

CANADA / JUDGMENT

Lloyd Investments Ltd. v. Fairline Development (Canada) (1992) Ltd.

2022 BCSC 1270

COURT

Supreme Court of British Columbia

DECIDED

26 July 2022

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2022 BCSC 1270 Lloyd Investments Ltd. v. Fairline Development (Canada) (1992) Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lloyd Investments Ltd. v. Fairline Development (Canada) (1992) Ltd., 2022 BCSC 1270 Date: 20220726 Docket: H130186 Registry: Vancouver Between: Lloyd Investments Ltd. Petitioner And Fairline Development (Canada) (1992) Ltd., Yao Sun Loong Kong Chicken Ltd., David Leung, YHY Enterprises Ltd., Kin Wa Chan, Her Majesty the Queen in Right of Canada, Excel Feeds Inc., and Wai Man Kong Respondents Corrected Judgment: The front page of this judgment was corrected on October 25, 2022. Before: The Honourable Justice Slade Reasons for Judgment No appearance on behalf of the Petitioner: Counsel for the Respondents, Fairline Development (Canada) (1992) Ltd., Yao Sun Loong Kong Chicken Ltd. and David Leung: B.J. Promislow Counsel for the Respondents, Yhy Enterprises Ltd. and Kin Wa Chan: J. Yuan Counsel for the Respondent, Wai Man Kong: J. Shragge Counsel for British Columbia Chicken Marketing Board: R.J. Androsoff Counsel for Sterling Business Management: D. Davison Counsel for OS Enterprise LLC: M. Ellis No appearance on behalf of the Respondents, Her Majesty the Queen in Right of Canada and Excel Feeds Inc. Place and Date of Hearing: Vancouver, B.C. September 10, 2021 Place and Date of Judgment: Vancouver, B.C. July 26, 2022

Introduction

- [1] The present application, filed January 21, 2021, seeks relief in relation to money paid into court upon foreclosure of Fairline's interest in a parcel of land located in Langley and known as Lot 30. The petitioner, Lloyd Investment Ltd., had taken an assignment of the mortgage of Lot 30 and another Lot (Lot 56) in Langley, BC held by the Farm Credit Corporation and registered on October 17, 2005. The petition was filed on February 14, 2013 (the "Lloyd Petition").
- [2] The Lot 30 was sold pursuant to an order of the Court pronounced on August 6, 2016. The surplus proceeds of sale, \$1,295,523, were paid into Court to the credit of this proceeding.
- [3] The application is brought under the Lloyd Petition.

- [4] The Lloyd Petition names the present applicant, Wai Man Kong, and respondent, Kin Wa Chan, as the holders, respectively, of a third and second mortgage of the Langley Lands. Mr. Chan filed a response to the Lloyd Petition on March 3, 2021.
- [5] Mr. Kong seeks a declaration that the amount of money secured by the third mortgage is \$4,290,310.07 with interest accruing at \$3,192.06 daily from February 10, 2021, until payment. Mr. Kong also seeks a declaration that the third mortgage ranks in priority "to the interests in the lands of all persons having a financial interest in the Lands". This relief is sought in relation to the second mortgage (Mr. Chan) and all registered interests below the third mortgage. If granted, the declaration would put Mr. Kong's mortgage in second place. Mr. Kong also applies for an order for the payment out of the Surplus Proceeds of \$1,295,523 from Lot 30 in partial satisfaction of the debt secured by the third mortgage.
- [6] The application asserts various grounds on which Mr. Kong contests the validity and enforceability Mr. Chan's second mortgage. When the application came on for hearing I expressed concern that it raised questions of fact that rendered it unsuitable for summary disposition, and suggested to the Parties that the matter proceed by way of trial. The parties asked that I determine, based on the paper record, Mr. Kong's claim that Mr. Chan's second mortgage is unenforceable due to the effluxion of time under the applicable Limitation Act. In issue is whether the Limitation Act, R.S.B.C. 1996, c. 266 [1996 Act], or the Limitation Act, S.B.C 2012, c. 13 [2012 Act], applies.
- [7] A related question is whether the time within which Mr. Chan could bring action under the applicable Limitation Act had been extended due to a confirmation of the indebtedness to Mr. Chan prior to the expiry of the limitation period. Relevant Transactions The Chan Mortgage
- [8] David Leung was a principal of Fairline Development (Canada) (1992) Ltd. ("Fairline") and a guarantor of Fairline's debt obligation to the Farm Credit Corporation (the "Farm Credit Mortgage"). Mr. Lloyd took an assignment of the Farm Credit Mortgage.
- [9] Fairline and Mr. Leung borrowed funds from YHY Enterprises Ltd. ("YHY") and an individual named Lin Sung Hsing pursuant to a loan agreement. The loan agreement is dated February 10, 2010. The debt was secured by a mortgage of the Langley Lands and two parcels of land Leung owned in Richmond, BC, Lots 6 and 7 (the "Richmond Lands"). It was registered on February 12, 2010. Funds had been advanced prior to the date of the loan agreement.
- [10] The Farm Credit Mortgage did not provide security over the Richmond Lands.
- [11] Farm Credit and Mr. Lloyd were out of the picture upon the August 6, 2016 sale of the Langley Lands as Mr. Lloyd was paid in full upon their sale.
- [12] Mr. Chan acquired the second mortgage by way of assignment of the mortgage held by YHY and Mr. Hsing.

- [13] The Chan Mortgage debt is, under the terms, payable on demand. It makes no provision for periodic payments. It is, for the purposes of this application, common ground that no demand has ever been made. The Kong Mortgage
- [14] The Kong mortgage was registered on October 24, 2012. Liquid Capital Foreclosure
- [15] Mr. Leung borrowed funds from Liquid Capital Exchange Limited ("Liquid Capital"), which registered a fourth-place mortgage over the Richmond Lands on November 18, 2013.
- [16] Liquid Capital commenced foreclosure proceedings on January 14, 2014. On August 14, 2015, the Court approved the sale of Lot 6 and directed a payment out of surplus funds from the sale to the second mortgagee, Mr. Chan. The payment was made on October 8, 2015. The Application
- [17] The central parties to the application are Mr. Kong and Mr. Chan who are, respectively, the holders of the third and second mortgages registered against Mr. Leung's title to the Richmond Lands, both of which have been foreclosed in the proceedings taken by Liquid Capital. The dispute is over money paid into Court as a result of the Farm Credit foreclosure of Fairline's interest in Lot 30. Positions of Parties to the Application
- [18] The applicant argues that Mr. Chan is barred from asserting a security interest by the effluxion of time as tolled under the 2012 Act, which came into force on June 1, 2013 (the "Effective Date").
- [19] The applicant argues that time has tolled under the 2012 Act since, at latest, the pronouncement of the August 14, 2015 order approving the sale of Lot 6. Under the 2012 Act, the limitation period is two years: 2012 Act, s. 6. If the two-year limitation period under the 2012 Act applies, Mr. Chan's right to court ordered relief based on the mortgage of the Richmond Lots expired on August 14, 2017, as Mr. Chan has never commenced an action to enforce his security.
- [20] The applicant argues that even if the October 8, 2015 payment to Mr. Chan could be considered in law an acknowledgment of the debt secured by the mortgage it would not avail Mr. Chan as time would toll under the 2012 Act from that date. This would extend the time within which an action may be commenced to October 8, 2017. Mr. Chan has not commenced an action asserting his interest based on the second mortgage. A statute barred claim cannot be revived by an acknowledgment of liability by the mortgagor: 2012 Act, s. 24(1).
- [21] Mr. Chan argues that the transitional provisions, s. 30, of the 2012 Act apply, and that there was a "discovered" breach of mortgage covenant prior to June 1, 2013, the Effective Date of the 2012 Act. Hence, pursuant to s. 30(3) of the 2012 Act, the 1996 Act applies.

- [22] Further, Mr. Chan relies on payment made on October 8, 2015 against the second mortgage pursuant to Court order in the Liquid Capital foreclosure for Lot 6 in Richmond as confirmation of the indebtedness secured by his mortgage over the Langley and Richmond Lands. The payment reduced the indebtedness to Mr. Chan that was secured by a mortgage of the Richmond Lands. In consequence, time under the 1996 Act tolls from the date of the payment. Default Under Chan Mortgage
- [23] The Liquid Capital foreclosure petition, filed over eight months after the Effective Date, put the mortgagor in default of covenant in relation to Mr. Chan's security over the Richmond Lots.
- [24] On August 14, 2015, the Court approved the sale of Lot 6. The proceeds from the sale were paid to discharge the loan made by the petitioner, the surplus was paid as directed by the August 14 Order, to Mr. Chan. The payment was made on October 8, 2015.
- [25] Liquid Capital's foreclosure on Lot 7 was concluded subsequently. There was an order for sale and those proceeds were paid into Court.
- [26] Mr. Chan has not brought foreclosure proceedings. His participation as a party in the several proceedings taken by other secured creditors both before and after the Effective Date has been due to the registration of his second mortgage against the Richmond Lands at the Land Title Office.
- [27] In his application response filed March 3, 2021, Mr. Chan opposes the granting of the relief sought by Mr. Kong. Transitional Provisions of the 2012 Act
- [28] Mr. Chan argues that the transitional provisions of the 2012 Act apply and result in his remaining in time to bring an action to enforce his security by way of a claim to money held in Court from the sale of Lot 30. He relies on an alleged breach by the mortgagor prior to the Effective Date, and s. 15 of the 2012 Act.
- [29] Sections 30(1)-(3) of the 2012 Act provide: Transition 30(1) In this section: "effective date" means the day on which this section comes into force; "former Act" means the Limitation Act, R.S.B.C. 1996, c. 266, as that Act read immediately before the effective date; "former limitation period" means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date; "pre-existing claim" means a claim
- (a) that is based on an act or omission that took place before the effective date, and
 - (b) with respect to which no court proceeding has been commenced before the effective date.
- (2) A court proceeding must not be commenced with respect to a pre-existing claim if
- (a) a former limitation period applied to that claim before the effective date, and
 - (b) that former limitation period expired before the effective date.

- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
 - (4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date,
 - (c) in the case of any other pre-existing claim,
 - (i) subject to subparagraph (ii) of this paragraph, this Act applies to the pre-existing claim, and
 - (ii) Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of (A) the effective date, and (B) the day the act or omission takes place under section 21 (2) of this Act.
- [30] Mr. Chan argues that subsection (3) applies and, as his pre-existing claim was "discovered" before the Effective Date, the 1996 Act applies.
- [31] Section 3(6)(a) of the 1996 Act established a six-year limitation period for an action by a secured party "to realize on that collateral".
- [32] The applicant relies on the August 14, 2015 order in the Liquid Capital foreclosure as the event of default to commence time tolling under the 2012 Act. The applicant argues that as this occurred more than two years after the Effective Date, time had run out for Chan to commence an action to enforce the security. Pre-Existing Claim
- [33] In submissions in response to this application Chan argues that his claim was discovered upon a date prior to the Effective Date, in particular Leung's failure to pay the municipal taxes. He relies on s. 15 of the 2012 Act, which provides: Discovery rule for claims to realize or redeem security
15. A claim to realize or redeem security is discovered on the first day that the right to enforce the security arises.
- [34] As evidence of this "discovered" claim Mr. Chan relies on para. 6 of Fairline and Mr. Leung's Response to the February 14, 2013 Farm Credit Canada petition for foreclosure of Fairline's interest in the Langley Lots. Paragraph 6 states: The Respondents have, albeit not admitted until February 2013 and not before incurring penalties for late payment paid all the municipal tax arrears which have accumulated but have now been paid and satisfied all taxes to date. (sic)
- [35] This, in my opinion, falls short of establishing that there was a default that pre-existed the Effective Date.
- [36] There is evidence in the record of the possible existence of other defaults under the Chan Mortgage that occurred before the Effective Date, June 1, 2013. However, Mr. Chan has not argued that any of these established that there was a claim "discovered" before the Effective Date that he can rely upon for the application of s. 15.

- [37] As the purported confirmation, payment made against the second mortgage on October 8, 2015 pursuant to court order, occurred over two years past the commencement of the limitation period under the 2012 Act, it could not be of avail to Chan as it could not revive a statute barred claim.
- [38] In the result, the evidence on the application supports a finding that s. 30(4)(c) of the 2012 Act applies. Therefore, the two-year limitation period under s. 6(1) of the 2012 Act applies and Mr. Chan's claim under the second mortgage is statute barred. The Application Record
- [39] The parties have not confined the application record for determination of the issues of limitations and confirmation of indebtedness to evidence that bears directly on those issues. It is the record prepared for the determination of all of the issues originally sought to be determined by way of summary application.
- [40] The written submissions of the applicant do not provide a road-map of documents in the application record that pertain directly to the limitations and confirmation issues. Mr. Chan's submissions are likewise deficient, and contain argument that has nothing to do with the issues of limitations and confirmation of indebtedness. It is no small challenge to discern the facts which pertain directly to the issues at hand on this application.
- [41] The material contained in the application record and the submissions of the parties on the application coming on for hearing reveals that there are issues over the validity of the Chan Mortgage and the enforceability of the terms of the loan that would not be resolved by a finding on the narrow question of limitations under the 2012 and 1996 Acts if Mr. Chan's claim to a secured interest is not statute barred.
- [42] Nevertheless, counsel for all parties urged the Court to rule on the limitations question.
Order
- [43] The enforceability of the mortgage and associated assignment of rents registered on title to property located at 2641 208th Street, Langley, BC, known and described as: PID: 004-202-988; LOT 30 SECTION 23 TOWNSHIP 7 NEW WESTMINSTER DISTRICT PLAN 50779
- [44] Under charge numbers CA1456283 and CA1456284 is barred by the effluxion of time. "Slade J."

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