

CANADA / JUDGMENT

Fraser Valley Credit Union v. Siba

2001 BCSC 744

COURT

Supreme Court of British Columbia

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2001 BCSC 744 Docket:

S10784

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FRASER VALLEY CREDIT UNION
PETITIONER

AND:

DELINDA ANN SIBA, JEAN ALBERTA LITZENBERGER,
HOUSEHOLD REALTY CORPORATION LIMITED,
THE OWNERS, STRATA PLAN NW2237
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LYNN SMITH

Counsel for the Petitioner: P. Keighley, Q.C.

Counsel for the Respondents: E. Morris

Date and Place of Hearing/Trial: Vancouver, BC

December 5, 2000

INTRODUCTION

- [1] In these proceedings the foreclosure order was made on October 2, 2000; the issue of priority as between the first and second mortgages registered against the title was tried separately.

EVIDENCE AND FINDINGS OF FACT

- [2] The petitioner, Fraser Valley Credit Union, approved a mortgage loan to the respondents Siba and Litzenberger on September 17, 1997. On that date there was already a first mortgage against the property in favour of Security Home Mortgage Investment Corp. and a second mortgage in favour of Household Realty Corporation Limited. Fraser Valley obtained a payout statement regarding the first mortgage. It then wrote to the West Broadway office of Household, to the attention of "Mortgage Department (Mike Doyle)", with reference to Household's second mortgage, as follows:

This is to advise that we act for Fraser Valley Credit Union with regard to registering a new first mortgage on the above noted property in the amount of \$97,200. (We will be attending to the payout of Security Home Mortgage Investment Corporation presently on title in first place). As you currently hold the second mortgage we are writing to confirm that Household Realty Corporation Limited is agreeable to executing a Priority Agreement enabling Fraser Valley Credit Union to be shown as the first financial charge on title.

Please acknowledge receipt of this letter and agreement to executing a prepared Priority Agreement by signing and returning this letter by fax.

- [3] On September 28, 1997 that letter was faxed back to Fraser Valley from the Broadway office of Household with a signature that could be "M. Doyle", above the letters "HRC". Counsel for Household, Mr. Morris, advised me that it could be assumed for the purpose of this hearing that the signature was that of the branch manager, Mike Doyle. However, Mr. Morris advised that both the branch manager's authority to sign and the legal significance of his doing so were matters in dispute.
- [4] There is no evidence of any discussion between Fraser Valley and Household as to the terms of the proposed priority agreement. There is no evidence that Fraser Valley notified Household of the principal amount of the new first mortgage it was taking from the mortgagors, nor is there evidence that they discussed the assessed value of the property at the time in question.
- [5] On October 7, 1997, Fraser Valley's solicitors sent a draft priority agreement to Household for execution. That draft agreement purported to grant priority for Fraser Valley's mortgage to secure repayment of \$97,200 with interest at 5.95% per annum and monthly payments of \$619. The Security first mortgage which was paid out had a face value of \$96,820.75 and provided for interest at 9.5% and monthly payments of \$834.

- [6] On October 7, 1997, Fraser Valley registered its mortgage as a third mortgage on title, securing a principal balance of \$97,200 with interest at 5.95% per annum and monthly payments of \$619. It registered a discharge of the Security first mortgage, leaving Household's mortgage in first place on title and Fraser Valley's mortgage in second place.
- [7] Despite Fraser Valley's persistent efforts to obtain a priority agreement from Household, no such agreement was ever executed. The evidence shows a follow-up letter from Fraser Valley on January 12, 1998, a fax on February 9, a telephone call on February 23, a fax on February 24, a telephone call on April 16, a fax on April 16, a telephone call on April 17, a telephone call on April 28, a telephone call on May 1, a letter from the solicitor for Fraser Valley on May 5, and a follow-up fax on May 12. The evidence shows only two responses to the requests.
- [8] The first response was in a telephone conversation in January, 1998 between Diane Rempel, legal secretary to Fraser Valley's solicitor, and Mr. Doyle of Household, after the first follow-up letter on January 12. Ms. Rempel deposed that she made a note of a telephone conversation with Mr. Doyle. The note reads:

Jan. 23. I called Mike. He advised he is fighting with Montreal Br. To get it signed & returned. Should be back to him hopefully Monday.

- [9] The second and final response came on June 4, 1998, in a letter from "Mike Doyle, Manager", that reads:

Our Lending Department has refused to grant a priority on the above.

They require confirmation that income be proven within accepted debt service criteria (sic) (40%) and I am unable to prove that level of income at this time.

I have left messages for Ms. Siba and am waiting for her to return (sic) my calls.

Until I can prove this income, especially in light of a deteriorating payment record, I will be unable to have this priority granted.

I will be back in the office tomorrow morning at 9:30 and will call you to discuss this.

This letter will serve as confirmation to you of the current state of this issue.

- [10] I note that Household has not provided any evidence regarding the identity of the signatory of the letter faxed back to Fraser Valley on September 28, 1997 or the scope of that signatory's authority. Assuming that Household's branch manager, Mr. Doyle, signed the letter (as it was conceded I should do) I conclude that he had ostensible authority to do so. I find that the returned letter, signed by Mr. Doyle, constituted a statement by Household that it would execute a priority agreement to be prepared by Fraser Valley.

- [11] Section 28 of the Land Title Act, R.S.B.C. 1996, c. 250 states:

28. If 2 or more charges appear entered on the register affecting the same land, the charges have, as between themselves, but subject to a contrary intention appearing from the instruments creating the charges, priority according to the date and time the respective applications for registration of the charges were received by the registrar, and not according to the respective dates of execution of the instruments.
- [12] Counsel for the petitioner did not press the argument that there was a contract between Fraser Valley and Household. There was at best an agreement to agree, since there was no precision of the terms of the priority agreement to be signed.
- [13] Instead, Mr. Keighley argued that Fraser Valley's mortgage is entitled to priority over Household's mortgage, despite s. 28 of the Land Title Act, because Household is estopped from relying on its prior registration, or because Household would be unjustly enriched if permitted to rely on the priority of its registration.
- [14] Mr. Morris for Household argued that the petitioner should not be able to rely on any equitable arguments since it had not come to the court with "clean hands". He argued that the petitioner had registered a mortgage which on its face prejudiced Household's equity position without first obtaining a proper priority agreement based on all relevant information and executed with the benefit of proper legal advice. In so doing, he submitted, the petitioner attempted to gain an advantage or, in the alternative, to create a disadvantage for Household without disclosure of all relevant information which, if known to Household, might have caused it to refuse priority. He suggested that Fraser Valley had taken advantage of the opportunity to deal with a junior branch manager rather than seeking a solicitor's undertaking, emphasizing that when the letter was faxed back to Fraser Valley on September 28, nothing was known about the particulars of the mortgage Fraser Valley proposed to register in priority to Household's.
- [15] I have considered those points but do not find that they stand in the way of considering the petitioner's arguments. There was no evidence that the petitioner failed to disclose information sought by Household. The Fraser Valley mortgage was not in identical terms to those of the original first mortgage, but there was no evidence before me that Household's position was worse than it would have been had the original first mortgage remained in place. There was no evidence that Mr. Doyle was a junior branch manager or that the petitioner believed that he was and tried to take advantage of him.
- [16] Mr. Morris also argued that, as a general proposition, equitable relief is not available in a Torrens environment with respect to priorities issues regarding land title registration. I cannot accept that general proposition, which is inconsistent with the recognition in the authorities over many years that, except where third parties without notice are involved, the indefeasibility of title is subject to claims which may be made on the basis of equity and which may involve equitable forms of relief such as the declaration of constructive trusts. If the fee simple title of a registered owner may be attacked on the basis of a claim stemming from an alleged estoppel or unjust enrichment, surely the priority position of a charge

holder against title may similarly be attacked.

- [17] Mr. Morris also argued that I should take judicial notice that certain practices have arisen between parties and their counsel which are designed to protect the interests of registrants against title, and that the practice adopted in the case at bar by the petitioner and its solicitors was not in accordance with established practice. Household's position is that the procedure followed by the petitioner left the petitioner open to considerable risk, a risk which it is now not willing to assume.
- [18] While I decline to take judicial notice regarding an established practice (there should have been evidence on this point, as the existence of a practice is not so notorious as to be appropriate for the taking of judicial notice) I do note that on the evidence there was nothing to prevent the petitioner from delaying the advance of the funds until a registrable priority agreement had been obtained from Household. It is a fair inference from the evidence before me that the petitioner knowingly decided that it would take the risk of proceeding without a signed agreement.
- [19] I will now consider the petitioner's argument that Household is estopped from relying on its prior registration or that Household would be unjustly enriched if permitted to rely on the priority of its registration.

ANALYSIS

(1) Estoppel

- [20] With respect to the first argument, based on equitable estoppel, I am not persuaded that the petitioner prevails, for the following reasons.
- [21] The doctrine of equitable estoppel, in its various forms, provides that where one party relies to its detriment on another party's representation or promise, the latter party is estopped from later denying what it represented or promised where it would be inequitable for it to do so. The two types of equitable estoppel that are relevant in this matter are: (a) representative estoppel, and (b) promissory estoppel.
- (a) The doctrine of representative estoppel
- [22] The elements of representative estoppel were listed by MacAdam J. in *Dover Financial Corp. v. Basin View Village Ltd.* (1995), 399 A.P.R. 1 (N.S.S.C.), referring to Spencer Bower & Turner, *The Law Relating to Estoppel by Representation*, 3rd ed. (Butterworths, 1977) at p. 287. These elements were said to be the following: (1) the plaintiff must have made a mistake as to his or her legal rights; (2) the plaintiff must have expended some money or done some act on the faith of the mistaken belief; (3) the defendant must know of the existence of his or her own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief regarding his or her rights; and (5) the defendant must have encouraged the plaintiff in his or her expenditure of money, or other acts that the plaintiff has done, either directly or by abstaining from asserting his or her

legal right.

[23] This description of representative estoppel requires further precision with respect to the final element. The "encouraging" of the plaintiff described therein does not refer to anything that might tend to encourage, but instead refers to encouragement by representation, as the name of the doctrine suggests. Further, a representation is a statement of fact, that is, a statement that refers to an existing or past state of affairs. A statement as to future intention is not a representation but a promise. Promises are enforceable at common law only where there is agreement and consideration, and enforceable in equity only under the doctrines of promissory and proprietary estoppel: *Spencer Bower* at pp. 34-35. Although promises are sometimes referred to as "representations", where the statement at issue is in fact a promise, the equitable doctrine applied by the courts is promissory, not representative, estoppel: *Hansen v. British Columbia* (2000), 76 B.C.L.R. (3d) 241 (C.A.), 2000 BCCA 338 at paras. 10-13; *S. Wilken & T. Villiers, Waiver, Variation and Estoppel* (John Wiley & Sons, 1998) at pp. 120-21, 192-93.

(b) The doctrine of promissory estoppel

[24] The elements necessary to a successful claim in promissory estoppel are: a promise or assurance intended to affect the legal relations between the parties; the party seeking to raise the estoppel having relied upon that promise or assurance to its detriment; and that it would be inequitable to permit the party who made the assurance to insist on the strict legal relations between the parties as if no such assurance had been given: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 at p. 615; *Combe v. Combe*, [1951] 1 All E.R. 767 at p. 770.

[25] At the outset it must be noted that the first element of promissory estoppel is the presence of a promise or assurance that is intended to affect the legal relations between the parties. Thus, it appears that some legal relations between the parties must be extant at the time of the promise: *Maracle*, supra; *Hansen*, supra. A promise to create some kind of contractual relations, where none yet exist, is not captured under the language of promissory estoppel. Professor Fridman asserts that this is unquestionably the case [G. Fridman, *The Law of Contract*, 4th ed. (Carswell, 1999) at p. 139, citing several decisions including *John Burrows* and *Maracle*]. While Professor Waddams, in *The Law of Contracts*, 4th ed. (Canada Law Book, 1999), states at p. 141 that some cases have denied the necessity of existing legal relations in claims of promissory estoppel, none of the cases he cites for that proposition are Canadian.

[26] The second element of promissory estoppel is that the promisee has relied upon the promise to his or her detriment.

[27] An analysis of the third element - the inequity of allowing the promisor to deny its promise and insist on the strict legal relations between the parties - demands some consideration of the history and scope of equitable estoppel.

(c) The foundations of equitable estoppel

[28] The modern doctrines of representative and promissory estoppel can be traced to the equitable doctrine expressed by Lord Cairns in *Hughes v. Metro. Railway Co.* (1877), 2 A.C. 439 (H.L.) at p. 448. Professor Fridman observes at p. 133 that "the effect and function of the doctrine in the *Hughes* case was to allow courts some flexibility when dealing with strict legal rights arising out of a contract where the conduct of the parties could be interpreted so as to make such flexibility legitimate." Fridman refers to *Baxter (M.L.) Equip. Ltd. v. GEAC Can. Ltd.* (1982), 36 O.R. (2d) 150 (Ont. H.C.), where Rutherford J. stated the following at p. 157:

...the concern has been to avoid going so far as to grant relief in situations where a plaintiff not in a legal relationship with the defendant acts to his detriment upon a promise made by the defendant and then sues the defendant because of the promise.

[29] Statements made by Denning J. (as he then was) in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130 were interpreted by some as suggesting that the doctrine of equitable estoppel did go that far. However, English and Canadian judgments subsequent to *High Trees* (including the judgment of Lord Denning himself in *Combe v. Combe*: see John Burrows at p. 360), made it plain that the true function of equitable estoppel is to affect existing contractual rights, not to manufacture contracts out of promises or representations. Fridman concludes at p. 134:

Numerous statements in English and Canadian cases can be cited to support the proposition that this use of estoppel can be made only to affect accrued or inchoate rights, not to produce contractual relations where the essential ingredients of a contract, such as consideration or a clear and ascertained agreement as to terms, are lacking.

[30] It appears that a plaintiff may, in the area of proprietary rights, use estoppel as a "sword" rather than a "shield" and attain rights where he or she would not be otherwise entitled to them at common law or equity. Under the doctrine of proprietary estoppel, this can occur where A acts to his or her detriment regarding A's land under the belief, encouraged by B, that B will grant A some right over B's land (such as an easement): see *Zelmer et al. V. Victor Projects Ltd.*, [1997] 7 W.W.R. 170 (B.C.C.A.); Fridman, *supra*, at pp. 134-37.

[31] At least in the area of proprietary rights, estoppel thus comes very close to the American doctrine of "injurious reliance". Fridman describes that concept at p. 138:

The Americans appear to have developed a notion of "injurious reliance" that has attracted considerable attention on the part of some writers who have attempted to propound the view that contracts can emerge from reliance on the conduct of another party where such reliance would cause injury if the "promise" were not recognized and enforced in some way by the court, even though there was no contract in the strict technical sense between the parties, and where such reliance and possible injury, in consequences, were within the reasonable expectations of the party whose promise was relied upon by the other party.

- [32] Fridman concludes that aside from the discrete area of proprietary estoppel, Canadian law does not contemplate estoppel as a means of creating contractual relations, where none previously existed, out of otherwise unenforceable assurances made by a defendant.
- [33] However, some decisions have included broad statements concerning the scope of equitable estoppel that suggest the doctrine could include cases of mere injurious reliance. In *Zelmer*, supra, Hinds J.A. for the court referred at para. 36 to the following statement of Lord Denning in *Amalgamated Investment & Property Co. v. Texas Commerce International Bank Ltd.*, [1981] 3 All E.R. 577 at p. 584:

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law ... When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

- [34] A similar statement appears in *B & A Bobcat and Excavating Ltd. v. Sangha*, [1999] B.C.J. No. 160 (Q.L.); 1999 BCCA 49 at para. 14, where Newbury J.A. for the court quoted from the judgment of Oliver J. in *Taylor Fashions Ltd. v. Liverpool Victoria Friendly Society*, [1981] 1 All E.R. 897 (Ch.D.):

[equitable estoppel] requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

Mr. Keighley for the petitioner argued that the equitable principles of estoppel are not limited to a set of pigeon holes, and that the overall principles are as stated in *B & A Bobcat and Excavating*.

(d) Equitable estoppel in the context of priorities of charges

- [35] In *Furmanek v. Community Futures Development Corp. of Howe Sound* (1998), 61 B.C.L.R. (3d) 254 (C.A.), the vendor of a business, who was actively involved in negotiations between the purchaser and lender, represented that the assets were free of encumbrances and that he would take a subordinate charge over them. This caused the lender to assume that it had a priority position with respect to the assets. Through an error in registration, the lender was left in a subordinate position with respect to certain inventory. At trial, Sigurdson J. held that the vendor was estopped from claiming priority, that is, from taking advantage of the deficiency in the registration of the lender's security interest. The Court of Appeal agreed that the vendor's personal property security interest, while technically ranking in priority to the respondent's interest, was subordinate to the latter interest. The Court observed that this was the correct result either on the basis of equitable estoppel (as had been decided by the

chambers judge) or "on the footing of a contractually enforceable acknowledgement of the respondent's right to a first charge on the inventory": Furmanek at paras. 7-8.

- [36] The finding that there was a contractually enforceable agreement was based on the reference in the Personal Property Security Act, R.S.B.C. 1996, c. 359 to subordination of priorities being achieved by "security agreement or otherwise" (s. 40), and decisions of Ontario and Alberta courts holding that the term "otherwise" captured oral agreements regarding subordination. Thus the agreement regarding subordination of the vendor's priority was an enforceable contract, not merely an agreement to agree. Where an agreement regarding subordination is not "clear and unequivocal", or where it consists only of assurances made in negotiations leading up to a final agreement, the initial agreement will not be binding: *Bank of Montreal v. Kimberley Brewing Co. et al.* (1999), 12 C.B.R. (4th) 10 (B.C.S.C.) at paras. 8-17; Furmanek at paras. 18-19. This flows from the general rule that agreements to agree (or non-final agreements) are not enforceable.
- [37] In Furmanek the findings of fact at trial—that the vendor and lender were actively involved in a legal relationship regarding the financed transfer of assets—were highlighted by the Court of Appeal. The vendor made assurances to the lender in order to ensure that the lender would participate. By purporting to take advantage of the lender's error in registration, the vendor was denying what it had promised the lender in a way that might even be characterized as fraudulent. As such, the vendor was estopped from asserting its technical priority.
- [38] Somewhat similar circumstances were under consideration in *Dover Financial*, supra, where a first mortgage was held by Montreal Trust and a second mortgage was held by Dover. A third mortgage had been assigned a number of times to different parties. The final assignment to Dover was incorrectly recorded at the Registry. Montreal Trust and Dover made arrangements for Montreal Trust to "replace" its original first mortgage and the Dover second mortgage with a new first mortgage. As part of that transaction, Montreal Trust executed what it thought to be a proper postponement agreement with respect to the third mortgage. Because of the error in registration, Montreal Trust was unaware that the third mortgage had in fact been assigned to Dover, and thus the postponement agreement was meaningless. The court held that because Dover was fully aware of Montreal Trust's mistaken belief as to its legal position, and had abstained from asserting its legal rights, it was estopped from asserting priority under the assigned third mortgage.
- (e) Application of these principles in the present case
- [39] Fraser Valley sent a letter to Household asking if the latter was "agreeable to executing a Priority Agreement". No priority agreement was ever executed. The terms of the proposed agreement were not specified until after registration. Unlike the facts in Furmanek, there was not a "clear and unequivocal" agreement with respect to the priority of the charges. Further, section 28 of the Land Title Act does not contemplate unregistered agreements regarding the re-ordering of priorities, unlike section 40 of the Personal Property Security

Act which was relevant in *Furmanek*. There was no agreement between the parties, and Fraser Valley does not allege that there was.

- [40] I find that the doctrine of representative estoppel has no application in this case because the letter signed by Mr. Doyle amounted to a promise, not a representation. It was a statement regarding what Household agreed to do in the future, and thus if any form of equitable estoppel is applicable to the statement, it is promissory estoppel.
- [41] In any event, not every element of representative estoppel is present in this case. First, there does not appear to be any evidence that Fraser Valley was mistaken as to its legal rights. It can be assumed that Fraser Valley, through its counsel, was well aware of the priority rules under s. 28 of the Land Title Act, the terms that are necessary in a valid subordination agreement, and the lack of enforceability of "agreements to agree". Fraser Valley was not mistaken as to its legal rights - it was mistaken in its belief that Household would proceed to negotiate a subordination agreement with Fraser Valley. Second, even if it could be said that Fraser Valley was mistaken as to its legal rights, there is no evidence that Household was aware of that error, unlike the circumstances in *Furmanek* and *Dover Financial*. Household did not know that Fraser Valley was proceeding to discharge the Security mortgage and register its own without concluding a subordination agreement with Household.
- [42] I turn to the application of promissory estoppel. When the letter was sent from Fraser Valley to Household, they had not entered into any "legal relations", although they were both bound by the statutory scheme of priorities under the Land Title Act. Thus, the first requirement, that the promise was intended to affect existing legal relations between them, was not met unless one considers that the statutory scheme of priorities created such relations.
- [43] The second element of promissory estoppel is present if the first requirement is assumed to have been met. By signing the letter and returning it, Household made a promise that it would permit Fraser Valley to take priority against the title. Fraser Valley relied to its detriment on that promise, since it now occupies an inferior position with respect to the mortgaged property.
- [44] As to the third element, the question is whether it would be inequitable to permit Household to rely on its statutory priority. The jurisprudence in this area is varied and includes very broad statements that might support the use of promissory estoppel to create legal relations where a party has injuriously relied on another's promise. However, decided cases in Canada do not appear to go this far, preferring instead to restrict the doctrine to addressing unconscionable results in existing legal relationships. In both *Furmanek* and *Dover Financial*, the parties were involved in contractual relations that were extant at the time of the alleged promise or representation. In both cases, the promisor/representor knew what the other party was expecting to be the outcome of the transaction. In both cases, the promisor/representor knew that the other party was mistaken as to the outcome of the transaction, abstained from mentioning that mistake, and then attempted to take advantage of it. The respective courts had no difficulty in seeing the inequity in allowing such a result.

[45] The facts are different here. It would be an extension of the doctrine to say that it is inequitable for a promisor to retract a non-binding promise simply because the promisee has, without the promisor's knowledge, relied on that promise to his or her detriment. That is the situation in the present case, and therefore the claim in promissory estoppel cannot succeed.

(2) Unjust Enrichment

(a) The elements of unjust enrichment

[46] As was set out in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, the elements of unjust enrichment are: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a "juristic reason" for the enrichment. In *Peter v. Beblow*, [1993] 1 S.C.R. 980 at p. 990 McLachlin J. clarified that in considering the third element "the fundamental concern is the legitimate expectation of the parties".

[47] While both enrichment and deprivation are assessed from a straightforward economic point of view, the presence or absence of a juristic reason involves different considerations in different contexts (for example a commercial context as opposed to a family context). Examples in a commercial context can be found in *Atlas Cabinets & Furniture Ltd. v. Nat. Trust Co.* (1990), 45 B.C.L.R. (2d) 99 (C.A) and *KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd.* (2000), 190 D.L.R. (4th) 47; 2000 BCCA 458. In *Atlas Cabinets, Lambert J.A.* for the majority referred to the elements in *Pettkus v. Becker* and wrote at pp. 109-10:

In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. In a domestic relationship, equality of the parties to the relationship should normally be the standard of fairness. But, in a business relationship, honest dealing, not equal dealing, should set the standard of fairness. That is not to say that the three factors enumerated in *Pettkus v. Becker* are not equally applicable in commercial cases. ... But it is important to understand what is meant by "enrichment", by "deprivation" and by "juristic reason" in the context of a commercial relationship where ordinary and extraordinary flows of funds are part of the reality and purpose of the relationship. To my mind the key to the correct interpretation and application of the decisions of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of "unjust enrichment".

[48] Justice Lambert concluded this discussion with the statement at p. 110: "In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial relationship."

[49] In *Hallmark*, Lambert J.A. (concurring) discussed the meaning of "juristic reason" at para. 65:

The juristic reason may be legal or equitable or both. But it must be measured in accordance with the principles of equity which underlie the remedies of restitution and the remedial constructive trust. So the "injustice" of an enrichment must be measured by the standard of "good conscience" and, in a commercial case, the "good conscience" must be good commercial conscience.

[50] Support for the view that "juristic reason" can refer simply to good conscience or the legitimate expectation of the parties appears in *Manderson v. Foster*, [2000] B.C.J. No. 1029 (Q.L.); 2000 BCSC 787. There, the plaintiff alleged that he and the defendant had agreed that each would have an interest in certain real property owned by the defendant. Sinclair Prowse J. held that the plaintiff's claim in contract must fail because the vagueness of an essential term rendered the alleged agreement unenforceable. However, she held that the defendant's refusal to honour the agreement resulted in an unjust enrichment. She stated that there was a lack of juristic reason for the defendant's enrichment because the plaintiff had a reasonable expectation of receiving some benefit and the defendant knew or ought to have known that the plaintiff had this reasonable expectation. She stated at para. 93: "The fact that the agreement of the parties was not enforceable as a contract does not constitute a juristic reason for the Defendant's enrichment."

(b) Unjust enrichment in the context of priorities of charges

[51] Most cases involving unjust enrichment address some benefit that a party receives, either in the form of money, property, or improvements to property. However, there is no reason in principle why the doctrine should not apply where the benefit in question is an enhanced priority position.

[52] In *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 121 D.L.R. (4th) 53 (Ont. C.A.), Central held a first mortgage and Dixdale a second mortgage over certain property. By a mistake Central registered a discharge of its first mortgage. Dixdale's mortgage later went into default, and Dixdale sold the property under power of sale. Following the sale it became aware that Central had earlier discharged its first mortgage. In holding that Dixdale was unjustly enriched by the amount secured under Central's mortgage, Laskin J.A. for the court stated at p. 59:

In the present case on the sale of the property Dixdale acquired an enrichment or benefit equal to the amount of money required to satisfy its outstanding mortgage ... That "enrichment" was conferred on Dixdale at Central Guaranty's expense and therefore there has been a "corresponding deprivation". I observe that this is not a case where the deprivation arose as a result of any wrongdoing by Dixdale; nor does the evidence support a finding that Dixdale knowingly took advantage of Central Guaranty's mistake to acquire a benefit at the latter's expense. Rather this is a case where Dixdale might be said to have received a windfall benefit as a result of Central Guaranty's mistake. Whether Central Guaranty is entitled to recover this benefit depends on whether it can satisfy the third element of an unjust enrichment claim, that there is an absence of any juristic reason for the enrichment or, simply, that it would be unjust to allow Dixdale to retain the money in dispute.

[53] Laskin J.A. held that neither Dixdale's lack of knowledge of Central's error, Central's carelessness in discharging its mortgage, nor the priority rules of the Registry Act, R.S.O. 1990, c. R.20 constituted a juristic reason for the enrichment. With respect to the provisions of the Registry Act, Laskin J.A. stated at p. 61:

If the provisions of the Act alone are considered then Dixdale's position is unanswerable. Registration of the discharge gives Dixdale priority under the statute. But, in my opinion, the statute alone is not dispositive of this appeal. In an appropriate case a court may give effect to the principle of unjust enrichment despite the terms of a statute.

In effect, because it was the legitimate expectation of both Dixdale and Central that Central remained the first mortgagee, the enrichment arising from a reversal of that expectation lacked a juristic basis.

[54] In *Metropolitan Trust Co. of Canada v. Henneberry* (1995), 22 O.R. (3d) 703 (Ont. C.A.), the owner of a prior registered mortgage made an oral promise to provide a postponement (i.e. subordination) agreement to a new construction financing mortgage. Prior to the execution and registration of that agreement, the prior mortgage was assigned. Although the assignee, Henneberry, was aware of the intended agreement, it asserted that under the terms of the Registry Act it maintained a priority position. Following Dixdale, the Ontario Court of Appeal refused to permit that result, holding that Henneberry would be unjustly enriched if it was allowed to maintain the priority that had been intended to pass to Metropolitan. It is implicit in the *Metropolitan Trust* reasons that the court did not view the priorities scheme in the Registry Act as a juristic reason for Henneberry's enrichment. At para. 18, Finlayson J.A. for the court stated:

If effect were given to the argument of the appellants, the investors would achieve, through the Registry Act, a priority that they were not entitled to under the terms of their agreement ... They would have received a windfall, and, given the property values in the [project], they would be unjustly enriched at the expense of Metro Trust. The courts have consistently resisted such a result...

As in *Dixdale*, the expectation of the parties that the mortgage priorities would be ordered a certain way was given more importance than the technical priority rules of the land title legislation. Although Henneberry had only maintained the existing mortgage priority, the court held that maintaining it in the face of the promise to the contrary constituted an unjust enrichment. The court pointed out that the result applied only between the parties to the agreement and that there was no evidence of innocent third parties having relied on the Registry to their detriment.

[55] The circumstances were somewhat similar in *Federal Business Development Bank v. Royal Bank of Canada* (1985), 28 B.L.R. 279 (N.S.S.C.). In that case FBDB was planning to pay out existing first and second mortgages and register a new mortgage. Royal, which held the third mortgage, had conditionally agreed to postpone its security to the new FBDB mortgage. Although one of the conditions was neither satisfied nor waived, FBDB proceeded with its

mortgage and registration of security without a written postponement agreement from Royal. Burchell J. held that since Royal had done nothing to cause FBDB to go ahead as it did, but had merely "stood by after the detriment to FBDB had been suffered to the full", it was not estopped from asserting its priority. The court continued at pp. 288-89:

A sense that this case calls for some form of equitable relief nevertheless persists. Standing away from specific submissions, the most obvious fact is that the Royal Bank has made an unintended gain through the negligence or error of [FBDB's solicitor]. The ranking of its security in relation to the security for sums formerly covered by first and second mortgages has been reversed. To that extent the Royal Bank has been unjustly enriched.

To remedy the unjust enrichment, Burchell J. ordered that the funds held by the receiver be paid out to FBDB and Royal as if FBDB was the first mortgagee.

(c) Application in the present case

[56] Counsel for the petitioner argued that Household's priority position constitutes a windfall, with a corresponding deprivation to Fraser Valley, that lacks a juristic reason. Counsel for Household, however, argued that the claim for unjust enrichment must fail because:

- (a) there was no evidence that the petitioner was deprived of anything by the non-registration of the priority agreement at the time of registration of the mortgage since there was no contemporaneous evidence of value; and
- (b) there was a juristic reason for the enrichment, if it existed, in that the petitioner failed to take prudent and adequate steps which a reasonable person in the same position would have taken to protect its position in the Torrens environment, which steps were easily available to the petitioner.

[57] With respect to (a), Fraser Valley's demotion from a first to a second position in priority is an economic detriment and Household's promotion to first place is a windfall benefit. Further evidence as to the value of the property at the time is not necessary to establish that this element existed.

[58] The real issue is whether Household's enrichment lacked a juristic reason and is an unjust enrichment.

[59] In my view, neither Fraser Valley's action in registering its mortgage without a proper priority agreement nor the priority rules of the Land Title Act provide the juristic reason for Household's enrichment. The Dixdale, Metropolitan Trust, and FBDB v. Royal decisions show that as between the parties to it, an arrangement regarding priorities may prevail over statutory priority rules. Although those decisions are from other jurisdictions, where the land title systems differ in some respects, they are persuasive authority and are consistent with the principles which have been adopted in British Columbia. Honouring the promises made in such arrangements or refraining from taking advantage of the other side's trust is an aspect of "good commercial conscience", the standard by which the injustice of an

enrichment is measured: Hallmark, supra, and Atlas Cabinets, supra.

[60] I find that the petitioner succeeds on this ground. Household would be enriched at the expense of Fraser Valley if its priority position were permitted to remain. Having sent the letter it did, Household created an expectation that it would execute a priority agreement. In good commercial conscience, it would have honoured that letter. Its enrichment through promotion of its priority from second to first place is unjust.

CONCLUSION

[61] On the basis of my finding that Household's enhanced priority position constitutes an unjust enrichment, I will grant the remedy sought by the petitioner, and order that the petitioner's mortgage BL344426 have priority over the mortgage of Household Realty Corporation Limited, BK117096.

[62] If counsel for the parties are unable to agree as to costs they may make submissions in writing through the Registry.

"Lynn Smith, J."

The Honourable Madam Justice Lynn Smith

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