

CANADA / JUDGMENT

0815639 B.C. Ltd. v. Radford

2015 BCSC 1948

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 1948 0815639 B.C. Ltd. v. Radford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0815639 B.C. Ltd. v. Radford,

2015 BCSC 1948

Date: 20151023

Docket: S-H-48058

Registry: Kamloops

Between:

0815639 B.C. Ltd.

Petitioner

And

Brandee Radford, also known as Brandee LEEAN Marie Radford,

James Ralph, Allen Radford, Friends Bayshore Marina & Grill Ltd.,

Sunset Cove Marina & Grill Inc., The Crown in Right of British Columbia,

J R Thompson Ltd., Lauren Johnstone, R 251 Enterprises Ltd.,

Canadian Western Trust Company, The Crown in Right of Canada, and

Greg Darroch

Respondents

Before: The Honourable Mr. Justice Punnett

On appeal from: An order of the Supreme Court,
(dated 12 May 2014 Kamloops Registry, H48058).

Reasons for Judgment

Counsel for the Petitioner and James Ralph:

R.P. Barton

Counsel for the Respondent Sunset Cove marina & Grill Inc. and Allen Radford:

S.A. Wilson

No one else appearing:

Place and Date of Hearing:

Kelowna, B.C.

June 24, 2015

Place and Date of Judgment:

Kamloops, B.C.

October 23, 2015

[1] This is an appeal arising from a foreclosure action. On May 12, 2014 a Master of this Court determined amounts to be paid out of court to various respondents. The petitioner appeals the Master's order on several grounds and further submits that the matter should have been referred to the trial list.

Background

[2] The original petitioner, the Royal Bank of Canada, held mortgages over three commercial properties:

- a) A marina and restaurant on Eagle Bay Road in Blind Bay, British Columbia on Shuswap Lake. This property was referred to in the pleadings as the "Eagle Bay Lands and Premises" and was previously owned by Brandee Radford;
- b) A coffee shop/bistro in Scotch Creek, located across Shuswap Lake from the marina. This property was and continues to be owned by Brandee Radford; and
- c) A gift shop owned by 0815639 B.C. Ltd. located adjacent to the Bistro.

[3] There were guarantors of the debt secured by the mortgages:

- a) Sunset Cove Marina & Grill Inc. and its president Allen Radford guaranteed the mortgages granted by Brandee Radford;

- b) Brandee Radford guaranteed the indebtedness of the corporate borrower Friends Bayshore Marina & Grill Ltd.;
- c) 0815639 B.C. Ltd. also guaranteed certain indebtedness of Brandee Radford.
- [4] 0815639 B.C. Ltd. provided a mortgage to the Royal Bank of Canada collateral to its guarantee of the indebtedness of the respondent Brandee Radford.
- [5] On August 6, 2013 separate orders nisi were obtained for each of the three properties. Also on August 6, 2013 the respondents Greg Darroch and Canadian Western Trust (pursuant to a subsequent charge) obtained conduct of sale over the Eagle Bay Land and Premises. On October 21, 2013 pursuant to their order for conduct of sale the said respondents obtained an order approving the sale of the marina for \$1,217,400. The sale was completed on November 7, 2013. The sale proceeds were \$1,183,682.92. It is the allocation of those sale proceeds that gave rise to the application before the Master.
- [6] The petitioner purchased the Royal Bank of Canada's security and foreclosure in January 2014 and by an order dated February 18, 2014 was substituted as petitioner in place of the Royal Bank of Canada.
- [7] By consent, all but \$259,335.17 of the sale proceeds of Eagle Bay Lands and Premises was paid out to those entitled to such funds. The sum of \$259,335.17 remains in trust, as its disposition is in issue.
- [8] On or about June 10, 2009 the respondent J R Thompson Ltd. took a fourth mortgage from the respondent, Brandee Radford, in the sum of \$125,000 under mortgage number CA1176156 over the Eagle Bay Lands and Premises. The respondent, Brandee Radford, was unable or unwilling to make the monthly payments under that fourth mortgage.
- [9] Sunset Cove Marina & Grill Inc. and Allen Radford state that they entered into an oral agreement with J R Thompson Ltd. whereby Sunset Cove Marina & Grill Inc. and Allen Radford would make all of the payments due under the fourth mortgage on the understanding that upon payment in full the fourth mortgage would be assigned by J R Thompson Ltd. to Sunset Cove Marina & Grill Inc. That is, the funds paid by Sunset Cove Marina & Grill Inc. and Allen Radford were payments towards a future assignment of the fourth mortgage, not simply payments reducing the debt of Brandee Radford under the fourth mortgage.
- [10] The respondent Sunset Cove Marina & Grill Inc. alleges it is entitled to receive from the funds held in trust the amount paid by them to purchase the mortgage from J R Thompson Ltd. They state they paid \$120,000 over time and the final payout of \$32,806.06 at the time the assignment was signed and registered. The petitioner alleges that the J R Thompson Ltd. mortgage is only security for the final payout evidenced by the assignment and that the remainder of the funds are payable to Canada Revenue Agency who hold registered judgments against Brandee Radford. As a result, if the funds accrue to Brandee Radford's debt to Canada Revenue Agency the equity available to the petitioner increases.

- [11] The petitioner argues the respondent has not proven it did any more than simply make the payments under the mortgage and as a result the mortgage only secures the final amount paid for the assignment. The petitioner also submits that the terms of the mortgage preventing re-advances limit the respondent Sunset Cove Marina & Grill Inc. to the balance due at the time the assignment was executed.
- [12] The payment to the Receiver General for Canada is not in issue. The payments to Sunset Cove Marina & Grill Inc. are in dispute as a result of challenges to the sufficiency of the evidence before the Master and the value of the J R Thompson Ltd. mortgage relied on by Sunset Cove Marina & Grill Inc. The petitioner also challenges the suitability of this matter for summary trial resolution and on the basis that the Master lacked jurisdiction to make the order.

The Mortgage

- [13] On August 2, 2013 J R Thompson Ltd. transferred their mortgage to Sunset Cove Marina & Grill Inc. The Transfer of Charge with Express Charge Terms" provide that on May 1, 2012 the principal sum of the mortgage was \$30,406.06 with interest to accrue at 10% per annum calculated semi-annually and that the assignee Sunset Cove Marina & Grill Inc. paid to the assignor J R Thompson Ltd. the sum of \$32,806.06 as consideration for the transfer. The petitioner calculates that with interest accrued from May 1, 2012 to April 15, 2014 the total debt secured by the J R Thompson Ltd. mortgage is \$36,660.28.
- [14] However, Sunset Cove Marina & Grill Inc. asserts that as of November 6, 2013 the value of the J R Thompson Ltd. mortgage was \$180,200.46. That is based on their assertion that it paid \$120,000 towards the assignment and that the \$32,806.06 was simply the balance due at the time of the transfer of the mortgage plus a sum claimed for special costs and interest.
- [15] That mortgage states in s. 7 of the Form B:

MORTGAGE secures a current or running account? No.

- [16] Page 2 of that mortgage in s. 9 states that the mortgage consists of Standard Mortgage Terms.
- [17] For the purpose of the issue before the Court the Standard Mortgage Terms in para. 14(1) do not permit re-advancing of funds where the mortgage form states that it is not a current or running account mortgage. Paragraph 14(1) provides:

If the mortgage form states that this mortgage secures a current or running account, the lender may, on one or more occasions, advance and re-advance all or part of the principal amount

- [18] On November 28, 2013 counsel for the petitioner requested that counsel for Sunset Cove Marina & Grill Inc. provide documentation confirming the payout sum claimed. Counsel for Sunset Cove Marina & Grill Inc. responded with a statement from the principal of J R Thompson Ltd. that stated "Sunset Cove and Marina purchased the mortgage at 2001 Eagle Bay Road, from J R Thompson Ltd. It has been paid off in its entirety. The final payment being made in July 2013."
- [19] On December 3, 2013 before the petitioner purchased the Royal Bank of Canada security they requested the value of the mortgage and were advised it was \$180,200.46 as of November 6, 2013.
- [20] As Sunset Cove Marina & Grill Inc. did not produce documentation supporting the claim of \$180,200.46 secured by the J R Thompson Ltd. mortgage the petitioner applied to the Court for directions as to how the funds in trust should be disbursed to the interested charge holders.
- [21] It was only then that Sunset Cove Marina & Grill Inc. filed materials explaining the basis for the claim of \$180,200.46.
- [22] The Master found that Sunset Cove Marina & Grill Inc. was owed \$152,806.06 plus special costs and interest for a total claim of \$180,200.46. However the difference between the \$180,200.46 claimed and the \$152,806.06 was \$27,394.44 which as it related to special costs and interest was to remain in trust until those costs and the interest claimed were proven.
- [23] As a result, on May 12, 2014 the Master made an order that the following payments be made from the trust funds:
- a) The sum of \$103,114.83 to the Receiver General for Canada on account of the tax debt obligations of Sunset Cove Marina & Grill Inc.;
 - b) The sum of \$49,691.23 to Pushor Mitchell LLP in trust for the respondents Sunset Cove Marina & Grill Inc. and Allen Radford;
 - c) The sum of \$27,394.40 to Pushor Mitchell LLP in trust on account of the respondents, Sunset Cove Marina & Grill Inc. and Allen Radford's claims for interest and special costs, pending written agreement of the parties and;
 - d) The balance of funds from the sale of the Eagle Bay Lands and Premises to the Receiver General for Canada in partial payment of the tax debt obligations of Brandee Radford.
- [24] There is no dispute that \$103,114.83 of those funds are payable to the Receiver General for Canada on account of the tax debt obligations of Sunset Cove Marina & Grill Inc.

Law

The Standard of Review

- [25] The standard of review of an order made by a Master is correctness. On that standard a court may substitute its opinion for that of the Master. Deference need not be given. (*Royal Bank of Canada v. Bush*, 2012 BCSC 1628 at para. 14 [Bush]). However, as was noted by Madam Justice Hyslop in *Royal Bank of Canada v. Davis*, 2015, BCSC 882 [Davis]:
- [14] This court cannot interfere with a Master's discretion unless the Master is clearly wrong: *Abermin Corporation v. Granges Exploration Ltd.*, [1990] B.C.J. No. 1060.
- [26] In *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCSC 999, Madam Justice Fenlon (as she then was) addressed the standard of review:
- [7] The standard of review to be applied on an appeal to a judge of this Court from a master's decision has been settled since early 1990:
- 1) Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.
 - 2) A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.

(*Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) [Abermin]; *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2d) 124 (S.C.) [Northland].)

Is the Order a Final Order?

- [27] A master has jurisdiction to grant an interlocutory order, but not a final order (*S.M.Z. v. A.Z.*, 2005 BCSC 341 at para. 19). In *S.M.Z.* Mr. Justice Melnick also said this at para. 22:
- [22] A helpful authority which sets out the general principles to be applied in determining whether an order is interlocutory or final is the decision of Mr. Justice Donald in *Burlington Northern Railroad Co. v. Canadian National Railway* (1994), 10 B.C.L.R. (3d) 302 (C.A.) [Burlington]. There, at [paras.] 4-5 of the decision, Mr. Justice Donald stated:

The classic distinction between final and interlocutory orders was drawn by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547 (C.A.) where he said at pp. 548-49:

It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

This court has consistently used that test: *Wolverton & Co. v. Hooper* (1971), 24 D.L.R. (3d) 567 (B.C.C.A.) [other authorities cited].

- [28] The appellant submits that the Master's decision was a final order and hence the Master lacked jurisdiction to make it. They rely on *Bush* where Mr. Justice Rogers in the context of an appeal of a Master's decision noted:
- [14] The learned Master's decision had the effect of determining priority to a fund of money in court. Payment of those funds, had it been made (the funds remain in court pending the outcome of the appeal), would have constituted a final order on that issue. As such, the learned Master's decision was a final decision.
- [29] However, in *Bush* the Master was addressing the issue of priority. In this matter the issue of priority was determined as a final order in the order nisi. As a result the Master was simply addressing the issue of the amount owing under the mortgage. That is, the issue was the value of the *J R Thompson Ltd.* mortgage.
- [30] An order nisi is a final order because the Court in granting such an order determines if there is a mortgage, whether it is in default and the amount owing amongst other relief. In *Davis Hyslop J.* also noted:
- [11] In *Bank of Montreal v. Singh (Banns) et al*, [1980] 3 W.W.R. 403, the Court of Appeal states the following about an order nisi:
- [24] We were also referred to *Locarno Investments Limited v. Industrial Mortgage and Finance Corporation Limited* (1967), 59 W.W.R. 293. There, at page 294, Tysoe J.A. giving the judgment of the Court, said this after setting out the nature of the proceedings:
- "From that dismissal the appellant has appealed to this Court. McFarlane J., as he then was, pointed out in his judgment at page 192 that:
- 'It must be observed that the order nisi in such action is the judgment of the Court. The order absolute, which under our practice is made by a Judge in Chambers, is really ancillary or supplemental to the judgment of the Court, i.e., the order nisi.'"
- [31] Practice Direction PD-42 addressed Masters' Jurisdiction. It states:
- (8) Subject to constitutional limitations and to the direction set out in paragraph 2, a master has jurisdiction to make the following final order:
- a. order by consent
- f. Orders under Rule 21-7(5) where no matter is contested or where there is no triable issue
- [32] Rule 21-7(5) addresses the powers of the Court in foreclosure proceedings. Rule 21-7(5)(f) provides that a court may "determine summarily, or order an inquiry to determine, any issues raised between respondents, including priorities".

- [33] The Master at the first hearing date raised the issue of her jurisdiction to hear the matter with respect to the issue of priorities. The matter was adjourned to May 5, 2014 in anticipation it would be heard in judge's chambers. However, on May 5, 2014 it once again was in master's chambers, before the same master.
- [34] At that time the parties made it clear that issue of priorities were not in dispute. The Master as a result concluded she had jurisdiction and the parties proceeded with their submissions. The Master adjourned the matter over to May 7, 2014 for her oral judgment.
- [35] On May 7, 2014 when counsel appeared to receive judgment counsel for the petitioner sought to file a supplementary affidavit of Mr. Thompson correcting an error in his earlier affidavit. In response the respondent produced a further affidavit. The Master permitted counsel to re-open the matter, both affidavits were admitted and the matters was adjourned for further submissions as a result of the new evidence.
- [36] On May 12, 2014 the Master heard further submissions and gave the oral reasons that are the subject of this appeal.
- [37] In my view the order made, given it simply determined the amounts due to the respondents, was not a final order because firstly it did not address the issue of priorities and secondly because the final order was in fact the order nisi.
- [38] As a result, given the order appealed from is not a final order and does not raises an issue of law the standard of review is correctness and the appeal is not to be allowed unless the Master was clearly wrong.

Decision of the Master

- [39] The Master found on the evidence that Sunset Cove Marina & Grill Inc. and Allen Radford paid to J R Thompson Ltd. the sum of \$152,808.06 consisting of the sum of \$120,000 and the sum of \$32,806.06. The evidence of Mr. Thompson was that he received "the approximate amount of \$120,000" plus the final payment of \$32,806.06. Mr. Radford stated that he paid \$120,000 plus \$32,806.06. She noted that Brandee Radford did not contradict that evidence.
- [40] She then said:
- [3] Now I have read the new affidavit saying Brandee Radford made five payments and the new affidavit from Mr. Radford saying that he actually provided the money to her to make those payments. The evidence is not perfect. We do not have the perfect paper record to show every transaction, but I am satisfied with the affidavit of Mr. Radford and those documents that he has been able to locate that he actually put the money up to make these payments, and I do not have Brandee Radford denying it. So, I still find that Mr. Radford made the payments. Mr. Radford did not owe money to Mr. Thompson. He made the payments on behalf of Brandee Radford on condition that the mortgage would be assigned to him once he paid off the amount owed to Mr. Thompson.

- [4] The assignment of the mortgage document written by JR Thompson and signed by Mr. Radford is incorrectly worded, and both signatories to the agreement agree that the document does not reflect the actual situation. No one has rebutted that evidence.
- [5] It would be unjust to limit Sunset's recovery to the amount stated in that assignment. So to limit their recovery to \$32,000 would, in my view, be unjust when there is evidence that it also paid \$120,000 to JR Thompson and intended to have all the amount secured, not just the final payment secured.
- [6] The document is imperfect. The financial paper trail is equally imperfect. We are being told that approximately \$120,000 was paid rather than an exact figure, but both parties agree that those monies were paid, and I do accept that evidence.
- [7] I do not find it fair to have Brandee Radford benefit by having this amount paid to reduce her tax debt when she apparently paid nothing. I find no justification for that at all, and she is not here to complain about unfairness.
- [8] I do find Sunset Cove Marina is owed \$152,806.06, plus special costs and interest, but I picked up on that as well, Mr. Barton. That has not been proven yet, so I do not know what those special costs and interest would be.
- [41] Before addressing the sufficiency and reliability of the evidence I will consider the argument of the petitioner that since the mortgage did not permit re-advances once it was paid off it could no longer support the value ascribed to it by Sunset Cove Maria & Grill Inc.
- [42] That submission assumes that the payments were made in reduction of the respondent Brandee Radford's debt, not as payments made towards a future assignment of the fourth mortgage. It is the latter that the Master found was the case.
- [43] The Master held that both parties to the agreement stated that the payments were to be credited towards the future assignment of the mortgage. The respondent Brandee Radford did not appear and did not file a response disputing that was the case. As a result the only evidence the Master received was the evidence of the oral agreement from both parties asserting there was such an agreement along with less than "perfect" financial documentation. As both parties testified to agreeing on the same terms of the mortgage assignment agreement, the amount paid and that it was paid in full, the Master accepted this was the case.
- [44] I cannot say the Master was clearly wrong in reaching that conclusion. As a result the payments to J R Thompson Ltd. were not re-advances but were payments against the "Purchase Price" in order that Sunset Cove Marina & Grill Inc. could take an assignment once all of the purchase price had been paid in return for the assignment of the security paid off the debt and the mortgage assigned to Sunset Cove Marina & Grill Inc. remained as security for sum paid.
- [45] As a consequence the issue of re-advances not being permitted does not arise.

[46] The issue then is whether the value shown on the assignment of the mortgage, if in error, prevents Sunset Cove Marina and Grill Inc. and Allen Radford from claiming entitlement to the funds sought. Before considering this issue I turn to the issue of whether the matter was suitable for summary disposition.

Sufficiency of the Evidence for Summary Trial

[47] The petitioner also claims that the Master failed to consider the standard of proof the respondent was required to establish and that the Master erred in finding that Sunset Cove Marina & Grill Inc. had provided sufficient evidence to support the value of the mortgage as claimed.

[48] The petitioner challenges the evidence of the payments made on the basis that the materials produced are incomplete and fail to sufficiently substantiate the alleged agreement or the amounts paid. They also submit that the subsequent affidavits correcting errors in the earlier affidavits lead to additional concerns respecting the credibility of the parties and the materials before the Court.

[49] Those criticisms however must be considered in the context of the evidence as a whole. While the materials before the Court were "not perfect" as noted by the Master, the Master was able to make her determination based on the evidence before the Court establishing the following:

- a) There was the uncontradicted evidence of Mr. Radford and Mr. Thompson regarding the agreement to purchase an assignment of the mortgage.
- b) The only two parties to the alleged agreement and the payments made were Mr. Radford on behalf of Sunset Cove Marina & Grill Inc. and Mr. Thompson of J R Thompson Ltd. Mr. Radford confirmed that Sunset Cove Marina & Grill Inc. made the payments of \$120,000 and Mr. Thompson confirmed that he received such an amount. Brandee Radford did not contradict that this payment totalling \$120,000.00 was made.
- c) While there was not a complete paper record of the payments made including those provided by Mr. Radford but paid by Brandee Radford, Ms. Radford did not appear and dispute that is what had occurred.
- d) There was no dispute that Sunset Cove Marina and Grill Inc. paid the remaining \$32,806.06.
- e) The assignment of mortgage document contained an error in that it failed to express the full amount paid for it.

[50] With respect to the submissions respecting issues of credibility and reliability of the evidence the criticisms arise with respect to the affidavits of Mr. Thompson and Mr. Radford. Mr. Thompson originally swore that all payments received by him came from either Mr. Radford or Sunset Cove Marina and Grill Inc. He stated that, "I received no payments from Brandee Radford". In his supplementary affidavit of May 6, 2014 he stated

that on a review of his records he realized that was not accurate. He stated in his supplementary affidavit that he had in fact received 18 post-dated cheques commencing with the August 15, 2009 payment drawn on the account of Brandee Radford and that the first five cheques were honoured and the next three were returned NSF and the remaining cheques were returned to him by his financial institution.

- [51] Mr. Radford in his supplementary affidavit sworn on May 7, 2014 confirmed that he had made all of the payments but that the first five cheques while drawn on Brandee Radford's bank account due to his absence from BC and were from funds provided by him to Brandee Radford for that purpose.
- [52] There is no evidence from Brandee Radford confirming or denying these assertions.
- [53] The errors have been explained and to some extent substantiated from bank statements provided by Mr. Radford showing transfers of funds to Brandee Radford's account.
- [54] This is not a case where there is a conflict in the evidence that cannot be resolved without assessing credibility. Rather, the parties with knowledge of what occurred and who were the sole parties to the agreement are the ones with the necessary knowledge and they are *ad idem*.
- [55] The explanation of Mr. Radford and Mr. Thompson is the only one that makes sense. It does not make sense that Mr. Radford and Sunset Cove Marina and Grill Inc. would make the payments voluntarily when they had no obligation to do so. Mr. Radford and Sunset Cove Marina and Grill Inc. were attempting to prevent a foreclosure and in return expected to recover what was paid under the mortgage that was assigned to Sunset Cove Marina and Grill Inc.
- [56] I note as well that during submissions the suitability for summary resolution was not argued in any significant way, indeed it was only referred to in passing. In addition no application was made to cross-examine the affiants.

Rectification

- [57] The respondent states that this situation is somewhat akin to rectification but acknowledges that in rectification normally the protagonists are the parties who entered into the contract where one party seeks rectification on the basis the document does not reflect the intention of the parties. In other words it only arises if there is a disagreement between the parties as to what the terms of the contract were.
- [58] In Fridman, *The Law of Contract*, 6th ed. (2011), at pp. 773-774 the author states:

The essence of rectification is to bring the document which was expressed or intended to be in pursuance of a prior agreement into harmony with that prior agreement. It deals with the situation where, contracting parties have reduced into writing the agreement reached by their negotiations, some mistake was made in the wording of the final, written contract, altering the effect, in whole or in part, of the contract. What the court does is to alter the document, in accordance with the evidence, and then enforce the document as changed.

(Adopted in *Kootenay Savings Credit Union v. Toudy* 1987 CarswellBC 262 (BCSC).)

- [59] In this instance there was no document evidencing the agreement. Instead the only documentation consists of the financial records and the registered Assignment of Mortgage.
- [60] The respondent submits that assistance is found in *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 93 D.L.R. (3d) 221 (Ont. S.C. H.C.J.) at para. 13, where the Court noted "a Court had jurisdiction to rectify an agreement if there was a common continuing intention in regard to a particular provision of the agreement".
- [61] The petitioner submits that the evidence falls short of establishing such a common continuing intention noting that Brandee Radford and Allen Radford had been spouses and that Allen Radford was attempting to keep the enterprise afloat, the implication being that Mr. Radford had additional reasons arising from his relationship with Brandee Radford for seeking to have the assigned mortgage secure the larger sum. The difficulty with that assertion however is that it is contradicted by the statement of Mr. Thompson, the only other party to the agreement. Both Mr. Radford and Mr. Thompson confirm that they agreed that the mortgage was purchased with payments made over time and that the Assignment reflects the final payment made. There is no dispute between them.
- [62] The petitioners further submit that they are entitled to rely on the amount shown in the assignment as the amount paid and that none of the earlier payments are secured by the mortgage on the basis that the parties to the assignment cannot "rectify" the assignment if third party purchasers for value without notice are affected.
- [63] In *Chegancas v. Weeks* (1998), 78 A.C.W.S. (3d) 392 (Ont. C.J. Gen. Div.), the issue of rectification and the rights of third parties was addressed quoting from *Consortium Capital Projects Inc. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (H.C.J.).
- [64] At page 766, Mr. Justice Gray stated:
- ... although it has been said that rectification should never be granted when the rights of third parties are affected, the proper test is whether the third party relied on the document as executed and took action based on that document. This proposition or principle flows from the reasoning of Spence J. in the Supreme Court of Canada in *Augdome Corp. Ltd. v. Gray* (1974), 49 D.L.R. (3d) 372 and as outlined by Hallett J. in *Federal Business Development Bank v. Elcom Petroleum* (1983), 58 N.S.R. (2d) 246

- [65] It is unlikely that rectification applies in the circumstances of this case, but in any event the above test if applied would in my view determine the issue. The J R Thompson Ltd. mortgage assignment is dated August 2, 2013 and it was registered in the land title office on the same day. However, solicitors for the petitioner were advised on December 5, 2013 by then counsel for Sunset Cove Marina & Grill Inc. that the value of the mortgage was \$180,200.46 as of November 6, 2013 with a per diem of \$34.25. Hence the petitioner was aware that the amount claimed was not restricted to the face amount of the assigned J R. Thompson Ltd. mortgage before they purchased the security and foreclosure from the Royal Bank of Canada. The assignment agreement between the Royal Bank of Canada and the petitioner is dated January 21, 2014.
- [66] As a result the petitioner cannot establish that it relied on the face amount of the assignment to its detriment.
- [67] For the above reasons I am not satisfied that the Master erred.
- [68] The appeal is dismissed with costs to the respondent Sunset Cove Marina & Grill Inc.
- "Punnett J."

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