

CITATION: Arkland Homes Inc. v. Liu, 2024 ONSC 6423
COURT FILE NO.: CV-24-00715280-0000
DATE: 2024-11-21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
)
 ARKLAND HOMES INC., 11291319) Jed Blackburn and Sarah Kemp for Plaintiffs
 CANADA INC., 11291289 CANADA)
 INC., 11291246 CANADA INC., 11291262)
 CANADA INC. and ZHEN KANG, a.k.a.)
 Ryan Kang)
 Plaintiffs)
)
 – and –) Ran He for Defendants Ming Wei Liu,
) Junhua Wang, Yizi Feng
)
 MING WEI LIU, CHEN DA HAI)
 JUNHUA WANG, YIZI FENG, LIU XIAO,)
 JIANJUN SHI, QIONG HUANG,) Michael Myers and Parjot Benipal for
 YISHENG MA, ABC CORPORATION,) Defendants Qiong Huang, Jianjun Shi, Chen
 RAN YANG, FENGQIN ZHANG, HONG) Da Hai, Yisheng Ma
 JING and LIHAN JING)
 Defendants)
)
) No counsel on record for remaining
) Defendants
)
)
)
)
)
) **HEARD:** July 10 and September 13, 2024

2024 ONSC 6423 (CanLII)

PARGHI J.

REASONS FOR DECISION

[1] The Plaintiff Zhen Kang (also known as Ryan Kang) is the owner and sole shareholder of the Plaintiff Arkland Homes, a property development company. Arkland Homes owns the four numbered company Plaintiffs. In connection with Arkland Homes’ first home construction projects, Mr. Kang and his companies have taken several loans, including

mortgage loans, from the Defendants Ming Wei Liu (also known as Edward Liu), Yizi Feng, and Da Hai Chen.¹

- [2] The Defendants Mr. Liu and Mr. Feng state that Mr. Kang and his companies have defaulted on the mortgages for two properties at 177 and 171 Rumsey Road in East York (the “Rumsey Properties”) and one property at 93 Bannatyne Drive in North York (the “Bannatyne Property”). In the wake of these alleged defaults, Mr. Liu sold the Rumsey Properties in January 2024 and now seeks to sell the Bannatyne Property. Mr. Liu and Mr. Feng say the Plaintiffs embarked on an ill-conceived venture to build homes, and that venture has now crashed. They say the Plaintiffs have borrowed over \$10 million from them and from other Defendants, have not finished any of the construction projects that were funded with that money, and have impeded Mr. Liu’s and Mr. Feng’s legitimate efforts to enforce the mortgages on which they have defaulted.
- [3] The Plaintiffs state that they have not defaulted on the mortgages and that Mr. Liu and Mr. Feng seek to alienate them from title to properties that they rightfully own and have built through their development business.
- [4] The Plaintiffs have now commenced this action, seeking a declaration that the mortgages on the Bannatyne Property and Rumsey Properties are in good standing, a declaration that the purchasers of the Rumsey Properties are not *bona fide* purchasers for value, and an order that the sales of the Rumsey Properties be set aside.
- [5] The parties are also embroiled in other litigation. Mr. Liu has commenced an action for enforcement of the mortgage on the Bannatyne Property and possession and sale of the Bannatyne Property (CV-24-00717746-0000). He has commenced an action for enforcement of the mortgage on the Rumsey Properties and possession of the Rumsey Properties (CV-23-00708596-0000). Additionally, he has commenced an action in respect of various secured and unsecured loans, including a second mortgage on the Rumsey Properties (CV-24-00715323-0000).
- [6] There are three motions before me in this action.
- [7] First, the Plaintiffs seek an injunction against Mr. Liu and Mr. Feng restraining their sale of the Bannatyne Property under power of sale. The Plaintiffs assert that the mortgage on the Bannatyne Property is not in default. They further state that Mr. Liu and Mr. Feng are predatory lenders and have acted in bad faith, including through Mr. Liu’s “surreptitious” sale of the Rumsey Properties.
- [8] Second, the Defendant Qiong Huang brings a motion for possession of 177 Rumsey Road. Ms. Huang states that Mr. Liu sold 177 Rumsey to her pursuant to a valid power of sale

¹ During the hearing, counsel chose to use the English language names of some of the parties. Where they did so, I have done so as well. Additionally, some of the parties’ names in the title of proceedings appear with the last name first. When I refer to the parties in this Endorsement, I do so using their first name, followed by their last name.

after the Plaintiffs' default on the Rumsey Mortgage, and that she is a *bona fide* purchaser for value. A Certificate of Pending Litigation has been registered on title for 177 Rumsey.

- [9] Third, the Plaintiffs bring a cross-motion for a Certificate of Pending Litigation on 171 Rumsey Road. The Defendant Jianjun Shi purchased that property pursuant to a power of sale conducted by Mr. Liu. The Plaintiffs state that this purported sale was improper, and that Mr. Shi conspired with Mr. Liu to improperly obtain title to 171 Rumsey.
- [10] For the reasons below, I grant the injunction restraining the sale of the Bannatyne Property. I do not grant the motion for possession of 177 Rumsey. I grant the cross-motion for a Certificate of Pending Litigation on 171 Rumsey. I further order that this action be consolidated with the actions listed above and any other litigation relating to the various loan arrangements between the parties, and that the consolidated actions be case managed.

Background

The Bannatyne Mortgage

- [11] Mr. Kang purchased the Bannatyne Property in October 2020. Arkland Homes was incorporated the following year and developed and built the Bannatyne Property. The original mortgage for the Bannatyne Property was entered into in December 2021, between Mr. Kang as borrower and Mr. Liu as lender. It was brokered by the Defendant Xiao Liu (also known as Alex Liu, and to whom I will refer as "Alex"). Mr. Kang and Alex had worked together in the past before he engaged Alex as a project management advisor on Arkland Homes' development projects.
- [12] The "Loan Commitment Agreement" for the mortgage on the Bannatyne Property provided that the mortgage was for the principal amount of up to \$1.4 million, to be provided in several advances. An initial advancement of \$600,000.00 would be made in December 2021, provided that backfill in the construction project was completed. Six months of interest was to be deducted from that initial advance. A second advancement in the same amount could be made upon completion of drywall finishing, and a third advancement could be made upon obtaining the Occupancy Certificate. The mortgage had a maturity date in September 2022. The Schedule to Charge/Mortgage provided that the borrower would provide twelve post-dated monthly cheques covering monthly installments under the agreement.
- [13] In December 2021 and July 2022, pursuant to the Loan Commitment Agreement, principal advances of \$600,000.00 each were made to Mr. Kang. On each occasion, interest for six months was prepaid and deducted from the advance. In July 2022, Mr. Feng became a co-lender of the mortgage loan.
- [14] The Plaintiffs say that because this was a construction loan, there was an "overarching agreement" that the principal would not have to be repaid until construction of the Bannatyne Property was completed and the property sold. The mortgage would renew routinely until that time. Mr. Liu and Mr. Feng dispute that claim.

The 2023 Payment

- [15] In April and May 2023, Mr. Kang transferred RMB 11,900,000 (approximately \$2,297,087.73) to Mr. Liu and Mr. Feng's Chinese bank account (the "2023 Payment"). There is no evidence before me as to why the 2023 Payment was made or against which loans it was to be applied. The 2023 Payment plays an important role in these motions, as discussed below.

The Rumsey Mortgage

- [16] In June 2023, two of Mr. Kang's companies, the Plaintiffs 11291319 Canada Inc. ("11291319") and 11291246 Canada Inc. ("11291246"), obtained a mortgage loan from Mr. Liu in respect of the Rumsey Properties for \$4.38 million ("the Rumsey Mortgage").
- [17] The "Loan Commitment Agreement" for the Rumsey Mortgage provided that the mortgage had a four-month term. Interest was to be paid monthly. Any request to renew or extend the Rumsey Mortgage was to be made in writing at least 60 days before the maturity date. If the lender did not grant a renewal, the mortgage was to be repaid in full upon maturity. If the mortgage was not repaid in full at maturity, the lender could either choose a "deemed auto renewal," which would impose certain fees on the borrower, or grant no renewal and demand the full amount of the mortgage. The lender's option would not prejudice their rights "for any default act" under the *Mortgages Act*, R.S.O. 1990, c. M.40.

The Bannatyne Mortgage

- [18] In July 2023, the mortgage on the Bannatyne Property was renewed for a six-month term by way of a written "Mortgage Renewal Agreement" between Mr. Kang as borrower and Mr. Liu and Mr. Feng as lenders. I will refer to the renewed iteration of the mortgage as the "Bannatyne Mortgage".
- [19] The Mortgage Renewal Agreement indicated that Mr. Kang was in default of the original mortgage on the Bannatyne Property because he had failed to make his interest payments. It provided that Mr. Liu and Mr. Feng agreed to renew the mortgage "on the condition that" Mr. Kang "shall make all future interest payments on time" and maintain the mortgage in good standing, failing which the mortgage "shall be in default immediately" and Mr. Liu and Mr. Feng could proceed with power of sale.
- [20] The Mortgage Renewal Agreement provided that an advancement of \$200,000.00 would be made to Mr. Kang on August 1, 2023. Mr. Kang's existing debts were deducted from the advancement, as were interest penalties and a renewal fee. In the result, the net advancement was \$53,420.
- [21] Interest was due on the first day of each month. On August 1, 2023, Mr. Kang was to provide six post-dated cheques for the interest amounts due at the start of each month. For the first five months, interest costs would be \$17,500.00; thereafter they would be \$28,000.00.

- [22] The Mortgage Renewal Agreement did not modify the terms governing the renewal of the mortgage. Those terms were articulated in the Loan Commitment Agreement for the original mortgage and mirrored those of the Rumsey Mortgage. Any request to extend the mortgage was to be sent in writing 60 days before the maturity date. If no extension was granted by the lender, the mortgage was to be repaid in full on the maturity date. If the mortgage was not repaid in full on the maturity date, the lender could either select a “deemed auto renewal” for a six-month period, which would be subject to various fees to the borrower, or demand that the full amount of the loan be paid on the maturity date with no renewal or extension. The lender’s option would not prejudice their rights upon any default under the *Mortgages Act*.
- [23] Mr. Kang’s interest payments through to July 2023 were taken out of the principal advance of \$200,000.00. Mr. Kang paid the interest from August 2023 and September 2023 separately via post-dated cheque.
- [24] Mr. Liu and Mr. Feng say that the interest from October 2023 onward has not been paid and that the Bannatyne Mortgage is consequently in default. In February 2024, they served a Notice of Sale for the Bannatyne Property. It states that \$1,755,341.85 is owed on the Bannatyne Mortgage, inclusive of all principal, interest, and fees. Soon afterward, they commenced an action to enforce the Bannatyne Mortgage (CV-24-00717746-0000), in which they plead that \$1,790,376.10 is owed.
- [25] The Plaintiffs deny that the Bannatyne Mortgage is in default, for two reasons. First, they state, in early September 2023, Mr. Kang directed Mr. Liu and Mr. Feng to make all monthly interest payments for October 2023 onward out of the 2023 Payment, which had been remitted to Mr. Liu and Mr. Feng a few months earlier. The Plaintiffs say that Mr. Liu and Mr. Feng failed to honour Mr. Kang’s instructions, and that had they done what Mr. Kang told them to, the Bannatyne Mortgage would not be in default. Mr. Liu and Mr. Feng dispute that there was any agreement to so apply the 2023 Payment.
- [26] Second, the Plaintiffs state that the Bannatyne Mortgage had automatically renewed by the time the Notice of Sale was issued. As such, its principal was not due, and it was not in default. Mr. Liu and Mr. Feng disagree.
- [27] Finally, the Plaintiffs say that the Notice of Sale for the Bannatyne Property is unsigned and has errors and improper charges. Mr. Liu and Mr. Feng say that these charges are proper, and that in any event, any errors can be corrected and are not impediments to their right to proceed with the sale of the Bannatyne Property.

The Rumsey Mortgage, Continued

- [28] Mr. Liu states that 11291319 and 11291246 never paid any interest owed on the Rumsey Mortgage and accordingly defaulted on it.
- [29] The Plaintiffs deny that the Rumsey Mortgage is in default, for the same reasons they offer in respect of the Bannatyne Mortgage: the 2023 Payment was supposed to have been

applied against the Rumsey Mortgage, and in any event the Rumsey Mortgage had renewed automatically by the time the Notice of Sale was issued.

- [30] In September 2023, Mr. Liu served a Notice of Sale in respect of the Rumsey Properties. It stated that \$4,649,885.00 was owed on the Rumsey Mortgage, inclusive of principal, interest, and fees. He says he served it via registered mail to the Rumsey Properties and the shared office of 11291319 and 11291246. The Plaintiffs say Mr. Kang did not receive the Notice of Sale and they had no notice of Mr. Liu's intention to sell.
- [31] In October 2023, Mr. Liu issued a Statement of Claim in the CV-23-00708596-0000 matter, seeking to enforce the Rumsey Mortgage against 11291319 and 11291246. In his Statement of Claim, he alleges that \$5,021,985.00 is now owed on the Rumsey Mortgage.
- [32] Mr. Liu obtained default judgment in that action on December 14, 2023. The Plaintiffs say they did not receive the Statement of Claim or any warning before the default judgment was obtained. They have brought a motion to set aside the noting in default, which is to be heard later this month.
- [33] In November 2023, Mr. Kang moved into 177 Rumsey with his family. Mr. Liu says Mr. Kang moved into 177 Rumsey simply to make it more difficult for Mr. Liu to enforce the Rumsey Mortgage and sell the property. He states that at the time, the property was unfinished and had "serious safety concerns and no occupancy permit".
- [34] The Plaintiffs say they did not learn that the Rumsey Properties had been listed for sale until December 30, 2023. When they made this discovery, they retained counsel, who communicated promptly with the listing agent and Mr. Liu. In the ensuing communications, Mr. Liu agreed to de-list the Rumsey Properties and pause any litigation in respect of them. He indicated he was willing to consent to the default judgment being set aside. The Plaintiffs state that these assurances were designed to give them a "false sense of security" and that Mr. Liu went on to re-list the properties and sell them without their knowledge.
- [35] On December 30, 2023, the Defendant Ms. Huang entered into an agreement of purchase and sale to purchase 177 Rumsey from Mr. Liu, under power of sale, for \$1.9 million. The sale closed on January 11, 2024; it was originally scheduled to close on January 5.
- [36] On December 31, 2023, the Defendant Mr. Shi entered into an agreement of purchase and sale to purchase 171 Rumsey from Mr. Liu, under power of sale, for \$1.78 million. The sale closed on January 10, 2024.
- [37] The Plaintiffs discovered the sales of the Rumsey Properties on January 20, 2024. They say the sales were conducted without any warning to them, in a hurry, and below market value, all in an effort to preclude their opposition to the sales. They describe the sales as "surreptitious" and a reflection of bad faith on the part of Mr. Liu.
- [38] Mr. Kang and his family lived at 177 Rumsey at the time. Some days after the sale, Ms. Huang attended at the property, saying she was its owner. The police were called. They

instructed her to leave. She later returned with Alex, who stated that Mr. Liu “had instructed him to empty” the Rumsey Properties. Alex pushed the door to the home open and physically assaulted Mr. Kang and his wife. The police returned and arrested Alex. None of this is contested by Alex.

Analysis

[39] Many of the issues before me pertain to both Mortgages and/or more than one of the three motions. I have therefore analyzed the issues first, before considering the specific motions.

Whether the Mortgages only had to be paid when construction was complete

[40] The Plaintiffs say that because this was the Bannatyne Mortgage and the Rumsey Mortgage were construction loans, there was an “overarching agreement” that their principal amounts would not have to be repaid until construction was completed and the Properties sold.

[41] I am unable to agree. There is no evidence before me of any oral or written agreement to this effect. To the contrary, each Mortgage expressly gives the lender the option to demand payment of the Mortgage in full upon maturity, without requiring that construction be complete before payment is demanded.

Whether the Mortgages renewed automatically

[42] The Plaintiffs claim that both the Bannatyne Mortgage and the Rumsey Mortgage had automatically renewed before their respective Notices of Sale were issued. They say the auto-renewal clause in the Loan Commitment Agreement for each Mortgage required the lender to make a demand for full payment of principal upon maturity, failing which there was a “deemed auto renewal” of the Mortgage. Mr. Liu (and Mr. Feng) never made such a formal demand. As such, there was a “deemed auto renewal” of each Mortgage upon maturity and neither was in default.

[43] I am respectfully unable to agree. Each Mortgage expressly required the borrower to make a written request to extend the Mortgage at least 60 days before maturity. Mr. Kang did not do this for the Bannatyne Mortgage. His companies did not do this for the Rumsey Mortgage. Each Mortgage required that, if the lender did not grant a renewal, the principal was due in full upon maturity. Mr. Liu (and Mr. Feng) did not grant a renewal of either Mortgage. As such, the principal of each was due in full at maturity. Finally, each Mortgage provided that if the Mortgage was not repaid fully at maturity, it was the lender’s choice – and the lender’s choice alone – to either renew the Mortgage or demand the full amount. Neither Mortgage was paid in full upon maturity. It was therefore entirely for Mr. Liu (and Mr. Feng) to choose what to do next. There is no suggestion in the record that they opted to renew. There is every indication that they demanded full payment. Indeed, Mr. Liu commenced his action to enforce the Rumsey Mortgage within days of its maturity date.

[44] It was not for Mr. Kang or his companies to choose the “auto renewal” option: that was not their choice to make. The Plaintiffs’ view to the contrary is not consistent with the express language of the renewal provisions of the Mortgages. Nor is it commercially reasonable.

Whether there was an agreement or instruction that the 2023 Payment be applied against the Mortgages

- [45] The Plaintiffs further submit that Mr. Kang instructed Mr. Liu and Mr. Feng to apply the 2023 Payment against the interest owed on the Mortgages and that they did not do so. They say Mr. Liu and Mr. Feng thereby “concocted” a default so that they could sell the Properties under power of sale. Had the 2023 Payment been applied against the Mortgages in accordance with Mr. Kang’s instructions, say the Plaintiffs, both Mortgages would be in good standing.
- [46] Mr. Liu and Mr. Feng acknowledge that they received the 2023 Payment from Mr. Kang and that they did not apply it against either Mortgage. They say that they instead applied it against two unsecured loans made to Mr. Kang in September 2022 by the Defendant Mr. Chen, in the amount of \$600,000.00 each (the “Chen Loans”). Mr. Liu and Mr. Feng say Mr. Kang had instructed them to apply the 2023 Payment against the Chen Loans, and that in any event they had the authority to do so, as the lenders and pursuant to an “Assignment Agreement” between Mr. Liu and Mr. Chen.
- [47] The record before me does not support the Plaintiffs’ claim that there was an agreement between the parties, or a binding instruction from Mr. Kang, as to how the 2023 Payment was to be used.
- [48] First, there is no contemporaneous evidence as to the purpose of the 2023 Payment, or what debt obligations it was intended to be applied against, at the time that Mr. Kang remitted it to Mr. Liu and Mr. Feng.
- [49] According to Mr. Liu and Mr. Feng, on September 22, 2023, Mr. Kang verbally agreed to apply the 2023 Payment against the Chen Loans. The Plaintiffs deny that he did so.
- [50] According to the Plaintiffs, Mr. Kang subsequently instructed Mr. Liu and Mr. Feng to apply the 2023 Payment against the Mortgages. However, in my view, the record does not contain any such clear indication. It indicates the following:
- a. On September 17, 2023, in a “WeChat” text message to Mr. Liu and Alex, Mr. Kang indicated that he and his companies had “one request,” which was that they “cannot agree” to using the 2023 Payment towards the first mortgage on 173 Rumsey (a separate property that is not under consideration in this proceeding);
 - b. On September 23, 2023, Mr. Kang stated that he intended to use the 2023 Payment to pay the interest on certain of his loans with Mr. Liu and then apply part of the 2023 Payment against the Chen Loans. In identifying the loans against which he intended to apply the 2023 Payment, he identified the Bannatyne Mortgage but not the Rumsey Mortgage;
 - c. On September 24, 2023, Mr. Liu said he would need to calculate if the 2023 Payment was enough to pay out 173 Rumsey, and that if it was not enough, it could not be used to pay any outstanding mortgage interest;

- d. On September 29, 2023, Mr. Kang asked if the 2023 Payment could be used to pay the interest on the Bannatyne Mortgage. He also emailed Mr. Liu's lawyer making the same request;
- e. On September 30, 2023, Mr. Liu rejected Mr. Kang's request, saying that the 2023 Payment "is to be used for properly resolving the 173 dispute. I'm still waiting for your payout"; and
- f. On December 24, 2023, Mr. Liu reiterated his rejection of Mr. Kang's request.

[51] Thus, even if Mr. Kang agreed, on September 22, 2023, to apply the 2023 Payment against the Chen Loans, he subsequently asked to modify this arrangement by allowing the 2023 Payment to be applied against the Bannatyne Mortgage and other debts owed to Mr. Liu. Those other debts did not include the Rumsey Mortgage. These were wishes or requests, not instructions. Mr. Kang worded them as such, and the parties treated them as such. Mr. Liu never acceded to these requests. Indeed, he consistently refused them.

[52] I also note that although both Mortgages were entered into after the 2023 Payment was made, neither Mortgage's Loan Commitment Agreement refers to the 2023 Payment, or to any pre-payments having been made under the Mortgage. To the contrary, each Loan Commitment Agreement refers to Mr. Kang's obligation to write monthly cheques to cover his interest obligations.

[53] I am therefore not persuaded that there was ever an agreement among the parties, or an instruction from Mr. Kang, that the 2023 Payment was to be applied against either Mortgage.

Whether Mr. Liu and Mr. Feng had authority to apply the 2023 Payment against the Chen Loans

[54] Mr. Liu and Mr. Feng say that they had authority to apply the 2023 Payment against the Chen Loans. They base this argument in part on an "Assignment Agreement," dated December 19, 2023, in which Mr. Chen assigned the Chen Loans to Mr. Liu and gave Mr. Liu the right to enforce them.

[55] I am unable to agree. The 2023 Payment was made by Mr. Kang to Mr. Liu and Mr. Feng alone. It was therefore to be applied only against loans made to Mr. Kang by Mr. Liu and/or Mr. Feng unless the parties had a clear agreement to the contrary. Mr. Chen had no right to the 2023 Payment because Mr. Kang did not make the 2023 Payment to him.

[56] In any event, there is no evidence as to when, or even whether, the 2023 Payment was applied against the Chen Loans. As such, there is no evidence to demonstrate that the Assignment Agreement pre-dates the application of the 2023 Payment against the Chen Loans, as it must have in order to have authorized it.

Whether Mr. Liu and Mr. Feng applied the 2023 Payment against the Chen Loans

- [57] The evidence that Mr. Liu and Mr. Feng actually applied the 2023 Payment against the Chen Loans, as they claim, is limited. There is no direct affidavit evidence from them, or from Mr. Chen, saying that this was done. The only documentary evidence of this transaction is a “Receipt” from Mr. Chen indicating that he received \$1,850,794.52 in cash from Mr. Liu and that Mr. Liu’s obligations under the Assignment Agreement were fulfilled. The Receipt does not state that the money paid to Mr. Chen came from the 2023 Payment. The Plaintiffs doubt whether Mr. Liu in fact applied the 2023 Payment against the Chen Loans at all. They suggest he merely pocketed the 2023 Payment.

The “Repayment Confirmation” and the evidence of Mr. Liu and Mr. Feng generally

- [58] The record contains a document created by Mr. Liu and provided to Mr. Kang entitled “Repayment Confirmation”. The dates of its creation and provision to Mr. Kang are unknown. The Repayment Confirmation indicates that, on September 15, 2024, Mr. Liu applied the 2023 Payment against two loans that Mr. Chen had made to Mr. Kang. First, he used the 2023 Payment to pay out, in its entirety, a loan from Mr. Chen of \$1,790,539.78. He then used the remaining balance of the 2023 Payment to pay down a separate loan from Mr. Chen of \$1.2 million. According to the Repayment Confirmation, both loans against which the 2023 Payment was applied were secured against 173 Rumsey, a property that is not involved in this motion but is referenced in the WeChat messages discussed above.
- [59] In cross-examination, Alex gave evidence that, contrary to what the Repayment Confirmation indicates, Mr. Liu did not apply the 2023 Payment against loans from Mr. Chen that were secured against 173 Rumsey. Rather, he applied it against the Chen Loans. That is also the position taken by Mr. Liu and Mr. Feng in this motion. There is no evidence that purports to explain this discrepancy between what the Repayment Confirmation, created by Mr. Liu, states, and what Mr. Liu now submits before me on this motion.
- [60] Alex further testified that the first payout referred to in the Repayment Confirmation, of \$1,790,539.78, relates to a third-party loan that has nothing to do with this action. I take this to mean either that Mr. Kang’s money was in fact applied against another borrower’s debt, as the Plaintiffs claim, or that his money was applied against his debt to a different lender, not Mr. Liu. The Repayment Confirmation, however, misleadingly indicates that the 2023 Payment was applied against Mr. Kang’s own debts to Mr. Liu.
- [61] Alex’s evidence aligns with that of Mr. Kang, who says that the \$1,790,539.78 payment identified in the Repayment Confirmation amount “far exceeded” any loan made to him (or his companies) by Mr. Chen and must pertain to a loan from Mr. Chen to some unnamed third party.
- [62] If Alex’s evidence is believed, Mr. Liu has created, in the Repayment Confirmation, a document that contains material errors or falsehoods. Notably, no effort has been made to explain those errors or falsehoods, because Mr. Liu and Mr. Feng offer no direct affidavit evidence in this motion. This is so even though one or both of them loaned the funds at

issue to Mr. Kang, decided to apply the 2023 Payment against the Chen Loans, sold the Rumsey Properties via power of sale, commenced the process for selling the Bannatyne Property via power of sale, and created the Repayment Confirmation document, whose contents, by the Defendants' own admission, are untrue. Their counsel suggested that they do not speak English and therefore were not proper affiants. I see no reason why they could not have provided affidavit evidence via an interpreter. Indeed, Alex received assistance from an interpreter during his cross-examination.

- [63] The record thus leaves me unable to assess the following material issues:
- a. Whether and when Mr. Liu and Mr. Feng applied the 2023 Payment against the Chen Loans, as they now claim they did;
 - b. Why Mr. Liu generated, and provided to Mr. Kang, a document that he now acknowledges incorrectly identifies the debt against which he applied the 2023 Payment; and
 - c. Whether Mr. Liu applied part of the 2023 Payment against a debt owed to him by someone other than Mr. Kang, and, if he did, why that was, and why he concealed the fact of the misapplication of funds in the Repayment Confirmation.

[64] These issues are squarely relevant to Mr. Liu and Mr. Feng's claims that they had authority to apply the 2023 Payment against the Chen Loans, and that they in fact did so – claims that lie at the heart of Mr. Liu's and Mr. Feng's position in this motion.

[65] These issues are also relevant to the allegations of bad faith made by the Plaintiffs. If Mr. Liu generated a document that he knew mis-stated the loan against which he had applied Mr. Kang's debt, or said he applied the 2023 Payment against the Chen Loans but did not do so, or knowingly applied part of the 2023 Payment against a debt owed by another borrower and concealed that fact from Mr. Kang, he may well have acted in bad faith.

Whether the errors in the Bannatyne Property Notice of Sale preclude its sale

[66] The Plaintiffs say that the Notice of Sale for the Bannatyne Property is unsigned and has errors and improper charges. Mr. Liu and Mr. Feng say that these charges are proper, and that in any event, any errors can be corrected and are not impediments to their right to proceed with a sale of the Bannatyne Property.

[67] I accept that there are circumstances in which errors in a Notice of Sale might prove fatal. If a Notice of Sale does not accurately reflect the borrower's indebtedness, the borrower cannot meaningfully exercise their option to redeem. The purpose underlying the Notice of Sale is thus defeated.

[68] Here, however, there is no suggestion that Mr. Kang would have been able to redeem the Bannatyne Mortgage, had the Notice of Sale correctly calculated the amount he owed. To the contrary, the evidence suggests Mr. Kang is not able to pay anything, other than the 2023 Payment, against any of his debts. The issue of whether any errors in the Notice of

Sale preclude the sale of the Bannatyne Property is therefore academic. In these circumstances, I am not persuaded that any such errors, on their own, stand in the way of the proposed sale.

Whether the alleged issues with service of the Notices of Sale and Statement of Claim preclude the sales of the Properties

- [69] The Plaintiffs state that Mr. Kang did not receive the Notice of Sale for the Bannatyne Property. As a result, they had no notice of its proposed sale. The record contains an affidavit of service for the Notice of Sale and a Canada Post tracking receipt for it. The Plaintiffs say Mr. Kang did not receive the Notice of Sale and that the Canada Post tracking receipt contains a signature that was not his. They imply someone forged Mr. Kang's signature, although there is no indication of who that was.
- [70] The Plaintiffs likewise say that they did not receive the Notices of Sale for the Rumsey Properties. The record contains Canada Post documentation indicating that the Notices of Sale were delivered or picked up in person at Canada Post. Some of this documentation indicates that an individual named "Zhen K," which is Mr. Kang's name, picked up the items from Canada Post. Other documentation indicates that the items were picked up but does not specify by whom.
- [71] The Plaintiffs further state that they never received the Statement of Claim in the enforcement proceedings for the Rumsey Mortgage. The record contains an affidavit of service indicating that the Statement of Claim was personally served upon Mr. Kang on behalf of 11291319 and 11291246.
- [72] The Plaintiffs thus assert that someone forged Mr. Kang's signature in respect of the Notice of Sale for the Bannatyne Property; that Mr. Kang did not pick up the Notices of Sale for the Rumsey Properties, even though there is documentation indicating that they were all picked up, and at least some of them were picked up by Mr. Kang; and that Mr. Kang never received a pleading that, according to an affirmed affidavit of service, was served on him personally. I find it unlikely that all these claims hold true. I am also informed by the principle that it is sufficient in these circumstances for notice to be given by registered mail in accordance with the requirements of the *Mortgages Act*, as was done here (*CIBC Mortgage Corp. v. Chopra* (1997), 35 O.R. (3d) 362 (C.A.)). I therefore am unable to accept the argument that these alleged issues with service preclude the sale of the Bannatyne Property or undermine the validity of the sale of the Rumsey Properties.

Whether Mr. Liu acted in bad faith in selling the Rumsey Properties

- [73] The Plaintiffs say that the sales of the Rumsey Properties were conducted without any warning to the Plaintiffs, in a hurry, and below market value, all to preclude their opposition to the sales.
- [74] The record shows, and Mr. Liu does not seriously contest, that he told the Plaintiffs he would delist the Rumsey Properties and nonetheless went on to sell them. I accept that this was not a transparent way of proceeding. To the extent that legal counsel was involved in

making any misrepresentations to Plaintiffs' counsel in these interactions, that is of particular concern.

- [75] More contested is the issue of whether Mr. Liu sold the Rumsey Properties for less than their fair market value, as the Plaintiffs assert. Mr. Liu acknowledges that he did not accept the highest available offers and that he chose the offers they did because they were unconditional and would close quickly. The Plaintiffs state that, even if there was a default on the Mortgage (and they say there was not), Mr. Liu, as mortgagee, was under a “duty to take reasonable precautions to obtain the fair market value of the mortgaged property” (*1427814 Ontario Limited v. 3697584 Canada Inc.*, 2013 ONCA 597, at para. 17).
- [76] The parties have tendered voluminous evidence on whether the Rumsey Properties were sold at their fair market value. They make extensive arguments on the admissibility and weight of one another's evidence. I will not summarize the evidence or the evidentiary disputes here. It suffices to say that the Plaintiffs have obtained valuations of the Rumsey Properties that are higher than those obtained by Mr. Liu, and that the record shows that both Rumsey Properties received offers for higher purchase prices than the ones that were ultimately accepted. On this basis, the Plaintiffs say that Mr. Liu failed to obtain fair market value, and that this is a sign of his bad faith.
- [77] I am not persuaded on this basis alone. The various valuations were obtained when the Properties were at different stages of construction and completion. I am therefore unable to do an “apples to apples” comparison of the parties' respective valuations, or of those valuations to the actual sale prices.
- [78] What does give me pause for thought, however, is the speed at which the Rumsey Properties were sold. The record does not specify when they were listed for sale, although it was likely shortly after default judgment was obtained on December 14, 2023. The agreements of purchase and sale for 177 Rumsey and 171 Rumsey were entered into on December 30, 2023 and January 2, 2024 respectively. The sales closed within 12 and 8 days respectively. They were originally scheduled to close even earlier. This is a very compressed timeline. Indeed, Alex's evidence acknowledges that Mr. Liu sold the Rumsey Properties quickly in an effort to sidestep what they considered to be the Plaintiffs' ongoing efforts to avoid enforcement of the Mortgages.
- [79] Mortgagees may be in breach of their duty to take reasonable precautions to obtain fair market value where they list properties for only brief time frames and prioritize a fast sale over obtaining market value (*Wilf Rieck Inc. v. Gordon J. Holdings Ltd.*, 1994 CarswellOnt 757 (Ct. J. (Gen. Div.)), at para. 16; *Filion v. 689543 Ontario Ltd.* (1994), 68 O.A.C. 389 (Ct. J. (Gen. Div – Div. Ct.)), at paras. 33-36). Based on the timeline described above, I find that there is basis for concern that Mr. Liu and Mr. Feng did not meet their obligations to take reasonable steps to obtain fair market value.
- [80] I also have grave concerns about the “self-help” approach Mr. Liu and Alex took upon learning that 177 Rumsey was occupied by Mr. Kang and his family. Some days after the sale, Alex attended at 177 Rumsey, stating Mr. Liu “had instructed him to empty” the

Rumsey Properties, pushing the door to the home open, and physically assaulting Mr. Kang and his wife. He was arrested. That this happened is not contested by Alex or any of the Defendants. To put it mildly, it is alarming. It may well be, as Ms. Huang argues, that as a matter of practice parties do not always obtain writs of possession for newly constructed homes. However, upon learning that the home was indeed occupied, Mr. Liu should not have sent Alex in to clear out its occupants. Alex should not have accepted the instruction to do so. This was blatant lawlessness. It strongly supports the Plaintiffs' claim of bad faith.

The Plaintiffs' motion for an injunction against the sale of the Bannatyne Property

- [81] The Plaintiffs seek an injunction preventing Mr. Liu and Mr. Feng from selling the Bannatyne Property under power of sale, on the bases that the Bannatyne Mortgage is not in default and Mr. Liu and Mr. Feng have acted in bad faith and/or engaged in tortious conduct. A party may seek an interlocutory injunction pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and Rule 40 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- [82] The test for interlocutory injunctive relief is well-established: the moving party must establish that their action raises either a serious issue to be tried or a strong *prima facie* case, that they will suffer irreparable harm if an injunction is not granted until the completion of the trial, and that the balance of convenience favours granting the relief sought because they would suffer greater harm than the responding party if the injunction is not granted (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5, [2018] 1 S.C.R. 196).
- [83] For the reasons below, I grant the injunction.

Serious Issue to be Tried

- [84] The parties agree that the standard to be applied to the first part of the test is the “serious issue to be tried” standard – that is, whether the Plaintiffs have shown that there is a serious issue to be tried as to whether the Bannatyne Mortgage was in default. Whether the case raises a serious issue to be tried is determined “on the basis of common sense and an extremely limited review of the case on the merits” (*RJR-MacDonald*, at p. 348). Essentially, it requires a determination that the case is not frivolous or vexatious (*RJR-MacDonald*, at p. 337).
- [85] I agree this is the correct standard, given that the Plaintiffs seek a prohibitory injunction. They seek to stop Mr. Liu and Mr. Feng from doing what they are currently doing (or were doing, before an interim injunction was granted): selling the Bannatyne Property under power of sale.
- [86] For the reasons above, I find that there are serious issues to be tried as to whether Mr. Liu and Mr. Feng had authority to apply the 2023 Payment against the Chen Loans instead of the Bannatyne Mortgage, whether they in fact applied the 2023 Payment against the Chen Loans, and whether they mis-applied any portion of the 2023 Payment against a loan made by Mr. Chen to another borrower rather than to Mr. Kang.

- [87] It flows from this that there is a serious issue to be tried regarding whether the Bannatyne Mortgage was truly in default. If indeed Mr. Liu and Mr. Feng were obligated to apply the 2023 Payment against the Bannatyne Mortgage, then the Advance Payment (which was for \$2,297,087.73) would have fully paid off the Bannatyne Mortgage (on which the amount owed, as at the time the Statement of Claim was issued, was \$1,790,376.10).
- [88] There is also a serious issue to be tried as to whether Mr. Liu and Mr. Feng have acted in bad faith. If Mr. Liu and Mr. Feng said they applied the 2023 Payment against the Chen Loans but did not, or if they applied a portion of it against another borrower's debts while suggesting otherwise to Mr. Kang, then they did not act in good faith. These are significant concerns that go to the core of the relationships and dealings among the parties.
- [89] Separately, I am of the view that the documentation maintained, and not maintained, by Mr. Liu and Mr. Feng in respect of their lending activity leaves much to be desired. They are unable to provide clear documentary evidence that they applied the 2023 Payment against the Chen Loans, as they claim, even though this is a claim that is capable of clear proof and which lies at the core of their position in this motion. They are unable to show me that they had clear authority to apply the 2023 Payment against the Chen Loans. This, too, is an essential issue. The documentation they have provided indicates, wrongly, that the 2023 Payment was applied against a secured loan on an altogether distinct property. It also suggests, concerningly, that part of the 2023 Payment may have been applied against the loan of another borrower or another creditor altogether, but that this was concealed from Mr. Kang. In my view, these concerns regarding the actual status of the Mortgages, the record keeping on the part of Mr. Liu and Mr. Feng, and the overall good faith of their conduct together strongly support granting interlocutory relief.

Irreparable Harm

- [90] I must also assess whether irreparable harm will result if the injunction is not granted. The burden is on the Plaintiffs to place sufficient evidence before me to show that they will suffer irreparable harm, which is harm that "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald*, at p. 341). The word "irreparable" describes the nature of the harm, rather than its magnitude (*RJR-MacDonald*, at p. 341). I am to consider the question of irreparable harm in the context of the specific facts of this case.
- [91] I am not persuaded that Mr. Kang or his companies would suffer irreparable harm if the injunction were not granted. The Bannatyne Property is Mr. Kang's personal property; he purchased it before Arkland Homes developed it and owns it in his own name. The claim that the Plaintiffs' business reputation will suffer if it is sold is therefore debatable. I also note that, because Arkland Homes is a new venture, it only recently began earning revenue and has earned only minimal revenue to date. Against this backdrop, I am not persuaded that the business will be harmed if the Bannatyne Property is sold.

Balance of Convenience

- [92] Finally, I must assess the balance of convenience. The Supreme Court of Canada has held that the question to be asked at this stage of the inquiry is which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits (*Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at p. 129).
- [93] I find that the balance of convenience favours granting the injunction. I am concerned about changing the *status quo* in the face of my concerns about potential bad faith on the part of Mr. Liu and Mr. Feng. I am not prepared to find that the balance of convenience favours the parties about whose conduct I have reservations. Even if these reservations prove unfounded, and the issue is more about Mr. Liu's and Mr. Feng's documentation (or lack thereof), interlocutory relief is still appropriate. Those issues give rise to questions about how the 2023 Payment was actually used and what, in turn, Mr. Kang's actual indebtedness to Mr. Liu and Mr. Feng is. They are properly addressed by way of interlocutory injunction.

Conclusion

- [94] Based on the analysis above, I find it appropriate to grant the injunction. It will be just and equitable in all the circumstances to do so (*1960529 Ontario Inc. v. 2077570 Ontario Inc.*, 2017 ONSC 5254, at para. 23), particularly in light of my concerns about potential bad faith and my finding that there is a serious issue to be tried as to whether the Bannatyne Mortgage is in default. Although I am not persuaded that Mr. Kang would suffer irreparable harm without an injunction, overall, my assessment of the other two criteria outweighs any reservations I may have about irreparable harm. The three criteria are inter-related and weakness in one may be compensated for by strength in another (*Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.)). In my view, the strength of the serious issue to be tried and balance of convenience criteria compensate for the relative weakness of the irreparable harm criterion.

The Defendant Ms. Huang's motion for an order for possession

- [95] The Defendant Ms. Huang entered into an agreement of purchase and sale for 177 Rumsey on December 30, 2023. The sale closed on January 11, 2024, after initially being scheduled to close on January 5, 2024. Mr. Kang currently resides at 177 Rumsey with his family, having moved there in November 2023.
- [96] Ms. Huang now seeks an order that the Plaintiffs deliver possession of 177 Rumsey to her, an order that the sheriff of the City of Toronto deliver vacant possession of 177 Rumsey to her, an order that the Caution currently registered against title to 177 Rumsey by 11291246 be lifted, and leave to issue a Writ of Possession against 177 Rumsey. The Plaintiffs oppose her motion. They state that they did not receive notice of the sale of 177 Rumsey and that the sale was made under suspicious circumstances and is not valid.
- [97] At the core of Ms. Huang's motion is her claim that she has good title to 177 Rumsey under the safe harbour provisions of sections 35 and 36 of the *Mortgages Act* and sections 99(1)

and 99(1.1) of the *Land Titles Act*, R.S.O. 1990, c. L.5. Those provisions together protect *bona fide* purchasers for value of property under power of sale from impeachment of title due to any improper notice or conduct of the power of sale proceedings. They in effect shield Ms. Huang, if indeed she is a *bona fide* purchaser for value, from claims of impropriety by Mr. Liu in the sale of 177 Rumsey.

- [98] Whether Ms. Huang is a *bona fide* purchaser for value is one of the issues the Plaintiffs ask the court to address in the underlying action. Indeed, it is squarely pleaded in the action. Ms. Huang now asks the court to consider this issue in this interlocutory motion. She effectively asks for grant summary judgment on this issue. I am not prepared to grant it.
- [99] I find that whether Ms. Huang can invoke the safe harbour provisions cited above is a genuine issue requiring trial, for several reasons. First, the compressed timeline of Ms. Huang's purchase of 177 Rumsey supports the inference that Mr. Liu may not have taken reasonable steps to obtain fair market value in its sale. This is an issue that may only be evaluated at trial, with evidence from all of the relevant players, including Mr. Liu.
- [100] Second, and relatedly, there is competing evidence on whether the Rumsey Properties were sold at market value. The record does not enable me to draw any clear conclusions in this regard. This, too, is a matter better addressed at trial, where the competing property valuations may be explained by witnesses and fully scrutinized by the trier of fact.
- [101] Third, there are other circumstances surrounding the sale that, taken together, raise questions as to whether it was a truly arms length transaction. For instance, Ms. Huang waived her right to a property inspection, her right to visit the property to view it and obtain an appraisal, and her right to vacant possession. Some of these conditions might logically be waived by a purchaser who is moving into a newly (yet partially) constructed home. However, there is limited evidence before me on Ms. Huang's waiver of these conditions. Whether these are indicia of a non-arms length purchase (and whether, as a consequence, Ms. Huang is not a *bona fide* purchaser for value without notice) is, in my view, a genuine issue requiring trial.
- [102] Ms. Huang also waived the financing condition on the purchase and paid the entire purchase price in cash. She says that her parents provided that cash but does not provide records that satisfactorily document such transactions. This, too, is an aspect of the transaction that is relevant to the *bona fide* purchaser for value issue, and which can only be assessed with the benefit of trial testimony from Ms. Huang and Mr. Liu.
- [103] I also find that Ms. Huang's evidence raises credibility issues that may only be properly evaluated at trial. These include her claim that she "personally visited" 177 Rumsey on December 30, 2023, which the Plaintiffs claim is misleading, and whether she knew or should have known that Mr. Kang and his family were in fact residing there at the time.
- [104] Accordingly, it is my view that declaring Ms. Huang to be a *bona fide* purchaser for value of 177 Rumsey would amount to an improper granting of partial summary judgment.

- [105] Ms. Huang further asks for an order for possession of 177 Rumsey, the effect of which would be to require Mr. Kang and his family to move out of 177 Rumsey, where they have resided for about a year. This is in substance a request for injunctive relief on the issue of possession, which is itself an essential issue in the underlying action. Ms. Huang has not framed her request for relief as such, however. She makes this request without the benefit of a full record and trial evidence, including evidence from Mr. Liu.
- [106] I find that she does not meet the test for interlocutory injunctive relief. For the reasons above, I find there are serious issues to be tried regarding whether Ms. Huang is a *bona fide* purchaser for value and is in fact entitled to possession of 177 Rumsey. I am not persuaded by the record before me that she would experience irreparable harm if she were not granted possession, given that she never moved in and does not currently reside there, does not appear to be incurring any costs of running the home, and knew the home to be incomplete at the time of purchase. Any harm she incurs could be addressed through damages. Finally, I find that the balance of convenience would favour not granting the order: this would maintain the *status quo* and would not tip the scale in favour of Ms. Huang, whose purchase of 177 Rumsey raises several serious questions requiring trial.

The Plaintiffs' motion for a Certificate of Pending Litigation on 171 Rumsey

- [107] The Defendant Mr. Shi entered into an agreement of purchase and sale for 171 Rumsey on December 31, 2023. The sale closed on January 12, 2024; it was originally scheduled to close on January 9.
- [108] The Plaintiffs now seek a Certificate of Pending Litigation (“CPL”) on 171 Rumsey. They assert that Mr. Shi purchased the property through an improper power of sale process when the Rumsey Mortgage was not in default, and that he bought it for a fraction of its market value and through a hasty transaction. They say he is not a *bona fide* purchaser for value and that he conspired with Mr. Liu to improperly obtain title.
- [109] The court’s authority to grant a CPL is found in s. 103(1) of the *Courts of Justice Act*. To grant the CPL, I must first be satisfied that the Plaintiffs have a triable claim to an interest in 171 Rumsey. Then I must consider all relevant factors between the parties and balance the interests of the parties in the exercise of my discretion to issue the CPL (*Rahbar v. Parvizi*, 2022 ONSC 1104, at para. 20).
- [110] I am satisfied that the Plaintiffs have a triable claim to an interest in 171 Rumsey. They were the registered owners of 171 Rumsey before the power of sale proceedings began. They challenge the power of sale proceedings and assert that the Rumsey Mortgage would not have been in default had Mr. Liu and Mr. Feng applied the 2023 Payment against it. As discussed above in relation to the injunction motion, I find that whether Mr. Liu and Mr. Feng had authority to apply the 2023 Payment against the Chen Loans rather than the Bannatyne Mortgage is a serious issue to be tried. For the same reasons, I find that whether they had authority to apply the 2023 Payment against the Chen Loans rather than the Rumsey Mortgage is a triable issue. In addition, the Plaintiffs assert that the Rumsey Properties were sold improvidently to Mr. Shi; if they are correct on this issue, then they

have an interest in the difference between 171 Rumsey's actual market value and the price at which it was sold to Mr. Shi. Based on these considerations, I find that the first part of the test for granting a CPL is met.

- [111] Turning to the second part of the test, I am satisfied, based on the relevant factors between the parties and a balancing of their interests, that it is appropriate to exercise my discretion in equity to grant a CPL.
- [112] As discussed above, there are valid questions about the speed with which the Rumsey Properties were sold, and, relatedly, whether the Rumsey Properties were sold at fair market value. The evidence in this motion reinforces these concerns. It shows that, mere weeks after Mr. Shi purchased 171 Rumsey, he obtained a new mortgage that was predicated on a market valuation about one and a half times the price he paid for it.
- [113] The record also raises questions as to whether Mr. Shi truly has an arms-length relationship to the Defendants. Mr. Shi had a longstanding relationship with Alex and was performing construction work at 171 Rumsey for Alex when he purchased the property. Additionally, Mr. Shi obtained a vendor takeback mortgage from Mr. Liu as part of the power of sale. He did not attempt to obtain a traditional mortgage for the purchase. He did not make regular interest payments on the mortgage from Mr. Liu.
- [114] Considering these relevant factors between the parties, and balancing their respective interests, I find that it is appropriate to exercise my discretion to grant a CPL over 171 Rumsey. The concerns that Mr. Shi may not be an arms-length purchaser and may not have paid fair market value are equitable considerations. The CPL is appropriately granted in these circumstances.

Conclusion and additional orders

- [115] These motions raise important questions about Mr. Liu's and Mr. Feng's potential bad faith, inadequate or misleading documentation, and inability to make out the claims, central to their position, that they were authorized to apply the 2023 Payment against the Bannatyne Mortgage and Rumsey Mortgage and that they did in fact do so. The motions also raise concerns about whether the Rumsey Properties were in fact purchased by *bona fide* and arms-length purchasers. These considerations form the basis of my decision to grant interlocutory relief.
- [116] I am, at the same time, mindful that the courts should not unduly interfere with the ability of a mortgagee to exercise their power of sale (*Arnold v. Bronstein et al.*, [1971] 1 O.R. 467 (H.C.)). If indeed it is found that the Bannatyne and Rumsey Mortgages are in default, there is, on the record before me, no evidence that the Plaintiffs have any funds with which to pay the Mortgages other than the 2023 Payment, which in any event is insufficient to redeem both Mortgages. There is no evidence that the Plaintiffs have refinanced either Mortgage; that they have additional funds that they are willing and able to apply against either Mortgage; or that the completion of construction on any of the Properties is

imminent. If the Mortgages are in fact in default, then any power of sale proceedings should be able to unfold in a timely and smooth fashion.

- [117] I therefore consider it appropriate to consolidate and impose case management on this action, the related actions identified above, and any other litigation among the parties relating to the loan arrangements among them. Presently, these actions appear to be unfolding in parallel. Indeed, these three motions were originally scheduled to be heard by two separate judges on two separate dates. This approach will only result in delay and additional expense for the parties. It will also result in an inefficient use of judicial resources and, potentially, inconsistent judicial findings. Consolidation and case management will help the actions to move forward efficiently and in a timely way.
- [118] The parties are to advise me if there are any actions among the parties other than the ones about which I am aware and which I have listed earlier in these Reasons. If there are such actions, they will be added to the case management and consolidation order.

Costs

- [119] In exercising my discretion to fix costs under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, I may consider the factors enumerated in Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. Those factors include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of indemnity, the reasonable expectations of the unsuccessful party, and any other matter relevant to costs.
- [120] In the recent case of *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, the Ontario Court of Appeal restated the general principles to be applied when courts exercise their discretion to award costs. The Court held that, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then “step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable”. The overarching objective is to fix an amount for costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant.
- [121] Applying these principles here, I note that the Plaintiffs were successful in each of the three motions. They had to do considerable work to put together the evidentiary record given the various transactions and interactions at issue. These are all factors that support granting them their costs. I am also of the view, however, that both parties drove up their own and one another’s costs by taking steps that were unnecessary, such as serving sur-reply materials and raising objections on matters that could and should have been sorted out constructively. Additionally, there is some duplication of effort across the motions, given that several factual and legal issues overlap across the motions to some extent.
- [122] The Plaintiffs claim a total of \$194,091.30 in costs on a partial indemnity basis, inclusive of HST and disbursements, on the three motions. This number breaks down as follows:

- a. For the Plaintiffs' injunction motion, \$72,201.28;
- b. For Ms. Huang's motion for possession, \$59,475.80;
- c. For the Plaintiffs' motion for a Certificate of Pending Litigation, \$62,414.22.

[123] Stepping back and viewing the matter as a whole, I consider it appropriate for the Plaintiffs to recover \$170,000.00 in costs, inclusive of HST and disbursements. This amount shall be paid by the Defendants within 30 days.

Order granted

[124] The Plaintiffs' motion for an interlocutory injunction restraining the sale of 93 Bannatyne pending the final determination of this action is granted.

[125] Ms. Huang's motion seeking an order that the Plaintiffs deliver possession of 177 Rumsey to her, an order that the sheriff of the City of Toronto deliver vacant possession of 177 Rumsey to her, an order that the Caution currently registered against title to 177 Rumsey by 11291246 be lifted, and leave to issue a Writ of Possession against 177 Rumsey, is denied.

[126] The Plaintiffs' motion for leave to register a Certificate of Pending Litigation on 171 Rumsey pending the final determination of this action is granted.

[127] This action, together with the action for enforcement of the mortgage on the Bannatyne Property and possession and sale of the Bannatyne Property (CV-24-00717746-0000), the action for enforcement of the mortgage on the Rumsey Properties and possession of the Rumsey Properties (CV-23-00708596-0000), the action in respect of various secured and unsecured loans, including a second mortgage on the Rumsey Properties (CV-24-00715323-0000), and any other actions involving the loan arrangements among the parties shall be consolidated and case managed. If there are other such actions beyond the ones identified herein, the parties shall advise the court immediately.

[128] The Defendants shall pay the Plaintiffs \$170,000.00 in costs, inclusive of HST and disbursements, within 30 days.

Parghi J.

CITATION: Arkland Homes Inc. v. Liu, 2024 ONSC 6423
COURT FILE NO.: CV-24-00715280-0000
DATE: 2024-11-21

ONTARIO

SUPERIOR COURT OF JUSTICE

• **BETWEEN:**

ARKLAND HOMES INC., 11291319 CANADA INC.,
11291289 CANADA INC., 11291246 CANADA INC.,
11291262 CANADA INC. and ZHEN KANG, a.k.a.
Ryan Kang

Plaintiffs

– and –

MING WEI LIU, CHEN DA HAI
JUNHUA WANG, YIZI FENG, LIU XIAO,
JIANJUN SHI, QIONG HUANG,
YISHENG MA, ABC CORPORATION,
RAN YANG, FENGQIN ZHANG, HONG
JING and LIHAN JING

Defendants

REASONS FOR DECISION

Parghi J.

Released: November 21, 2024