation that the sale is proceeding Lee would provide a discharge of the Lee CLP and the net proceeds of sale after payout of the first mortgage would be held in trust pending written agreement of the parties or further court order. It also provided that the terms pertaining to certificates of *lis pendens* in the Patel Order apply to the Lee CLP.

[13] The contemplated sale did not proceed, and it appears the appellants were not called upon to provide discharges pursuant to the January 15, 2021 and February 17, 2021 Orders.

[14] March 4, 2021 – A Consent Order is granted in the Patel and Lee Actions directing that the actions be tried concurrently with evidence in each action being “evidence in the other action to the extent determined and directly by the trial or chambers judge” and that the parties are “entitled to refer to and adopt any of the documents produced in either Action”.

Nixon Order Discharging CLPs

[5] Cunningham High Performance Execution Team Corp. and Cunningham AAA Land Investment Limited Partnership (together, “Cunningham”) applied for an order discharging the CLPs.

[6] On March 10, 2021, Justice D.B. Nixon granted an order (the “Nixon Order”) discharging the CLPs against the Cunningham Lands. The Nixon Order did not waive the requirements of *Land Titles Act*, RSA 2000, c L-4, (“*LTA*”) s 191(1) which prevent the Registrar from discharging a CLP if there is a pending appeal.

[7] BPPC and Lee filed an appeal of the Nixon Order on March 21, 2021 and served the notice of appeal on March 31, 2021.

[8] On April 8, 2021, counsel for Cunningham submitted the Nixon Order to the Land Titles Office in support of a request to discharge the CLPs. The evidence of a lack of an appeal required by *LTA* s 191(1) did not accompany the submission to the Land Titles Office.

[9] On April 16, 2021, counsel for BPPC and Lee emailed counsel for Cunningham, citing *LTA* 191(1), to request the withdrawal of the request to the Land Titles Office to discharge the CLPs given the pending appeal. Counsel for Cunningham did not withdraw the request to discharge the CLPs.

[10] On July 9, 2021, a second application to discharge the CLPs with the Nixon Order was submitted to the Land Titles Office.

2361841 Mortgage

[11] On July 15, 2021, 2361841 advanced \$275,000 to Cunningham. This amount was to be secured by a \$550,000 mortgage on the Cunningham Lands. At this time, the CLPs remained on title to the Cunningham Lands.

[12] Mr. Ghani, the corporate representative of 2361841 deposed that in advancing the mortgage proceeds, 2361841 relied on the representation of counsel for Cunningham to the effect that “the 2361841 mortgage would be registered as second priority on the Certificate of title to the Lands, immediately subsequent to the first mortgage and caveat registered in favor of Paragon Financial Corp. Inc.”

[13] Prior to the registration of the 2361841 Mortgage, a mortgage in favor of Brava Holding and Investment Corp. was registered against the Cunningham Lands. 2361841, Brava, and Cunningham entered into a Priority and Pari Passu Agreement on July 15, 2021 that provided in effect that 2361841 would be entitled to recover proceeds of the 2361841 Mortgage in priority to the Brava mortgage.

[14] Mr. Ghani deposed that 2361841 “relied on representations by [counsel for Cunningham] that there would be no other encumbrances registered on the Title that would have priority over the 2361841 mortgage.” He further deposed that 2361841 relied on the representations of counsel for Cunningham that the “Certificates of Lis Pendens ... would be sent to the Land Titles Office to be discharged pursuant to the terms of the [Nixon Order] prior to the registration of the 2361841 mortgage.”

[15] CLPs were discharged from title on September 14, 2021. At the time of the discharge, the 2361841 Mortgage had been submitted to the Land Titles Office.

[16] The 2361841 Mortgage was registered on title on November 25, 2021. At the time that the 2361841 Mortgage was registered, there were no CLPs on the title to the Cunningham Lands and the 2361841 Mortgage ranked third in priority after the Paragon Mortgage and the Brava Mortgage.

[17] On November 30, 2021, 2361841 and Brava entered into a Postponement Agreement that provided that the 2361841 would rank second in priority ahead of the Brava Mortgage and behind only the Paragon Mortgage. 2361841 submitted the Postponement Agreement for registration at the Land Titles Office on January 24, 2022.

Wilson Order Restoring CLPs

[18] BPPC and Lee applied for an order restoring the CLPs. On March 1, 2022, Justice Wilson granted an order restoring the CLPs to their “previous position of priority” on the Title immediately subsequent to the Brava Mortgage on the grounds that the CLPs were erroneously discharged contrary to *LTA* s 191(1).

[19] 2361841 was not served with notice of the application to restore the CLPs nor did 2361841 appear before the Court on the application. 2361841 was served with a copy of the Wilson Order.

[20] The Wilson Order provided that any encumbrancer on the Cunningham Lands at the time of the granting of the Wilson Order may apply to the Court with respect to the issue of priority of registration, to vary the Wilson Order, or seek directions from the Court.

[21] On May 3, 2022, the Postponement Agreement was registered on the title to the Cunningham Lands. At the time that the Postponement Agreement was registered, the restored CLPs were still in the pending registration queue and not registered on title to the Cunningham Lands.

[22] On May 26, 2022, the CLPs were restored to the title to the Cunningham Lands, but they were listed after the 2361841 Mortgage and the Postponement Agreement.

Foreclosure Proceedings

[23] Cunningham failed to make payments on the Paragon Mortgage. Paragon commenced foreclosure proceedings and obtained an Order Confirming Sale and Vesting Title in the present action on May 26, 2022 (the “Vesting Order”).

[24] The amount owing on the Paragon Mortgage, realty fees, property tax arrears, and solicitor’s fees were deducted from the sale proceeds. The remaining sale proceeds of \$367,439.53 were paid into Court.

[25] Pursuant to the Vesting Order, “any interest in the mortgaged lands of the defendant, anyone claiming through the defendant, or any other subordinate encumbrancer is hereby extinguished.” The money paid into Court now stands in place of the Cunningham Lands.

[26] 2361841 seeks an order directing that the funds held by the Court be paid out to 2361841 because at the time that the interests in the Cunningham Lands were extinguished by the Vesting Order, 2361841 Mortgage was the highest-ranking interest on title after the Paragon Mortgage. 2361841 claims that as of October 1, 2023, 2361841 is owed \$403,042.49 in respect of the 2361841 Mortgage.

Court of Appeal Decision

[27] On October 5, 2022, the Court of Appeal reversed the Nixon Order, holding “there are no extraordinary circumstances in this case that would justify the court discharging the CLPs while the claims to an interest in land and questioning the validity of the mortgage are the subject of ongoing litigation”: *Patel v Cunningham*, at para 36.

Analysis

[28] 2361841 submits that pursuant to *LTA* s 14(3) that it has priority of registration over the restored CLPs on the basis that the 2361841 Mortgage and the Postponement Agreement have earlier registration numbers than the restored CLPs.

[29] 2361841 further submits that it advanced funds to Cunningham pursuant to the 2361841 Mortgage “on the genuine belief that 2361841 would be the second priority financial charge after the Paragon mortgage.... 2361841 is a *bona fide* mortgagee for value....” 2361841 relies on *LTA* s 170(1).

[30] Application Judge Summers in *ATB Financial v Kilpatrick*, 2023 ABKB 657 at para 1 asked the question “where the Registrar of Land Titles mistakenly discharges an instrument and later reregisters that instrument, do instruments duly registered in the interim period enjoy priority over that mistakenly discharged instrument?”

[31] BPPC and Lee submit that *LTA* 188(2) provides that: “Every cancellation, correction or completion in the register and every instrument or entry cancelled, corrected, completed or added to has the like validity and effect as if the error had not been made or as if the entry or addition had not been omitted.”

[32] 2361841 says that *LTA* 188(2) must be read in light of *LTA* s 187(4) which provides that errors may only be corrected “so far as practicable without prejudicing rights conferred for value....” Sullivan J held in *Manor Investments v Ross*, 2000 ABQB 317 at para 12:

For the purposes of determining Manor’s place in the hierarchy of interests, it is the latter number, 991 303 041, that is operative in the circumstances. Although section 178(2) of the Act provides that a correction has the like validity and effect as if the error had not been made, this section does not permit the correction to defeat a properly registered interest that arose in the interim. To hold otherwise would be contrary to the purpose of the Torrens system and contrary to the principle approved by the Supreme Court of Canada in *Boulter-Waugh & Co. Ltd.*, *supra*, that in the absence of fraud, registration gives an indefeasible title to the interest.

[33] Summers AJ reached a similar conclusion in *Kilpatrick* where an ATB mortgage had been mistakenly discharged and a subsequent mortgage in favour of Olympia Trust was registered in the interim prior to the Registrar correcting the error. Summers AJ held at para 10: “I conclude that the Registrar’s correction did not have the effect of granting priority to the ATB Mortgage.”

[34] 2361841 submitted that it cannot be held responsible for the improper discharge of the CLPs. The improper discharge of the CLPs is the result of: (1) counsel for Cunningham proceeding with the discharge application in the face of an appeal and counsel for BPPC and Lee

objecting on the grounds of *LTA* s 191(1); and (2) the Registrar discharging the CLPs in reliance on the Nixon Order without a certificate of no appeal or other evidence of the disposition of the appeal.

[35] Counsel for 2361841 acknowledged in oral submissions that BPPC and Lee may have claims against the Registrar for discharging the CLPs or against counsel for Cunningham for submitting the discharges contrary to *LTA* s 191(1). Such claims, if successful, would be paid by the General Revenue Fund pursuant to the *LTA* or by the Law Society's Assurance Fund.

[36] The facts of the present case distinguish it from *Kilpatrick* and *Manor Investments*. In the present case, when the funds were advanced on July 15, 2021, the CLPs were on the title to the Cunningham Lands. The evidence of Mr. Ghani is not that 2361841 relied on the state of the title to the Cunningham Lands when funds were advanced; rather, his evidence is that 2361841 relied on the representation of counsel for Cunningham that the CLPs would be discharged. Given that the CLPs remained on title to the Cunningham Lands at the time that the money was advanced, 2361841 could not have relied on the title documents for the non-existence of the CLPs when advancing the funds.

[37] British Columbia has a similar land titles regime to Alberta. Justice Nathan Smith observed in *Scotia Mortgage Corp. v Ludwig*, 2010 BCSC 232 at para 24:

The statutory registration scheme is designed to protect those who rely on the registered state of the title.... The decided cases usually define reliance in terms of advancing funds, as when a mortgagee advances funds in reliance on the absence of prior registered charges... [emphasis added].

[38] To the extent that a representation was made to 2361841 by counsel for Cunningham that the CLPs would be discharged from title to the Cunningham Lands, that may be the basis for a claim by 2361841 against counsel for Cunningham. The representation does not change the fact that the CLPs were on the title to the Cunningham Lands on July 15, 2021.

[39] The CLPs provided notice to 2361841 at the time that money was advanced that BPPC and Lee had commenced actions claiming interests in the Cunningham Lands. Those actions further claim, among other things, that the Brava Mortgage was fraudulent because Cunningham and Brava were controlled by the same individual and no funds were advanced. On July 15, 2021, 2361841 nevertheless advanced funds to Cunningham and entered the Priority and Pari Passu Agreement with Brava.

[40] 2361841 now asserts the Postponement Agreement with Brava entered during the window of time that the CLPs were absent from the title to the Cunningham Lands to attempt to gain priority over the restored CLPs. There is no evidence as to what the consideration was for the Postponement Agreement and the Postponement Agreement itself was omitted from Mr. Ghani's Affidavit. There is no evidence that 2361841 relied on the absence of the CLPs on the title to the Cunningham Lands in entering the Postponement Agreement or advancing funds.

[41] The question of whether the 2361841 Mortgage has priority over the CLPs turns on the question of the validity of the Brava Mortgage. If the Brava Mortgage is fraudulent, as BPPC and Lee assert, 2361841's Postponement Agreement with Brava cannot function to give the 2361841 Mortgage priority over the CLPs because 2361841 had notice at the time that it advanced funds of the claim that the Brava Mortgage was fraudulent. If the Brava Mortgage is legitimate, then the 2361841 Mortgage will have priority over the CLPs. The issue of the

validity of the Brava Mortgage will be tried in the actions brought by BPPC and Lee against Cunningham and Brava. The money paid in Court shall remain in Court until that issue is decided or until further order of this Court.

Conclusion

[42] The application to vary the Wilson Order and to pay money out of Court to 2361841 is dismissed. BPPC and Lee are entitled to Schedule C costs for the application calculated using the appropriate column.

Heard on the 7th day of December, 2023.

Dated at the City of Calgary, Alberta this 13th day of December, 2023.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Ryley Dalshaug, Ogilvie LLP
for 2361841 Alberta Ltd.

Felipe A. Paredes-Canevari, Reliance Legal Group LLP
for the Bijal Patel Professional Corporation and Patrick Lee