KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 65**

2024 SKKB 65 (CanLII)

Date: **2024 04 17**
Docket: KBG-PA-00214-2023
Judicial Centre: Prince Albert

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

- and -

DAWN CRAWFORD AND CODY BRANDON CRAWFORD

RESPONDENTS

- and -

EASYFINANCIAL SERVICES INC.

RESPONDENTS

- and -

REGISTRAR OF TITLES

RESPONDENTS

CORRECTED FIAT: The text of the original fiat has been changed *per* the corrigendum released April 25, 2024. (A copy of the corrigendum is appended to this corrected fiat.)

Counsel:

M. Danish Shah	for CIBC
Dawn Crawford and Cody Brandon Crawford	on their behalf
Kyle McCreary	Registrar of Titles

FIAT MORRALL J.
April 17, 2024

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Introduction

[1] By originating application (twice amended), the Canadian Imperial Bank of Commerce [CIBC] seeks to rectify its mortgage interest in a property in Prince Albert with the civic address of 1907 14th Street West [Property]. The mortgagors, Cody and Dawn Crawford [Crawfords], reside on this Property. The impetus for this application is due to the fact that CIBC wishes to commence foreclosure proceedings against the Crawfords.

[2] This Property comprises four adjacent parcels of land. However, on April 7, 2017, CIBC erroneously registered their mortgage interest in only three of the four parcels. Subsequently, Easyfinancial Services Inc. [ESI] registered a second mortgage on the Property on all four parcels on July 4, 2019.

[3] CIBC wants to amend its registration to include all four parcels and backdate each registration so it would have priority of interest over ESI should the court subsequently grant a foreclosure with respect to the Property. All parties consent, including ESI, who did not participate in the proceedings or do not oppose rectifying CIBC's mortgage to include all four parcels; however, only ESI and the Crawfords consent to backdating the mortgage rectification. The Registrar of titles believes any backdating is contrary to the spirit and intent of the Torrens land system and vigorously opposes CIBC's application in that regard.

Evidence

[4] The only party to provide evidence in this application was CIBC.

[5] The affidavit of Rosana Salama [Ms. Salama], an employee of CIBC, filed on December 19, 2023, states that the Crawfords executed a mortgage approval document for the Property on March 25, 2017, and March 29, 2017. The legal description given for the Property was "1-3 & E' LY 5' OF LOT 44".

[6] The Crawfords then executed the Mortgage on March 25, 2017, which set out the legal description for the Property as below:

a) Lot 1 Blk/Par 4 Plan No P3885 Extension 0;
   As described on Certificate of Title 97PA07155;
b) Lot 2 Blk/Par 4 Plan No P3885 Extension 0;
   As described on Certificate of Title 97PA07155.

[7] The Crawfords executed the Acknowledgement, Direction and Authority document with CIBC on March 25, 2017. This document sets out the following legal description for the Property:

a) Lot 1 Blk/Par 4 Plan No P3885 Extension 0;
   As described on Certificate of Title 97PA07155;
b) Lot 2 Blk/Par 4 Plan No P3885 Extension 0;
   As described on Certificate of Title 97PA07155;
c) Lot 3 Blk/Par 4 Plan No P3885 Extension 0;
   As described on Certificate of Title 97PA07155.

[8] However, when the affiant recently looked at the title in relation to the civic address, in addition to the description of the three lots above, it also included the following lot:

a) Lot 16 Blk/Par 4 Plan No 101659978 Extension 56
   As described on Certificate of Title 97PA07155, description 56.

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[9] Lot 16 is a small rectangular piece of land described as being 0.01 acres in area.

[10] She then states that "Lot 16" was omitted from the legal description CIBC gave to the Information Services Corporation [ISC] when ISC registered the mortgage on title. However, she noted the following restriction on the title to each lot that comprised the Property:

Notes

Under *The Planning and Development Act, 2007*, SS 2007, c P-13.2 the title…may not be transferred or, in certain circumstances, mortgaged or leased separately without the approval of the appropriate planning authority. If you believe this restriction does not apply to this parcel, please contact 1-866-ASK-ISC1 to have this restriction reviewed.

[11] She then avers that it is unclear why ISC allowed these parcels to be transferred without the approval of the appropriate planning authority.

[12] The affidavit of Krysti Hayes [Ms. Hayes] filed on February 12, 2024, indicates that she is a legal assistant at the office of Butz & Company, being counsel for the applicant. She exhibits a letter dated January 19, 2024 that her office sent to the office of Duchin, Bayda & Kroczynski, who will likely be foreclosure counsel for CIBC, regarding a letter their office received from ISC. She also exhibits emails from Mr. Andrew Kroczynski dated January 22, 2024, and January 30, 2024, and a letter from Mr. Shah, counsel in this application, to Mr. Andrew Kroczynski, dated January 29, 2024.

[13] In his letter to Mr. Kroczynski dated January 19, 2024, Mr. Shah asks whether "if the CIBC mortgage is secondary to the Easy Financial Inc mortgage on title #142683374, how would it impact the foreclosure proceeding and what prejudice would it cause CIBC?" On January 22, 2024, by email, Mr. Kroczynski advised that CIBC's

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subordination to ESI would impede foreclosure and requested that Mr. Shah request that ESI postpone their interest to CIBC once there is confirmation of mortgage rectification.

[14] On January 29, 2024, Mr. Shah provided Mr. Kroczynski with a number of documents and requested that he provide an affidavit to the court in support of the application. On January 30, 3024, Mr. Kroczynski indicated that "As counsel for the Bank who will ultimately handle its foreclosure, I am not in a position to provide evidence, Affidavit [*sic*], opinion, or otherwise, for inclusion in your client's application." He then stated, "It is a fact (and not a legal opinion)" that whether CIBC forecloses or the court orders a judicial sale, the ESI mortgage will have to be addressed to provide a clear title. If not, he states that CIBC will be prejudiced in their efforts to foreclose. He also asks that Mr. Shah attend to the registration of an equitable mortgage in CIBC's name.

[15] Ms. Hayes then filed a further affidavit filed on February 15, 2024, which exhibits letters Mr. Shah sent to Tanner Cantin at the City of Prince Albert. Mr. Cantin's email signature describes him as the Development Coordinator for Planning and Development Services at the City of Prince Albert. In response to Mr. Shah's questions, Mr. Cantin noted that it is generally the property owner who applies for the parcel ties. Thereafter, this application is then consented to or not by the municipality and registered by ISC. He states that ISC is responsible for ensuring compliance with the regulations pertaining to the parcel ties and for verifying, placing or removing parcel ties. Mr. Shah then requested that Mr. Cantin provide an affidavit to the court in a request dated February 13, 2024. However, no response was received.

Issues

[16] As a result of the submissions by the parties, I would frame the issues as follows:

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1) Can the court consider the evidence from Ms. Hayes' affidavits filed on February 12, 2024, and February 15, 2024?

2) Should I rectify the mortgage pursuant to s. 109(1)(a) of the *Land Titles Act, 2000*, SS 2000, c L-5.1 [*LTA, 2000*] to amend the mortgage registration so that a mortgage is registered with respect to all the Property, including Lot 16?

3) If I rectify the mortgage as above, should I postpone ESI's interest pursuant to s. 109(1)(a) of the *LTA, 2000* so that CIBC's mortgage has priority with respect to all the lots that form part of the Property?

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Analysis

Evidence from Mr. Shah's assistant

[17] CIBC argues that pursuant to *Ares v Venner*, [1970] SCR 608 [*Ares*], these hearsay declarations by Mr. Cantin and Mr. Kroczynski exhibited in Ms. Hayes's affidavits are admissible as business records. They further assert their opinions are uncontroverted, necessary and reliable, as there is no other way to provide this information to the court.

[18] These affidavits clearly should never have been filed as they are problematic in a number of ways.

[19] The first issue arises from a consideration of the meaning of the word "uncontroverted." Counsel for CIBC essentially argued that because there was no affidavit material with sworn evidence filed in opposition to their application, they were able to rely upon the truth of the contents of the letters by Mr. Shah.

[20] This is not so.

[21] *Collins Dictionary* defines the word "uncontroverted" as "lacking controversy or undisputed." It does not mean unopposed. To dispute an application in a legal proceeding does not require affidavit evidence to the contrary. It may be that the evidence provided supports multiple inferences of fact. It may be that while the factual evidence is admitted, multiple oppositional legal conclusions may be drawn from the evidence.

[22] Further, counsel are not to enter the fray at all. They cannot test the waters to determine whether there will be oppositional evidence and, if there is, take some other course of action. As noted in the commentary under section 5-2.1 in the Law Society of Saskatchewan's *Code of Professional Conduct*:

> [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

[23] The decision of *Adams v Canadian Tobacco Manufacturers' Council*, 2010 SKQB 308, [2010] 12 WWR 264, provided the following direction about the above-noted provision in the *Code of Professional Conduct* as it pertains to the obligations cast upon employees in the same firm as counsel:

> 9 …a lawyer cannot circumvent Chapter IX Rule 5 of the Code by directing an articled student, office administrator, paralegal, secretary or other employee of the firm who answers to him to do indirectly what the lawyer himself cannot do directly.

[24] This decision was cited with approval in the matter of *Beauchamp v Beauchamp*, 2023 SKKB 88 at para 15.

[25] Given the controverted nature of this matter, it is clear that the court

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should not accept any evidence from counsel for CIBC through his assistant.

[26] That said, counsel for CIBC's evidence was somewhat limited in breadth as it pertained to this application. However, there are even more significant substantive issues with the evidence that he wishes to tender from other individuals whom he contacted by e-mail.

[27] Typically, the statements of others that are exhibited to affidavits are hearsay and presumptively inadmissible.

[28] However, counsel invokes the decision in *Ares* and opines that these emails are akin to business records, so they would qualify as an exception to hearsay. Notwithstanding this submission, there are obvious evidentiary issues which prevent the court from considering this hearsay evidence in that fashion.

[29] It should be noted that in Saskatchewan, the *Ares* decision has been primarily codified by s. 50 of *The Evidence Act*, SS 2006, c E-11.2, as follows:

> Original business records
>
> 50(1) Any record made of any act, transaction, occurrence or event is admissible in any proceeding as evidence of the act, transaction, occurrence or event if:
>
> (a) it was made in the usual and ordinary course of a business; and
>
> (b) it was in the usual and ordinary course of the business to make the record at the time of the act, transaction, occurrence or event or within a reasonable time after the act, transaction, occurrence or event.
>
> (2) The circumstances of the making of a record mentioned in subsection (1), including the time of making the record in relation to the time of the act, transaction, occurrence or event and lack of personal knowledge by the maker, may be shown to affect its weight, but those circumstances do not affect its admissibility.

[30] Section 30(1) of the *Canada Evidence Act*, RSC 1985, c C-5 is of the

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same effect.

[31] However, one of the evidentiary requirements resulting from *Ares* is the establishment that the author had a “duty” to create this type of record. There is no evidence of such a duty in the case at bar. Both Mr. Kroczynski and Mr. Cantin were responding to some inquiries made by counsel. Unlike the fact scenario in *Ares*, neither individual in the case at the bar was akin to a nurse or doctor who was duty-bound to record a patient's vital signs neutrally on a chart.

[32] Further, under the more modern exceptions to hearsay that were outlined in *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787, which involve satisfying the twin criteria of necessity and reliability, no evidence was provided, or inference could be drawn that Mr. Cantin or Mr. Krozcynski could not provide direct evidence or there was no other way to obtain this evidence. Further, it is noteworthy that both individuals, while they may be professionals, either wrote the letter from the perspective of the City of Prince Albert or as counsel for CIBC. Hence, the unbiased reliability of the statements written by advocates is very questionable.

[33] Thirdly, to the extent that any of the evidence provided is relied upon is opinion evidence, there has been no attempt to argue or provide evidence that there has been compliance with any of the criteria outlined in *R v Mohan,* [1994] 2 SCR 9 and *White Burgess Langille Inman v Abbott and Haliburton Co.,* 2015 SCC 23 [2015] 2 SCR 182. No document containing the qualifications of either individual was provided, so I do not know the nature of either individual’s purported expertise. Therefore, there is no reason for me to rely on Mr. Cantin’s opinion of the duties to be ascribed to ISC or Mr. Krozcynski’s opinions of the difficulties that may result in the foreclosure process should the court not make specific orders.

[34] Therefore, for the reasons above, I will not rely on any of the affidavit evidence provided by Ms. Hayes in this application.

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Should an amendment to the registration be granted?

[35] None of the parties involved in this application oppose the court rectifying the mortgage on the Property so that CIBC's mortgage interest in Lot 4 is registered.

[36] Section 109 of the *LTA, 2000* states as follows:

> General jurisdiction of court
>
> 109(1) In any proceeding pursuant to this Part, the court may make any order the court considers appropriate, and in so doing may direct the Registrar to, or authorize any person to apply to the Registrar to:
>
> (a) register, discharge, amend, postpone or assign an interest; or
>
> (b) transfer title or make changes to a title.
>
> (2) The court may seek assistance from the Registrar in any proceeding pursuant to this Part.
>
> (3) On an application to the court pursuant to this Part, if the judge hearing the application considers it appropriate to do so, the judge may make an order:
>
> (a) directing that a title be vested in any person; and
>
> (b) either:
>
> (i) directing the Registrar to transfer title or to make changes to a title; or
>
> (ii) authorizing any person to apply to the Registrar to transfer title or to have changes made to a title.
>
> (4) An application for an order pursuant to subsection (3) may be made:
>
> (a) on any notice that the court considers appropriate; or
>
> (b) without notice if, in the court's opinion, the circumstances warrant it.

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[37] In *Olney Estate v Great-West Life Assurance Co.*, 2014 SKCA 47, [2014] 8 WWR 293 [*Olney*] the court describes the corrective provisions of s.109 of the *LTA, 2000* as follows:

> 11 …The claim for relief was based on section 109 of The Land Titles Act. This is a curative provision that empowers the Court of Queen's Bench, in proceedings taken pursuant to section 107, to make any order the court considers appropriate, including orders directing or authorizing the Registrar to transfer title, vest title, or make changes to a title as the circumstances of the case suggest and the Act allows.

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[38] However, in considering the appropriateness of the relief requested, the court added the following *proviso* in *Farm Credit Canada v Gherasim*, 2016 SKQB 182:

> 14 The manner in which the court may exercise its discretion under s. 109 of the Act is not unfettered: its orders must remain consistent with the fundamental principles of the Act as a whole. Those principles were summarized by G.R. Jackson, then Master of Titles (now Jackson J.A. of the Saskatchewan Court of Appeal) in *Land Titles in Saskatchewan*, Vol 1 (Regina, Saskatchewan Justice, 1988):
>
> > First, a certificate of title is, subject to certain specified exceptions, conclusive of evidence of ownership, so that it can be relied upon in all transactions concerning that land. This principle is often called the principle of indefeasibility. Second, the scheme of the Act promotes facility of transfer. Relying on the principle of indefeasibility, prospective purchasers can freely deal with anyone purporting to be the registered owner of land. Third, registration of documents is compulsory which means that in order to take priority or have any effect over persons who are not parties to the transaction, the transaction or notice of the transaction must be registered or filed in the appropriate land titles office. Fourth, an assurance fund is created to compensate any person who suffers loss or damage through an error in the operation of the Land Titles System or through deprivation in circumstances where the principle of indefeasibility overrides previous common law rights of ownership.

[39] Therefore, having regard to the fundamental principles of the *LTA, 2000*, I must first determine whether it is appropriate to amend CIBC's mortgage registration so that it is included on all lots belonging to the civic address.

[40] The court in *MFI Ag Services Ltd. v Farm Credit Canada*, 2023 SKCA 30 [*MFI*], recently reviewed the applicable case law pertaining to the legal requirements to justify rectification as follows:

> [75] Rectification may be granted when a written instrument fails to correctly record the parties' agreement. The following excerpt from the reasons of Binnie J. in *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19, [2002] 1 SCR 678, nicely encapsulates the applicable general principles and the extent of this equitable remedy when a unilateral mistake is alleged:
>
> > [31] Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: [references omitted]. In *Hart* [(1916), 1916 CanLII 631 (SCC), 56 DLR 620], at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.
>
> [76] When a common mistake is asserted, the limits and prerequisites for the remedy of rectification are those set out by Brown J. in *Canada (Attorney General) v Fairmont Hotels*, 2016 SCC 56, [2016] 2 SCR 720:
>
> > [13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at pp. 417–18). It must, as this Court has repeatedly stated … be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the

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> commercial world in written contracts": *Performance Industries*, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement … . It is not concerned with mistakes merely in the making of that antecedent agreement … ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but the *agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries* (at para. 31), "[t]he court's task in a rectification case is … to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".
>
> [14] Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, [*Canadian Contract Law*] at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a *common* mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: [references omitted].
>
> (Emphasis in original)

[41] The court in *MFI* then provided the following comments on the nature of the evidence that will be required to support an application for rectification:

> [78] … As they did in the court below, the appellants rely on the following excerpt from *Fairmont Hotels* [*Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720] regarding the quality of the evidence need to support rectification:
>
> > [36] In my view, the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is that which *McDougall* [2008 SCC 53] identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged. As the Court also said in *McDougall* (at para. 46), "evidence must always be sufficiently clear, convincing and cogent". A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its

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> unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action. This idea was helpfully encapsulated, in the context of an application for rectification of a common mistake, by Brightman L.J. in *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 W.L.R. 505 (C.A.), at p. 521:
>
> > The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention *ex hypothesi* contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.
>
> [37] In brief, while the standard of proof is the balance of probabilities, the essential concern of *Performance Industries* remains applicable, being (at para. 42) "to promote the utility of written agreements by closing the 'floodgate' against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification".

[42] I find that a review of Ms. Salama's evidence establishes that the Crawfords and CIBC made a mutual mistake in omitting to register the mortgage on Lot 4 with respect to the Property. The mortgage, in relation to the civic address, fails to describe the Property accurately. It is clear and undisputed that both parties intended the mortgage to apply to all parcels related to the civic address, and this was not accurately completed. This error was not caught until CIBC contemplated foreclosure proceedings. This error did not mislead either party and correcting this error would fairly and reasonably return the mortgage to the original intent of the parties.

[43] Therefore, I will apply the doctrine of rectification so that CIBC has an interest against Title #142683374 in the nature of interest register #122183591, namely

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a mortgage with a value of $77,600, and the Registrar of Land Titles shall cause this interest to be registered.

If the amendment is granted, should the amendment be backdated?

[44] CIBC wishes to backdate the mortgage registration that I rectified above to April 7, 2017, at 07:58:08 am so that they would have priority over ESI's mortgage interest. ESI and the Crawfords have indicated they would consent to this procedure. CIBC argues that the principle of indefeasibility should not apply in this case as, based on equitable principles, both the Crawfords and ESI would have known about CIBC's mortgage on three out of four parcels on the face of the title. They also assert that ISC erred in not "double checking" CIBC's mistake in registering the mortgage and in ignoring the registration interests made pursuant to the *PDA, 2007*.

[45] On the other hand, The Registrar of Titles submits that directing the registrar to re-arrange priorities is not appropriate in a Torrens system. They submit that upon a third party registering their interests under the *LTA, 2000*, other third-party interest holders are entitled to rely on those titles without having to look behind the "curtain" to determine if there might be an unregistered interest. To do so would make all titles unreliable.

[46] I must now consider whether pursuant to s. 109 of the *LTA*, 2000, in accordance with its fundamental principles, it would be appropriate to order CIBC's mortgage interest to take priority over ESI's mortgage interest.

[47] The court in *Firm Capital Mortgage Fund Inc. v West Canadian Development Kensington Project Ltd.,* 2018 SKQB 198, 62 CBR (6th) 184 [*Firm Capital*] comprehensibly considered and rejected a similar argument to that made by CIBC as follows:

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[20] As can be seen, the system works by virtue of registration of interests. The registration provides any party searching a title at a particular point in time to have the certainty that the title reflects the interests claimed against that property at that moment. Section 25(1) of the *Act* makes that clear.

> 25(1) Except as against the person making it, an instrument purporting to transfer, assign, charge, deal with or affect any title, interest, or land for which title has issued, does not operate to create or convey any title or interest until an application for registration of a transfer of title or an application for registration of an interest based on that instrument is registered in accordance with this Act.

[21] In *Gherasim*, Ball J. at para. 15 states:

> 15 These principles are illustrated by ss. 23 and 24 of the *Act*, which declare that a current or prospective holder of a registered interest is entitled to rely on the state of the Register and is not affected by any other unregistered interest. This means registration is conclusive proof of any interests, exceptions or reservations that may affect ownership or an interest in land.

[22] Paragraphs 23 and 24 of the *Act* are reproduced here:

> **Reliability of title**
>
> 23(1) A person taking or proposing to take from a registered owner a transfer or an interest in land or dealing with a title:
>
> (a) is not bound:
>
> (i) to inquire into or ascertain the circumstances in or the consideration for which the registered owner or any previous registered owner acquired title; or
>
> (ii) to see to the application of the purchase money or any part of the purchase money; and
>
> (b) notwithstanding any law to the contrary but subject to sections 18 and 35, is not affected by any direct, implied or constructive notice of:
>
> (i) any trust;
>
> (ii) any other unregistered interest; or
>
> (iii) any unregistered transfer.
>
> (2) Knowledge on the part of the person that any trust or other unregistered interest or any unregistered transfer is in existence must not of itself be imputed as fraud.
>
> **Reliability of interest**

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> 24(1) A person taking or proposing to take an interest in a title or in another interest for the purpose of obtaining priority over any other trust or unregistered interest is not bound to inquire into and, subject to sections 18 and 35, is not affected by any direct, implied or constructive notice of any trust or any other unregistered interest.
>
> (2) Knowledge on the part of the person that any trust or other unregistered interest is in existence must not of itself be imputed as fraud.

[23] Those comments and the principals behind the organization of the *Act* and the necessity of registration are echoed in *Brick v Modus Resources Ltd.*, 2007 SKQB 111, 294 Sask R 21, *Hermanson v Saskatchewan (Registrar, Regina Land Registration District)* (1986), 52 Sask R 164 (Sask CA), *Jen-Sim Cattle Co. Ltd. v Agricultural Credit Corporation of Saskatchewan*, 2006 SKQB 173, 277 Sask R 193.

[24] The lender argues that is all fine and good however two recent decisions of the Court of Queen's Bench provide for the opportunity of this court to make the order sought. The first decision they rely on is *Olney Estate v Great-West Life Assurance Co.*, 2014 SKCA 47, 438 Sask R 47 [*Olney*]. *Olney* is quickly and easily distinguished. Firstly, the court pointed to the authority found in ss. 15(2) and (3) of the *Act* upon which to ground the application. Secondly, the application was brought for the purpose of correcting an error made by the registrar. Thirdly, it was emphasized that the powers of the registrar to alter a title under s. 109 and ss. 15(2) and (3) is still subject to the notion that rights obtained in good faith and for value cannot be prejudiced by such an application. The application in *Olney* was granted precisely to correct a registrar's error that did not impact on other registered interests.

[25] The lender relies heavily upon *Dunnison Estate v Dunnison*, 2017 SKCA 40, [2017] 8 WWR 18 [*Dunnison*]. In *Dunnison*, the court framed the discussion of the case in the following terms:

> **1** At the heart of this appeal are the important questions of whether voluntary transfer resulting trusts and the presumption that accompanies such trusts can exist with respect to land in this Province, given our land titles legislation and the Torrens system of landholding it creates. In light of such authorities as *Pecore v Pecore*, 2007 SCC 17, [2007] 1 SCR 795 [*Pecore*], voluntary transfer resulting trusts can exist with respect to land in this Province. Having said that, the presumption that accompanies such trusts is incompatible with the concept of absolute transfer of land and the fact a certificate of title is conclusive evidence of

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> ownership, as set out in ss. 90(1) and 213(1) of *The Land Titles Act*, RSS 1978, c L-5 [*The Land Titles Act, 1978*], as repealed by *The Land Titles Act, 2000*, SS 2000, c L-5.1 [*2000 Act*].

[26] The lender argues that since resulting trusts are an equitable concept, then equitable principles under the *Act* exist and play a role in the land titles system. The court then can give effect to equitable principles when faced with an application under s. 107 of the *Act*. The lender acknowledges that not every equitable principle can be utilized in the face of the concept of indivisibility of title but there must be an examination of the equitable principles on their merits. The lender argues *Dunnison* provides equitable claims and unregistered interests can exist under the Torrens system and that the exceptions to indefeasibility set forth in the *Act* are not the only exceptions that the court can apply. The lender then argues that such analysis serves to distinguish the Queen's Bench decisions previously mentioned regarding indefeasibility. The main problem I see with the lender's approach is that *Dunnison* involved claims for ownership of the land. It was not a case of priorities between competing interest holders. It was not a case where third parties who have a valid registered interest in the property would in any way be considered to have that interest subject to an unregistered interest, whether arising by virtue of equitable principles or not. Equitable and unregistered interests under *Dunnison* can be enforceable under the Torrens system as Schwann J. (as she then was) in *Mosiuk v Nagel's Debt Review Inc.*, 2017 SKQB 173, 79 RPR (5th) 44 determined, and only to the extent that they are being enforced against the persons that created those interests. In the context of this case, that simply stands for the proposition that the claim for an equitable mortgage against Lots 29 and 30 as between the lender and the borrower can be valid. There is nothing in the case to suggest however that that determination could impact on the priority interests of registered third party claims.

[27] If I am wrong on the above analysis, then the next argument put forward by the lender should be considered. That is the equitable principle upon which they base their claim for reordering their priorities on the title, is one of unjust enrichment. Again, I believe there is a short answer to that argument. For that equitable principle to come into play there must be an enrichment of Selkirk and CRA, there must be a corresponding deprivation to the lender and there must be an absence of a juristic reason for the enrichment. A juristic reason is found in the operation of the land titles system as previously discussed and therefore a juristic reason exists and no further analysis of unjust enrichment is necessary.

[48] I adopt the reasons of Justice Mills.

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[49] While the decision of *Primrose Drilling Ventures Ltd. v Registrar of Titles*, 2021 SKCA 15, [2021] 8 WWR 241 [*Primrose*] recognizes that the principle of indefeasibility is not absolute, that matter involves a consideration of a competing claim for ownership of an interest in land rather than a competing claim for priority between interest holders. Therefore, it is distinguishable from the case at bar and more akin to the factual scenarios outlined in Justice Mills' description in *Firm Capital* of the *Dunnison Estate v Dunnison*, 2017 SKCA 40, [2017] 8 WWR 18 decision. Further, *Primrose* arises from the same factual scenario as the *Olney* decision.

[50] This court's recent decision in *Melville (City) v Keller*, 2024 SKKB 25 at paras 71 to 81, also recognizes the importance of the *LTA 2000*'s underlying principles in the same way as *Firm Capital*.

[51] With respect to the argument of CIBC on the issue of the registry interest under the *PDA 2007*, I find that there is no evidence, actual or inferred, which could result in a duty, implied or otherwise, on behalf of ISC or any other organization to ensure or enforce compliance with requirements under the *PDA 2007*. This is codified in the legislation as follows at s. 122(3) of the *PDA 2007*:

> (3) The Registrar of Titles may register an interest or an amendment to an interest mentioned in subsection (1) without inquiring as to whether an approval was obtained from an approving authority.

[52] I find that the purpose of registration is not a matter between a mortgagee and a mortgagor. Registration is a matter between the mortgagee and the public with the establishment of a system of priority determining third-party interests. Whether or not consent is obtained from the mortgagor or the third party to backdate the registration is irrelevant. The integrity of the system demands certainty in order to create trust. Chipping away at the core principles of the Torrens Land System with esoteric exceptions undermines that trust. While the rules are strict and the consequences are sometimes harsh, there are means to seek compensation from the party responsible in

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the case of an error. For example, in the case of a registry error, an assurance fund is available.

[53] It is also noteworthy that a mortgagee could still foreclose on a mortgage whether or not that mortgage was registered. Registration does not increase the mortgagee's rights as against the mortgagor.

[54] The case law supports the maintenance of the core underlying principles of the *LTA, 2000* as they relate to the registration and priority of third-party interests.

[55] In the case at bar, there is evidence of an error on the part of CIBC. There is no evidence that ISC did anything contrary to law or negligently. I will not backdate CIBC's mortgage interest. The application is dismissed.

[56] As an aside, regardless of my decision, I note that ESI will likely agree to postpone their interest under s.62(1) of the *LTA, 2000* so that CIBC may proceed with their foreclosure application unhindered by ESI's priority interests in one parcel of the Property.

[57] All parties will bear their own costs of this application.

J.

J.P. MORRALL

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KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 65**

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Date: **2024 04 25**
Docket: KBG-PA-00214-2023
Judicial Centre: Prince Albert

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

- and -

DAWN CRAWFORD AND CODY BRANDON CRAWFORD

RESPONDENTS

Counsel:

M. Danish Shah	for CIBC
Dawn Crawford and Cody Brandon Crawford	on their behalf
Kyle McCreary	Registrar of Titles

CORRIGENDUM TO FIAT DATED APRIL 17, 2024 (2024 SKKB 65)
April 25, 2024 MORRALL J.

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[1] Upon review of this fiat dated April 17, 2024 the style of cause should be as follows:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

- and -

DAWN CRAWFORD AND CODY BRANDON CRAWFORD

RESPONDENTS

- and -

EASYFINANCIAL SERVICES INC.

RESPONDENTS

- and -

REGISTRAR OF TITLES

RESPONDENTS

J.

J.P. MORRALL

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