

CANADA / JUDGMENT

First West Credit Union v. Giesbrecht

2013 BCSC 564

COURT

Supreme Court of British Columbia

DECIDED

1 May 2013

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2013 BCSC 564 First West Credit Union v. Giesbrecht

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

First West Credit Union v. Giesbrecht,

2013 BCSC 564

Date: 20130501

Docket: FJ S21349

Registry: Vancouver

Between:

First West Credit Union

Petitioner

And

Doris Inge Giesbrecht, Steven Lawrence Kirzner,

Mia Gita Mackoff, Morbank Financial Inc., Eric Alan Burton,

Pro Street Automotive Ltd., Aventur Energy Corporation

(formally Doig River Resources Ltd.) dba Doig River Enterprises Ltd.;

and Eric Alan Burton dba 0473117 B.C. Ltd., or in the alternative,

0743117 BC Ltd., and the said 0743117 BC Ltd.

dba 0473117 BC Ltd.

Respondents

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

in Chambers

Counsel for Petitioner:

W. Roberts

L. Bevan

Counsel for Respondents Kirzner and Mackoff:

D.B. Hyndman

Counsel for Respondent Morbank Financial Inc.:

D. Crerar

K. Bienvenu (A/S)

Counsel for Respondent Burton and

0473117 B.C. Ltd.

R.J. McDonell

Appearing on her own behalf:

Doris Giesbrecht

Appearing on behalf of 0476779 B.C. Ltd.

William Grantmyre

Place and Date of Hearing:

Vancouver, B.C.

February 6-7, 2013

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2013

I. introduction

- [1] These proceedings raise the issue of whether or not a mortgagee's security is affected where the mortgagor, the registered owner of the subject indefeasible title, acquired the fee simple estate as a result of a voidable conveyance.

- [2] For the reasons that follow, I hold that the petitioner mortgagee's security is not affected and accordingly the petitioner is entitled to an order nisi of foreclosure.

II. The Properties

- [3] The three properties involved are:

- (a) 10493 Alder Road, Fort St. John, British Columbia

P.I.D. 009-297-the Company

Lot 11, Block 3, Section 2, Township 84, Range 19 West of the 6th Meridian

Peace River District Plan 9723;

- (b) 10415 Alder Road, Fort St. John, British Columbia

P.I.D. 012-806-960

Lot 10, Block 3, Section 2, Township 84, Range 19 West of the 6th Meridian

Peace River Plan 9723;

- (c) 10420 Alaska Road, Fort St. John, British Columbia

P.I.D. 010-730-541

Lot 8, Block 1, Section 36, Township 83, Range 19 West of the 6th Meridian

Peace River District Plan 9723;

(collectively the "Properties")

- [4] The Properties are tenanted commercial properties.

III. The Parties

- [5] The petitioner, First West Credit Union, is a credit union incorporated under the laws of our Province. First West holds a first mortgage and an assignment of rents over the Properties.
- [6] The respondents, Steven Kirzner and Mia Mackoff, are businesspersons. They hold a second mortgage and an assignment of rents over the Properties.
- [7] The respondent, Doris Giesbrecht, is a businessperson. She is the registered owner of the Properties.
- [8] The respondent, Eric Burton, is a businessperson. As described in greater detail below, he was previously the sole voting common shareholder and director of 0476779 B.C. Ltd. ("779"). In March 2011, 779 owned the Properties and transferred them to Ms. Giesbrecht.

- [9] The respondent, Morbank Financial Inc., is a corporation incorporated under the laws of Alberta. Morbank seeks to collect on a debt owed to it by Mr. Burton. Morbank holds certificates of pending litigation over the Properties. The certificates were filed after the date the first and second mortgages were registered.
- [10] The commercial tenants of the Properties are:
- (i) Aventur Energy Corporation doing business as Doig River Enterprises Ltd.;
 - (ii) Pro Street Automotive Ltd.;
 - (iii) Mr. Burton doing business as 0473117 B.C. Ltd., or in the alternative 0743117 B.C. Ltd. and said 074117 B.C. Ltd. doing business as 0473117 B.C. Ltd. ("117").
- [11] William Grantmyre is a businessperson. He has filed a response to First West's petition on behalf of 779. 779 is not a named respondent in the proceedings. Mr. Grantmyre is a respondent in the related action brought by Morbank in this Court (Morbank Financial Inc. v. 0476779 B.C. Ltd. and others (Action No. S124690, Vancouver Registry) (the "Morbank Action")).
- [12] Roger Field is a businessperson. He is also indebted to Morbank and is a respondent in the Morbank Action but he is not a respondent in the current proceedings.

IV. Relief Sought

- [13] First West is applying for an order nisi of foreclosure with a six-month redemption period. Mr. Kirzner and Ms. Mackoff, the second mortgagees, are applying for conduct of sale and the appointment of a receiver for the Properties.
- [14] Ms. Giesbrecht does not oppose the foregoing applications, but asks for a longer redemption period and for the conduct of sale and the appointment of a receiver to be postponed until the expiration of the redemption period. Mr. Grantmyre shares Ms. Giesbrecht's position.
- [15] Morbank does not oppose an order for sale or the second mortgagees' application for a receiver and conduct of sale. However, Morbank seeks to have any sale proceeds and other amounts, such as rents from the Properties collected by the receiver, paid into Court pending a resolution of the competing claims. In the Morbank Action, Morbank does not claim against any of the three mortgagees (First West, Mr. Kirzner, Ms. Mackoff).
- [16] Mr. Burton asks that First West's application be dismissed. In short, his position is that the Properties were transferred by 779 to Ms. Giesbrecht as part of a conspiracy by Ms. Giesbrecht, Mr. Field and Mr. Grantmyre and others (but not First West, Mr. Kirzner or Ms. Mackoff) to defraud him and obtain the Properties for their benefit. Accordingly, Mr. Burton's position is that the mortgage held by First West and the second mortgage held by Mr. Kirzner and Ms. Mackoff are invalid. Mr. Burton, in his response to this application, relies on the pleadings in the Morbank Action, in which Morbank has pleaded that the transfer of the Properties by 779 to Ms. Giesbrecht and the dilution of Mr. Burton's

shareholdings were fraudulent conveyances.

- [17] In the alternative, Mr. Burton says the issues arising in these proceedings are not suitable for determination by petition.
- [18] First West notes that Mr. Burton's allegations are disputed by many of the parties to these proceedings and those of the Morbank Action.
- [19] For the purposes of the current application only, First West is willing to proceed with its argument on the basis that Mr. Burton's allegations are not disputed.
- [20] The relief sought by First West and the second mortgagees, Mr. Kirzner and Ms. Mackoff, is the usual type of relief associated with the foreclosure of tenanted commercial properties. It is Mr. Burton's allegations that make the current proceedings different. For this reason, Mr. Burton's legal position warrants particular examination.

V. Mr. Burton's Facts (Admitted or Pleaded)

- [21] In this section, I will summarize Mr. Burton's facts either admitted or pleaded by him in these proceedings or the Morbank Action.
- [22] Mr. Burton was the sole voting common shareholder, director and president of 779. A corporation owned by relatives of Mr. Burton held a number of non-voting preferred shares. His ownership of shares in the capital of 779 were his only assets of note. The primary assets of 779 were the Properties and a property located at 10416 Alaska Road, Fort St. John, British Columbia.
- [23] In January 2009, Morbank obtained a judgment against Mr. Burton, Mr. Field and three others (644036 Alberta Ltd., 1224420 Alberta Ltd. and Robert Murray), for \$1,047,304.01. The debtors were jointly and severally liable.
- [24] Morbank took steps to enforce the Judgment. In the Morbank Action, Morbank has pleaded that in September 2010, it seized Mr. Burton's shares in the capital of 779. Mr. Burton has pleaded that any seizure is outside his knowledge. In the Morbank Action and in the proceedings at bar, Mr. Burton has pleaded specifically "until on or about November 2, 2010", the shareholdings were as described in paragraph 22 above.
- [25] In 2010, Ms. Giesbrecht, Mr. Field, a Mr. Mark Martel, a Mr. Darren Zimmerman, Mr. Grantmyre and Tenant-in-Common Corporation ("TIC Co.") (collectively, the "Third Parties") conspired to defraud and deprive Mr. Burton of his 100% ownership of voting common shares in the capital of 779 and, in turn, to obtain the assets of 779 for their benefit. To reach this goal, in the fall of 2010, Mr. Field fraudulently misrepresented to Mr. Burton that he should resign as sole director of 779.
- [26] Mr. Burton acted on Mr. Field's fraudulent misrepresentation that he should resign.

- [27] After Mr. Burton resigned, the Third Parties, without Mr. Burton's consent, caused 779 to issue further shares in the capital of 779. The further shares were issued to TIC Co.
- [28] The issuance of further shares deprived Mr. Burton of his control of 779 and of most of the value of his shareholding in the capital of 779.
- [29] Subsequent to the Third Parties taking control of 779, they caused the Properties to be transferred from 779 to Ms. Giesbrecht without any or adequate consideration for Mr. Burton's benefit, and to the wrongful benefit of the Third Parties.
- [30] Ms. Giesbrecht encumbered the Properties with mortgages totalling \$1,607,500:
- (a) March 23, 2011, First West, \$1,257,500;
 - (b) May 7, 2012, Kirzner and Mackoff, \$350,000.
- [31] In his Response to Notice of Civil Claim in the Morbank Action, Mr. Burton pleaded that the transfer of the Properties and the detention of his shares constituted "misappropriation of [his] legal and beneficial proprietary interests, and amounts to fraudulent conveyances, intended to delay, hinder and defraud [his] creditors". Mr. Burton asked that the Morbank claim against him be "dismissed against [him] with costs."
- [32] On September 13, 2012, Mr. Burton swore an affidavit in the Morbank Action in which he described his motives for resigning as the sole director of 779:
- 2. I resigned from the defendant 0476779 B.C. Ltd. around November 2010. Before then, I had tried to obtain a loan to pay back the Morbank debt referred to in the John Tiberio affidavit. I wanted to use the properties owned by my company 0476779 B.C. Ltd. to raise the funds. A local bank would not lend money to the defendant 0476779 B.C. Ltd. by reason of my unsatisfactory personal credit history.
 - 3. I told this to Mr. Field, a co-Judgment debtor, whom I trusted as a professional. Mr. Field told me that the defendant 0476779 B.C. Ltd. would never be able to obtain a loan while I was still attached to the company. I believed him.
 - 4. He told me to resign from the company, so that he could raise funds on my behalf. I did so.
 - 5. Mr. Field also told me to get the minute books and other records for 0476779 B.C. Ltd. and send them to an address in Chilliwack. I did so.
 - 6. Since then, Mr. Field has told me nothing about the operations of the company, simply telling me that the loan was being arranged but would require more time. He mentioned various complexities I did not understand to justify the delays.
 - 7. I never authorized Mr. Field or anyone else to issue new shares. At no time did I intend, by resigning, to give any ownership of the defendant 0476779 B.C. Ltd or its properties to anyone, or to give anyone control over the company, or to remove me from running or owning the company. My intent at all times was to simply permit Mr. Field to obtain the

financing he said he could get. Mr. Field was to use my absence from the defendant 0476779 B.C. Ltd. to arrange a loan to pay Morbank, no more. At all times, that is what I thought was happening. I never knew about the dilution of my shareholding until counsel for the Plaintiff told me that at an Examination in Aid of Execution.

Doris Giesbrecht

8. I have spoken with the defendant Doris Giesbrecht twice, I believe, both times over the telephone. The calls concerned leasing/administrative matters regarding property owned by the defendant 0476779 B.C. Ltd. She never told me the defendant 0476779 B.C. Ltd. had conveyed property to her. I thought she was some kind of an assistant to Mr. Field. I first learned of a conveyance when counsel for the Plaintiff told me that at an Examination in Aid of Execution.
- [33] Mr. Burton denies any wrongdoing.
- [34] There is no allegation that First West, Mr. Kirzner or Ms. Mackoff had any knowledge of any fraud or other irregularities when funds were loaned to Ms. Giesbrecht and the mortgages taken as security.
- [35] In his pleadings, Mr. Burton also asserts:
- (a) The shares in the capital of 779 that were issued to TIC Co. were issued unlawfully contrary to the British Columbia Business Corporations Act, S.B.C. 2002, c. 57 ("BCBCA"), and the Articles of Incorporation of 779.
 - (b) The Third Parties' conduct gave rise to obligations in trust and equity owed by the Third Parties to Mr. Burton and, in the result, any and all benefits held or controlled by 779 or the Third Parties as a result of their conduct including, without limitation, unlawful issuance of the additional 50,000 share of 779, the transfer of the Properties and the mortgage of the Properties, are held in trust for the benefit of Mr. Burton.
 - (c) The Third Parties' conduct resulted in the affairs of 779 including, without limitation, the appointment of directors, the exercise of powers of the directors of 779, the issuance of shares and transfer of property being conducted in a manner oppressive and unfairly prejudicial to Mr. Burton as shareholder as contemplated by section 227 of the BCBCA.
 - (d) Mr. Burton relied and acted upon Mr. Field's misrepresentations, and as a result suffered damage, injury and loss.
- [36] Mr. Burton's pleadings do not deny that he was indebted and Morbank was pursuing collection when the Properties were transferred from 779 to Ms. Giesbrecht.

VI. Mr. Burton's Legal Basis

[37] Mr. Burton argues that section 23(2)(i) of the Land Title Act, R.S.B.C. 1996, c. 250, (the "LTA"), section 25.1 of the LTA, our Court of Appeal's decision in *Gill v. Bucholtz*, 2009 BCCA 137, and this Court's decision in *Reliable Mortgages Investment Corp. v. Chan*, 2011 BCSC 1080, support his overall position (including his position in the Morbank Action) that the Properties should be restored to 779 free and clear of the First West first mortgage and the Kirzner and Mackoff second mortgage. He further says that the principle *nemo dat quod non habet* (no one can give what he or she does not have) applies.

[38] Section 23(2)(i) of the LTA reads:

23. (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:

...

(i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;

[39] Section 25.1 of the LTA reads:

25.1 (1) Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.

(2) Even though an instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument, and

(b) in good faith and for valuable consideration, purports to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

(3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument,

(b) is, on the date that this section comes into force, the registered owner of the estate, and

(c) in good faith and for valuable consideration, purported to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

- [40] In Gill, the plaintiff was the registered owner of certain real property ("Lot 4"). A rogue forged the plaintiff's signature on a transfer of Lot 4 to a person ("GG") who was working in concert with the rogue. Based on the forged transfer, GG became the registered owner of Lot 4. GG then purported to grant mortgages to the defendants. The plaintiff succeeded in having the registration of Lot 4 restored to his name unencumbered by the mortgages of the defendants. The mortgages were held to be void.
- [41] In Reliable Mortgages, the rogue used a forged power of attorney purportedly signed by the respondent in order to obtain funds from the petitioner based on the security of a mortgage on the respondent's property. The petition for foreclosure based on the mortgage was dismissed. The mortgage was held to be void.

VII. Analysis

- [42] For the exception found in section 23(2)(i) to apply, Mr. Burton must be shown to be a "person deprived of land". On the facts pleaded, Mr. Burton never owned the Properties. 779 did. Until around November 2, 2010, Mr. Burton was the sole voting common shareholder of 779 but this did not make him the owner of the Properties. However, in the Morbank Action, Mr. Burton does seek to have the Properties "restored to the rightful owner", which in his view is 779. This leads to the question of whether or not the Properties, if restored to 779, would still be subject to the charges of the mortgages. The answer to this question will depend upon whether or not the conveyances are voidable or void. As I will explain in greater detail below, if the conveyances are voidable, the Properties will remain subject to the charges of the mortgages.
- [43] In both Gill and Reliable Mortgages, the instruments were void because they derived from forgeries - a forged transfer document and a forged power of attorney, respectively. Here, 779 did in fact transfer the Properties to Ms. Giesbrecht.
- [44] The distinction illustrates the nemo dat principle. In Gill and Reliable Mortgages, the rogues had no property or interest to transfer. Accordingly, any purported transfer would be void. The nemo dat principle applies because the rogues could not give what they did not have. By contrast, 779 did have an interest to transfer to Ms. Giesbrecht, it being the rightful registered owner of the Properties.
- [45] The LTA has departed from the nemo dat principle where there is a "void" instrument for some limited acquisitions involving fee simple estates. I note that section 1 of the LTA defines "instrument". For the case at bar, its definition is not of significance. The key word for the case at bar is "void".
- [46] In section 25.1, the nemo dat rule is first expressed and then overridden for instruments purporting to transfer fee simple estates that become registered or were registered when section 25.1 came into force.

- [47] Section 25.1(1) expresses the nemo dat rule. A person "who purports to acquire land or an estate or interest in land by registration of a void instrument" acquires nothing. Section 25.1(2) then deems an instrument purporting to transfer a fee simple estate to have given the transferee indefeasible title upon registration (but not lesser estates or interests). Section 25.1(3) is a similar exception to the nemo dat principle for registrations of fee simple estates that occurred prior to section 25.1 coming into force. The exceptions are limited to bona fide transferees for value of fee simple estates.
- [48] Some examples may help to illustrate the workings of section 25.1. For example, if A had been the registered owner of Blackacre and R (as in rogue) through forgery becomes the registered owner of Blackacre and then sells to B, a bona fide purchaser for value, B will be deemed to be the registered owner on registration. This will be so "even though [the] instrument purporting to transfer [the] fee simple estate" from A to R is void. Under the nemo dat principle, B would have had nothing because R had nothing to give. The fee simple estate would be A's. As a result of section 25.1(2) (or subsection (3) as the case may be), B will be the registered owner. A will lose his or her fee simple estate. A's recourse will be to claim under the "assurance fund" pursuant to section 294.91 of the LTA.
- [49] Even in the situation where R represents himself to be A on a transfer instrument which B registers, B will be the registered owner provided B acted in good faith and gave valuable consideration for the purported acquisition of A's fee simple estate. Again, the nemo dat rule is overridden.
- [50] The nemo dat rule is not overridden if in either of the two foregoing examples B had taken a mortgage rather than a fee simple estate. Sections 25.1(2) or (3) do not afford relief for transfers of an estate or interest less than a fee simple estate. As our Court of Appeal stated in Gill:
- [26] Returning to the case at bar, it seems to me that the chambers judge's conclusion that the Act gives any registered owner - even a fraudster - an "indefeasible right to deal with the property" rests on a misapprehension of s. 23(2)(i) and fails to give effect to the Act as it now reads. The chambers judge himself recognized that a registered charge does not obtain the same quality of indefeasibility as the registered fee simple, but he failed to apply this principle. On its plain meaning, the exception in s. 23(2)(i) to the indefeasibility of title applies and the phrase "void instrument" in s. 25.1(1) includes a mortgage taken from a person who obtained her title by fraud or forgery, as occurred in this case. The Act preserves the nemo dat rule with respect to charges - even where the holder has relied on the register and dealt bona fide with a non-fictitious registered owner. The mortgagees in this case did not acquire any estate or interest in Lot 4 on registration of their instruments because having been granted by a person who had no interest to give, those instruments were void, both at common law and under s. 25.1(1). With respect, I conclude that the chambers judge erred in law in his interpretation of the scope and nature of indefeasibility in the context of the scheme, and in "applying a principle in favour of indefeasibility ... [by assuming] the answer to the ... question presented for decision." (Vassos, [Vassos et al. v. State Bank of

South Australia [1993] 2 V.R. 618 (S.C.), at 322.)

- [51] In Gill, the interests of the two mortgagees were void both under common law and section 25.1 of the LTA because, as the Court of Appeal notes, the rogue "had no interest to give". The plaintiff in Gill had no knowledge of either the forged transfer or the purported mortgage.
- [52] I do not read Gill as applying to voidable transactions as far as the consequences may relate to a bona fide third party for value and without notice. I also do not read the LTA in this respect as displacing the common law. The LTA does not have language that unmistakably states such. In discussing the abrogation of a clear principle of the common law by statute, our Court of Appeal in *Seven Mile Dam Contractors v. British Columbia* (1980), 25 B.C.L.R. 183, stated:
- [12] The second point made by Miss Gow was that in the Interpretation Act, because a person is defined to include a partnership, P2 was taxable on the full price. The weakness of that argument is that it assumes the general law of partnership is displaced in relation to the Social Services Tax Act by a definition from the Interpretation Act. There is a rule of construction of statutes that new principles are not to be introduced into any branch of the law except by clear language.

- [13] I quote the following passage from Craies on Statute Law (7th ed. 1971) at p. 339:

If it is clear that it was the intention of the legislature in passing a new statute to abrogate the previous common law on the subject, the common law must give way and the statute must prevail; but there is no presumption that a statute is intended to override the common law. In fact the presumption, if any, is the other way, for "the general rule in exposition is this, that in all doubtful matters, and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare¹⁰." It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion.¹¹

- (10) Per cur. 1 *Arthur v. Bokenham* (1708) 11 Mod. 150; *Secretary of State for India v. Bank of India Ltd.* (1938) L.R.65 I.A. 286, 298, per Lord Wright.

- (11) Per Devlin J. in *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 648 (D.C.).

- [53] In the Morbank Action, Morbank has pleaded that the transfer from 779 to Ms. Giesbrecht was a fraudulent conveyance. The mortgagees in these proceedings (First West, Mr. Kirzner and Ms. Mackoff) are not defendants in the Morbank Action and no allegations of wrongdoing have been pleaded against any of them. As a defendant in the Morbank Action, Mr. Burton has also pleaded that the transfer of the Properties to Ms. Giesbrecht "constitute misappropriation of Burton's legal and beneficial proprietary interests, and amounts to fraudulent conveyances, intended to delay, hinder and defraud Burton's creditors"

[54] With respect to fraudulent conveyances, the law is primarily case law and not statute. Chief Justice Finch notes this aspect in *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521, where the Chief Justice cites (at para. 36) Professor C.R.B. Dunlop, Uniform Law Conference of Canada, Civil Law Section (August 2004):

... Since 1571, the courts have been active in creating a large and complex body of law which purports to interpret the Statute but which in reality constructs a new right in "creditors and others" to challenge and avoid fraudulent conveyances.

[55] In its entirety, the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 ("FCA") reads:

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

- (a) a disposition of property, by writing or otherwise,
- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[56] Under the law of fraudulent conveyance, if the conveyances from 779 to Ms. Giesbrecht were to be set aside, 779 would take subject to the mortgages. Although section 1 of the FCA uses the word "void" and not "voidable", section 2 makes it clear that the conveyance will not be void as against one who acted bona fide without notice and for value. Our Court of Appeal's reasons in *Taylor Ventures Ltd. (Trustee of) v. High Meadow Holdings Ltd.*, 2008 BCCA 80, reflects this proposition. See also: *Waters' Law of Trusts in Canada*, (Toronto: Thomson Canada Ltd., 2005) at p. 332:

[57] I note that, as a general principle of contract law, where a contract is tainted by fraud, there is not "real consent" and the contract will be voidable. The Supreme Court of Canada recently described the legal effect of a contract tainted by fraud in *i Trade Finance Inc. v. Bank of Montreal*, 2011 SCC 26:

[45] Fraud makes an agreement voidable, not void: A. Swan, *Canadian Contract Law* (2nd ed. 2009), at p. 656; G. H. L. Fridman, *The Law of Contract in Canada* (5th ed. 2006), at p. 293; 434438 B.C. Ltd. v. R.S. & D. Contracting Ltd., 2002 BCCA 423, 171 B.C.A.C. 111, at para. 34. This long-standing proposition is exemplified by *Bawlf Grain Company v. Ross* (1917), 55 S.C.R. 232, in which Fitzpatrick C.J. wrote, at p. 233:

What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co. v. Ayscough* [6 E. & B. 761], the defence was that the contract was induced by fraud and Lord Campbell C.J. said: -

It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded.

See also *Allcroft v. Adams* (1907), 38 S.C.R. 365, at pp. 375-76, per Idington J.; *Racicot v. Bertrand*, [1979] 1 S.C.R. 441, at p. 453, citing *United Shoe Machinery Company of Canada v. Brunet*, [1909] A.C. 330 (P.C.), at p. 339.

[46] When an agreement is induced by fraud, it is the innocent party's consent to the agreement that has been fraudulently obtained. As Professor Fridman says, "[a] contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent [and it] may be revoked at his option" (p. 286 (footnotes omitted)). However, since the decision to revoke the consent and avoid the contract falls to the innocent party, that party may elect to waive the fraud and not to avoid the contract (Swan, at p 657).

[58] In sum, based on his pleadings, Mr. Burton may have been deceived (though I make no finding on this point), which may give rise to other remedies, but it will not enable him to have the Properties restored to 779 free and clear of any mortgages based on the LTA or the nemo dat principle.

[59] Mr. Burton has also pleaded the "oppression" and "unfairly prejudicial" provision of the BCBCA with respect to the affairs and the actions of the Third Parties in taking control of 779. Mr. McDonnell, counsel for Mr. Burton, stated in argument that he was not relying upon either of these provisions to base his client's opposition to First West's foreclosure application.

VIII. Ancillary Matters

[60] Mr. Burton's company, 117, is also one of the tenants of the Properties. Mr. Burton asked that the appointment of a receiver not apply to 117. The other two tenants, Aventura and Pro-Street, have been paying rent into trust. Mr. Hyndman, counsel for the second mortgagees, noted the May 3, 2012 "Standard Estoppel Certificate for Commercial Lease" signed by Mr. Burton on behalf of 117. On its face, the estoppel certificate recognized the lease and 117's obligation to pay rent. Mr. Hyndman also noted that to the extent that there were other arrangements, the receiver as an officer of the Court could investigate such and report back to the Court.

[61] With respect to the second mortgagees' conduct of sale of the Properties, at hearing, Mr. Hyndman stated that the mortgagees would not need to have conduct until two or three months following the date of these reasons.

IX. Disposition

- [62] The order nisi of foreclosure with a six-month redemption period is granted.
- [63] The second mortgagees, Mr. Kirzner and Ms. Mackoff, will have exclusive conduct of sale starting two months from the date of this judgment. The order will be based on the Minutes of Form of Order proposed by the second mortgagees subject to approval by counsel for First West, Morbank and Mr. Burton, with liberty to apply.
- [64] D. Manning & Associates will be appointed as a receiver of the Properties based on the Minutes of Form of Order proposed by the second mortgagees subject to approval by counsel for First West, Morbank and Mr. Burton, with liberty to apply.
- [65] Counsel shall prepare a draft of an order that reflects the related declarations and orders sought by First West in its petition and the second mortgagees in their application as are necessary and consistent with the foregoing reasons and orders.
- [66] The parties may speak to costs.
- [67] If there are other matters that should be addressed, there is liberty to apply.

"Funt J."

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