Court File No. CV-23-00698539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

-and-

1340182 ONTARIO LIMITED AND KAZEMBE & ASSOCIATES PROFESSIONAL CORPORATION

Respondent

SUPPLEMENTARY BOOK OF AUTHORITIES OF ARTHUR BRYAN

June 16, 2023

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SCHEDULE "A"

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3	Canadian Lawyer Magazine, *Law Firm Beats Debtor's Legal Manoeuvre for $2.8 million* (September 15, 2014), online: <https://www.canadianlawyermag.com/news/general/law-firm-beats-debtors-legal-manoeuvre-for-28-million/ 272788>
4	Michael Myers, "The New Reality: Mortgage Enforcement and Debt Recovery During the 2020 COVID-19 Pandemic"(October 28, 2020), Law Society of Ontario
5	Perry (Parjot) Benipal, "Protecting the Seller when the Sale of a House does not Close" (October 13, 2022), Law Society of Ontario
6	*Scott, Pichelli & Easter Limited v. Dupont Developments Ltd*., 2022 ONCA 757 (CanLII)

Court File No. CV-23-00698539-00CL

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

-and-

1340182 ONTARIO LIMITED AND KAZEMBE & ASSOCIATES PROFESSIONAL CORPORATION

Respondents

AIDE MEMOIRE – of the Responding Party, Arthur Bryan

Background

- Canadian Imperial Bank of Commerce ("**CIBC**"), has brought an Application seeking an Order appointing MNP Ltd., as a Receiver over all property, assets and undertakings of 1340182 Ontario Limited ("**Real Estate Co**") and Kazembe & Associates Professional Corporation ("**K&A OpCo**")

- Arthur Bryan is not opposed to the appointment of a Receiver with regard to K&A OpCo. However, Mr. Bryan is opposed to the proposed appointment of a Receiver with regard to Real Estate Co.

- Real Estate Co, is the registered owner of the property municipally known as 1888 Wilson Avenue Toronto, Ontario ("**Property**"). K&A OpCo operates its law practice out of the Property.

- Arthur Bryan is a secured creditor of Real Estate Co, pursuant to a mortgage registered against the Property for the face amount of $200,000 ("**Bryan Mortgage**")

- The Bryan Mortgage was initially registered on August 18, 2018. Mr. Bryan was a long-standing client of Courtney Kazembe, a licensed solicitor in the Province of Ontario and the sole shareholder, director and controlling mind of Real Estate Co and K&A Op Co. The Bryan Mortgage relates to funds which were lent by Mr. Bryan to Mr. Kazembe, K&A OpCO, and Real Estate Co., which was secured by the Bryan Mortgage.

- Mr. Kazembe and K&A OpCO improperly discharged the Bryan Mortgage on February 13, 2019, without authority or without any payment to Arthur Bryan, and without Mr. Bryan's knowledge. Mr. Kazembe and K&A OpCO re-registered the Bryan Mortgage on August 19, 2023, in third position behind a charge/mortgage registered in favour of CIBC (which was registered in 2019).

CIBC's Application and Mr. Bryan's Opposition to Appointing a Receiver over Real Estate Co.

- CIBC's application was issued on April 26, 2023, and unilaterally scheduled to be returnable on May 11, 2023. The Application Record was couriered to Mr. Bryan on the afternoon of Friday, April 28, 2023 (at the time, Mr. Bryan was unrepresented). Prior to this, CIBC had not advised Mr. Bryan of its intent to bring its Application, had not canvassed his availability for the hearing, and had not otherwise communicated with him, whatsoever, with me.

- The proposed terms of Receivership over Real Estate Co. include the prioritization of uncapped Receiver fees, and Receiver Counsel Fees, over mortgages secured against the Property. Mr. Bryan is very concerned that if this relief is granted, it will significantly erode or completely wipe out his equity in the Property, and ability to recover from the damages caused by his lawyer's malfeasance.

CIBC Refuses Reasonable Request for Short Adjournment of Unilaterally Scheduled Hearing

- On Sunday, April 30, 2023, counsel for Mr. Bryan wrote to CIBC and advised that, inter alia:

  - Mr. Bryan intended to oppose the appointment of a receiver over Real Estate Co.; and
  - A telephone discussion be held between counsel and failing a resolution, an adjournment should be sought to allow for the scheduling of the Application steps.

- On Tuesday, May 2, 2023, counsel for Mr. Bryan wrote a letter to CIBC and advised:
  - Mr. Bryan would consent to a judicial sale of the Property;
  - Re-requested an adjournment to the May 11, 2023 Application Date; and
  - Proposed a Timetable for a responding record, cross-examinations, the exchange of facta, and the hearing of the Application, all within the month of May, 2023.

- Counsel for CIBC responded the same day, and with regard to the adjournment request, wrote, inter alia: "*as I'm sure comes as no surprise, CIBC will not consent to an adjournment and intends to proceed with its receivership application on the 11th.In our view, your firm has been engaged on this matter since the 28th and has had more than ample opportunity (and continues to have ample time) to file any responding materials should you wish to do so*."

Mr. Bryan's Proposal to take Possession, List, and Sell Property for capped fees of $30,000

- On May 3, 2023, counsel for Mr. Bryan wrote another letter, on a "with prejudice basis" – which included a Draft Order with proposed terms for sale. In short, it was proposed that Mr. Bryan would be responsible for the legal steps necessary to take possession of the Property, evict any occupiers/tenants, list, and sell the Property. It was proposed that counsel's legal fees be capped at $30,000, exclusive of HST and disbursements for appraisals and real estate commissions (with the $30,000 fee ranking in priority to the mortgages). From the sales proceeds, the amount owing to the first mortgagee would be paid, and the remaining sales proceeds, net of required closing costs, would be paid into court. In the event that the actual costs exceeded $30,000, Mr. Bryan would be responsible for the overage.

- The letter also made clear that if either of the other mortgagees (including CIBC) was willing to undertake the work with a $30,000 cap, Mr. Bryan was content for them to do so.

After Mr. Bryan serves Responding Material, CIBC immediately seeks Adjournment

- As a result of CIBC refusing to adjourn its unilaterally scheduled Receivership Application, Mr. Bryan was obligated to file responding material by May 4, 2023. Mr. Bryan filed both a Responding Motion Record as well as a Factum. Despite CIBC's insistence on maintaining the May 11, 2023 motion date (and Mr. Bryan's explicit request to schedule the exchange of facta), CIBC has not served a moving factum.

- Shortly after being served with Mr. Bryan's Responding Record and Factum, CIBC's counsel wrote to Mr. Bryan's counsel, advising that now *CIBC* required an adjournment, given that Mr. Bryan had responded to the Application.

- To date, CIBC has not responded to Mr. Bryan's offer that either he (or CIBC or the first mortgagee), carry out the sale with legal fees capped at $30,000.

- Mr. Bryan is not opposed to adjourning the hearing to permit CIBC to file a factum, and Mr. Bryan to file a subsequent factum. However, Mr. Bryan reserves his rights to seek all costs, including costs thrown away.

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Solo Lawyer Spotlight

Michael Myers

Managing Partner at Papazian | Heisey | Myers

Michael began working with Barry Papazian, Alan Heisey and Ben Forrest in 1992 and the four of them formed Papazian | Heisey | Meyers as founding partners in 2001. With over 40 years' experience, Michael's current practice focuses on mortgage and debt collections as well as contract enforcement.

He has also written extensively and spoken at seminars to explain the operation and effectiveness of the 'transfer at undervalue' provisions of section 96 of the federal Bankruptcy and Insolvency Act. Michael co-chairs the Law Society's 6 Minute Debtor-Creditor and Insolvency Lawyer bi-annual seminars and he is a contributor to the mortgage enforcement and debt collection topics in the Litigation & Dispute Resolution module of Practical Guidance (formerly Lexis Practice Advisor).

At the start of the Covid-19 lock down, Michael has started blogging about mortgage enforcement challenges that private mortgage lenders will surely encounter. With 30 posts for far, this blog, which he has aptly named "THE NEW REALITY: PRIVATE MORTGAGE LENDERS' RIGHTS AND REMEDIES" is a soup to nuts overview that contains many practice gems for sole practitioners and young lawyers alike.

We asked Michael about his background, practice and the challenges that he faces.

Can you tell us a little bit more about your practice and the cases you focus on?

"There are three main types of cases that interest me of late. The first is helping property owners/mortgagors who are being taken advantage of by their private mortgage lenders; who try to impose (and collect) improper fines and often ludicrous default penalties when enforcing their mortgages. The courts have consistently ruled that virtually all (if not all) of the default fees that these private mortgage lenders add to discharge statements are improper and simply unenforceable. I often represent the property owner/mortgagor to make sure that their rights are being upheld and respected.

I also take on files where I represent the lenders to ensure they are paid what they are owed and are contractually entitled to. This can be secured and unsecured institutional lenders, equipment lenders and even private mortgage lenders.

The third type of case that I have ongoing at this time is quite specialized. It involves section 96 of the Bankruptcy and Insolvency Act of Canada, which prohibits certain gifts and undervalued conveyances by bankrupts up to 5 years before filing or being petitioned into bankruptcy. Section 96 is a powerful tool that I have used successfully to obtain very large recoveries for bankrupt estates from the recipients of these transfers at undervalue/fraudulent conveyances!"

What has been your approach to the 'business of law' side to your practice?
How has the COVID-19 pandemic impacted your area of practice? Are there other instances where you've experienced similar challenges?
Do you anticipate increased competition in bankruptcy and insolvency law as other firms look to diversify their practices? How will this impact your practice?
Any advice for lawyers who are looking to expand their practice into bankruptcy and insolvency law or any new practice area, for that matter?
On a slightly different note, is there anything that you're looking forward to in 2021?

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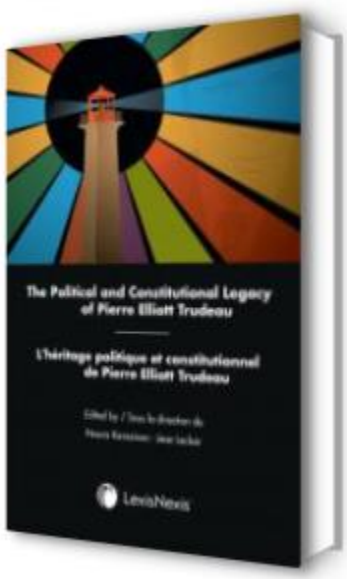

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Law firm beats debtor’s legal manoeuvre for $2.8 million

By Glenn Kauth
15 Sep 2014
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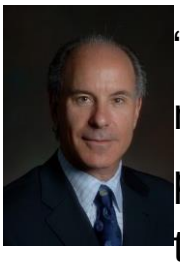
Lawyer Michael Myers had a rather unusual response to a demand letter he sent on behalf of his client, the National Bank

of Canada, seeking debt repayment.



“Further communication from you, either by phone or mail or registered mail will confirm that you are personally now assuming full commercial LIABILITY for the unlawful and fraudulent claims of the National Bank, OR, you are confirming that you are an equal respondent on the commercial lien and affidavit of obligation that may be created should the harassment continue,” wrote the debtor, Gail Marie Blackman, to Myers.

Myers is a lawyer at Papazian Heisey Myers in Toronto whose practice focuses on contract enforcement and who is one of two counsel who manage the National Bank’s residential mortgage enforcement and retail debt collection portfolio in Ontario and western Canada.

At first, Myers says he and others at the firm laughed at the letters they received. But when they received an invoice in June 2014 in the name of a corporate respondent for almost $2.8 million and a copy of a financing statement registered against Myers and his firm for non-payment under the Personal Property Security Act, it wasn’t so funny anymore.

“That’s what got us angry,” says Myers fresh off his victory on Thursday in lifting the registration under the act.

“It is clear on the facts that the PPSA registration against the applicants without colour of right and should be discharged forthwith,” wrote Superior Court Justice Graeme Mew in *Myers v. Blackman*. Mew awarded Myers and the firm $22,500 in costs but declined to order the requested punitive damages and relief for injurious falsehood.

Mew held Blackman jointly and severally liable in the case along with the corporate respondent, 8750432 Canada Inc., that registered the financing statement.

The invoice sent to the firm was for “threats and intimidation,” “unsolicited correspondence,” and “unauthorized use of name,” according to Mew’s endorsement.

While Myers and his firm succeeding in having the registration thrown out, he says the case is emblematic of a trend towards so-called Internet debt elimination scams.

Myers says they follow the oft-noted Freemen on the Land movement of people who challenge government authority and reject courts’ and governments’ right to uphold the rule of law. In recent years, those facing debt collections have been able to buy packages of information on the Internet advising them on how to fight repayment.

“It’s not supposed to be understandable,” says Myers, explaining that adherents suggest people have two essences: the flesh-and blood person and the “government-created person” connected to official documents like social insurance numbers and birth certificates. “That person has all the debt,” says Myers, referring to the government-created person.

He notes adherents also suggest the government set up trust funds for every person connected to a social insurance number around the time of the Great Depression and will respond that creditors can seek repayment from that money.

The letters Myers received in his attempts to collect on behalf of the bank, he notes, echoed some of the themes arising in Internet debt elimination scams. “It’s not English. It’s not law,” he says of the letters he received.

He and his firm alleged the respondents in the case were organized pseudolegal commercial argument litigants, a term described in detail in the Alberta Court of Queen’s Bench 2012 case *Meads v. Mead*s. While Mew didn’t make a finding the respondents in Myers were such litigants, he said a number of the characteristics described in Meads were present.

“An often employed tactic of OPCA litigants is said to be the use

of ‘foisted’ obligations in various forms — with the recipient being given a limited amount of time to respond and disagree, failing which they are held to have agreed to the terms of a unilateral agreement.”

While it was an unusual case, Myers expects such situations to be more common in the future. While he has seen such arguments in his work in the past, he says it was the first time it rose to the level of a personal attack against him. In fact, a Law Society of Upper Canada event on Oct. 27 includes a session on dealing with Internet debt elimination scams, he notes. Myers was the second reported decision this year dealing with this type of action under the Personal Property Security Act, according to Myers.

“I think what we’re going to find is more of these cases coming to light,” he adds, suggesting he expects judges will eventually warm up to ordering punitive damages.

Despite his victory last week, Myers says there’s still more to do.

“We’re not finished with this lady because, of course, I now have debts to collect,” he says, referring to the original bank debt and now the cost order. “All of this has resulted in her doubling her indebtedness.”

In the meantime, he notes the Ontario government has made it easier to deal with such situations through changes to the Rules of Civil Procedure that took effect July 1. The change, under Rule 2.1.01, allows judges to summarily dismiss vexatious actions without going through a vexatious litigant proceeding, he notes.

“No cases on that yet,” he says. “I’m hoping I’m the first.”

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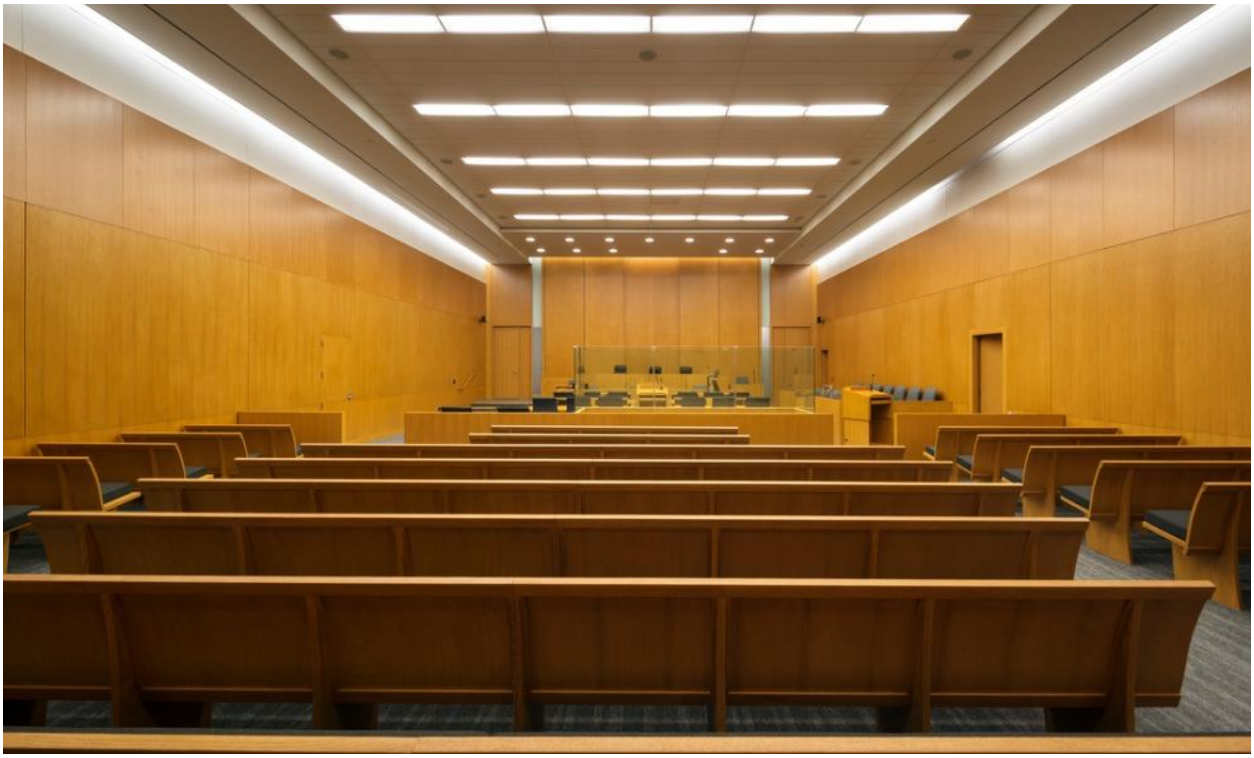

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TAB 3

The Six-Minute Debtor-Creditor and Insolvency Lawyer 2020

The New Reality: Mortgage Enforcement and Debt Recovery During the 2020 COVID-19 Pandemic

Michael Myers
Papazian| Heisey | Myers

October 28, 2020

cpd

The New Reality: Mortgage Enforcement and Debt Recovery during the 2020 Covid-19 Pandemic

by

Michael S. Myers, Papazian | Heisey | Myers

Overview

I think it safe to say that virtually all of us were taken by surprise when Ontario was suddenly locked-down last March to stem the rising rate of hospitalization of extremely ill Ontarians who had contracted Covid-19; to 'flatten the curve' as we now understand it.

The lockdown affected everyone and everything. There really was no way for any of us to have been prepared for the declaration of a pandemic caused by the SARS-CoV-2 virus and all that that entails. Sudden and unexpected passing of loved ones. Separation from friends and family. Business closures, layoffs and rampant unemployment – all at once. And grocery store shortages. Remember those empty rows of shelving where toilet paper was once displayed?

In my recent blog post I recalled that in my practice, before the lock down, two of the more common causes of mortgage default were mortgagors' deaths and marital breakdown. Few families can financially survive either of these calamities. Although merely anecdotal, it is safe to say that most Canadians were paying their mortgage debts in full and on time, until the pandemic arrived in March of 2020. But that was then.

This is now. The new reality. Covid-19 has changed everything – literally turning each of our world's upside-down, virtually overnight. By the end of March, 2020, more than one million Canadians had applied for EI. To date, more than three and one-half million Ontarians have applied for CERB - Canadian Emergency Response Benefits.

Fortunately, shortly after the lock-down, our federal government, working closely with OSFI – the Office of the Superintendent of Financial Institutions, Canada's bank regulators, and with CMHC and other mortgage insurers, permitted financial institutions to grant to its homeowner/mortgagor customers (without financial penalty) a moratorium, for up to 6 months,

on the payment of principal and interest owing under insured and uninsured mortgages not already in default. This was a welcome respite for the hundreds of thousands of Canadian households whose income or salary had suddenly stopped. By the 2nd week of July, payments under almost 750,000 mortgages had been deferred. In all, more than $170,000,000,000 (that's *one hundred and seventy billion* dollars) in outstanding mortgage debt was deferred across the country.

Mortgagors that started their mortgage payment deferral in April will have to start making regular monthly payments again this month, in October. Similarly, May deferrals will have to restart payments next month, in November. Only time will tell how devastating the pandemic will be on Canada's mortgage industry. Many insiders are predicting an avalanche of new defaults over the next few months, as a direct result of the pandemic payment deferrals now coming to an end.

Today, I've decided to speak about enforcing mortgages during a pandemic. Something new to all of us. And there is no question, it certainly will be more challenging that it was pre-pandemic, for a variety of reasons.

Institutional Insured Mortgages

Initially, during March and through to June, financial institutions took a very passive, consumer friendly approach to mortgage enforcement and debt collection, by imposing a self-declared moratorium on mortgage remedies. This was not only good public relations, but good common sense as well. With OFSI's revision of the rules dealing with mortgage defaults, non-performing deferred mortgage loans no longer had a negative impact on a financial institution's capitalization. CMHC, Canada's largest mortgage insurer, also had instructed financial institutions to stop all mortgage enforcement on insured loans, without exception. Bottom line was that no institutional mortgage lender wanted to be seen to be taking any mortgage remedy steps at all with their insured or their non-insured, conventional mortgage loans.

In my institutional practice, I was instructed to institute a complete moratorium on all mortgage remedy proceedings immediately after the lock down was announced. And if any mortgagor/customer contacted me, I was to send a pre-scripted email offering a sympathetic ear for their financial woes and a payment deferral if requested. The order of the day was to speak softly and not carry any stick at all.

By the end of June and early July, as lock-down restrictions were easing across the province, so, too, was the compete mortgage enforcement hiatus easing. While some institutions permitted notices of sale to be issued, and statements of claim to be served, CMHC maintained a strict hands-off approach on insured mortgages. But one also has to remember that the Courts were virtually shut down during the first few pandemic months, except for urgent matters. And for the most part, mortgage remedies were just not considered to be urgent – and rightfully so.

By September, however, mortgage remedies were opening up just enough to allow recovery work to continue so long as no one interfered with the owner/mortgagors possession of the mortgaged property. Even CMHC has started to allow insured lenders to restart mortgage remedies gently, with permission to become a mortgagee-in-possession of residential rental property, and to sell that property, so long as the tenant's rights are respected.

Conventional Loans

It goes without saying that on a go forward basis, each institution will formulate its own policies and procedures to deal with its non-insured mortgages in default. And just as the second wave of the pandemic seems to be taking a foothold across most of the country, so, too, should lenders' mortgage enforcement policies ebb and flow with the times. It is trite to say, "we shall see what we shall see".

Private Mortgages

Private mortgage lenders are not subject to OSFI regulations and requirements, and do not have to account for mortgage defaults in their financial statements as strictly as do OSFI regulated institutions. Nonetheless, many took a back seat last Spring and either formally or informally, allowed their mortgagors the same deferral options that were offered to insured mortgagors. Some private mortgagees made forbearance arrangements with owner/mortgagors and others just relaxed their mortgage enforcement for a few months. But by September, I was seeing an influx of new mortgage enforcement files in my office from private mortgagees. It was, for the most part, a return to business as usual.

At this stage of the pandemic, one must remember that the province's Emergency Order on March 16, 2020, that suspended all time periods in the Rules of Civil Procedure (including the twenty days for the delivery of a statement of defense by a defaulting mortgagor) has come to an end effective September 14, 2020. So it is now possible, in mortgage recovery actions, to note defendants in default, if they do not file and serve a statement of defense within the twenty day time period set out in the Rules of Civil Procedure.

But, of course, no one yet knows what the current wait time will be between the filing of a requisition for default judgement and obtaining default judgment signed by the Registrar of the Court. Nor is it clear whether the Courts will entertain electronic motions for summary judgment where a defendant has not filed a defense. Again, only time will tell. And no doubt different Courts around the province will have different wait times and very different attitudes about helping mortgage lenders enforce their security during the pandemic.

And this is where the story takes an unexpected twist. When their mortgages go into default, private mortgage lenders want their counsel to push ahead, take possession of the mortgaged property and then sell the mortgaged property. The law allows private mortgage lenders to take possession. Either by enforcing a writ of possession obtained from the Courts, or by using the self-help remedy of taking possession peacefully. However, with the Courts not yet being a reliable source for default judgments for possession or for motions asking for judgment for possession, the self-help remedy is even more appealing than it was previously.

Of course, no mortgagee can forcefully take possession without a court order if the mortgagee were to be required to breach the peace. This is a reasonable and fair limitation on the self-help remedy of taking possession without a Court order. Owner/mortgagors can therefore refuse to give up possession to her or his private mortgage lender by simply refusing to leave the mortgaged property. But what about tenants?

Tenants in Possession of Residential Rental Property

The law dealing with possession of mortgaged property, especially when the property is rented to a tenant, takes us back to our first year real property course from law school. Real Property Law 101 if you will.

You will recall that in Ontario, when we talk about an owners' *fee simple interest* in real property, what we are really saying is that at common law, an owner has a bundle of rights relating to her or his ownership of the land in question, and all of these rights taken together result in her or his absolute ownership of the real property ….. in fee simple. Included in this bundle of rights is the right:

- to occupy and live in the property – or put more formally, to be in possession of the property
- to allow others to use the property either by giving a license (temporary permission) to use the property or by granting a lease of the property
- to develop and build upon the property
- to farm the land or cut down timber
- to sell the property
- to bequeath the property upon death

In order to grant a lease of real property, the owner must give the tenant exclusive possession of the property for a clearly spelled out term. These 2 factors, exclusive possession and a 'term certain' are necessary preconditions to any lease of land at common law.

So an owner who has rented out the mortgaged property has, by definition, given exclusive possession of the property to the tenant as a necessary precondition to the creation of a residential lease. It is therefore the tenant, and not the owner, who is in possession of the mortgaged property.

Taking Possession of Rented Residential Property

A mortgagee's ability to take possession of mortgaged property without a court order stems back to the centuries old origins of mortgage law, when the granting of a mortgage was accomplished by the mortgagor actually handing over to the mortgagee the deed to the mortgaged property. Historically, the delivery of the deed to the mortgaged property was accompanied by the delivery of possession of the mortgaged property. At law, the mortgagee became the owner of the mortgaged property and was entitle to possess the mortgaged property. Somewhere in the annals of time, likely shortly after the English Courts of Equity created the concept of 'equity of redemption' (which permitted an owner/mortgagor to redeem the mortgage following default), the mortgage contracts themselves started containing clauses allowing the mortgagor to keep possession of the mortgaged property until default. And only after default, was the mortgagee entitled to possession of the mortgaged property under the mortgage contract. This practice of contractually reversing the common law rules of possession exists in virtually all mortgages.

And so, when the mortgage goes into default, the mortgagee is entitle by the mortgage contract to take possession of the mortgaged property. But if the property has been leased, possession has already passed from the owner/mortgage to the tenant.

When a mortgagee changes the locks on rented property and gives the tenant the new key, that rather symbolic action indicates the mortgagee's clear intention to prevent the owner/mortgagor from taking back possession of the property from the tenant at the expiry of the term of the lease. And upon doing so (as I mentioned in Blog XXI) the mortgagee becomes the mortgagee-in-possession of the mortgaged property.

Dye & Durham's Standard Charge Terms 200033, which is used in many many private mortgages these days, sets out 3 separate clauses allowing the mortgagee to take possession of the mortgaged property following default. The first is a clause which says that *"The Chargee - on default of payment for at least 15 days may, on at least 35 days' notice in writing given to the Charge,* **enter on** *and lease the land or sell the land."*

These standard charge terms go on to state that *"Provided further, that in the case default be made in the payment of the principal amount or interest or any part thereof and such default continues for two months ……then* **the Chargee may exercise the foregoing powers of entering,** *leasing or selling or any of the them without any notice….. ".* And lastly, these standard charge terms then clarify that *"Upon default in payment of principal and interest under the Charge. …..***the Chargee may enter into and take possession of the land hereby charged** *…….[whereupon]* **the Chargee shall enter into, have, hold, use, occupy, possess and enjoy the land without the let, suit, hindrance, interruption or denial of the Chargor or any other person or persons whomsoever***….."*.

And so, with the mortgage contract clearly giving the mortgagee the right and full power to take and keep possession of the mortgaged property upon the mortgagor's default, without the suit or hindrance of the mortgagor, no court proceeding and no writ of possession is needed in order for the mortgagee to do so.

All that the mortgagee need do is become the mortgagee-in-possession of the mortgaged property. Which can occur by the mortgagee attorning rent or changing the locks. But what if the tenant refuses to allow the mortgagee to change the locks?

The answer is fairly staighforward. Once a mortgagee attorns the rents, the mortgagee becomes the landlord of the residential property by virtue of section 47 of the *Mortgages Act*, R.S.O. 1990, c. M.40 . And section 24 of the *Residential Tenancies Act*, 2006, S.O. 2006, c.17 gives the landlord permission to change the locks on residential premises so long as the tenant is given a copy of the new key. So, it should be fairly simply for the mortgagee to change the locks on rental properties. 'Should be simple' - being the operative words. Sometimes, the tenant just says "no".

This month alone I've brought two separate motions seeking an urgent hearing allowing a mortgagee to change the locks and take possession of residential property when the tenant has refused to co-operate. The Brampton Court refused our request for an urgent motion date but gave us a regular motion date just 2 weeks after the motion was filed. We will see what the Oshawa Court will do…..

Time will tell. This is now…..our new reality.

Stay healthy everyone.

@ Michael S. Myers

https://www.phmlaw.com/blog

Law Society of Ontario | Barreau de l'Ontario

TAB 4

The Six-Minute Debtor-Creditor and Insolvency Lawyer 2022

Protecting a Seller when the Sale of a House does not Close

Parjot (Perry) Benipal
Papazian | Heisey | Myers

October 13, 2022

cpd

Protecting a Seller when the Sale of a House does not Close

Parjot (Perry) Benipal, Papazian Heisey Myers

The real estate market in Ontario was red hot in the first quarters of 2022. But almost as quickly as it heated up, it cooled down. Many took advantage of this market to turn a massive profit in a short period of time, but at the same time, many people lost thousands. Practically speaking, this gave rise to numerous real estate lawyers dealing with what happens when a typical transaction fails to close. The scope of this paper is to discuss how to best protect a seller of a house in Ontario, where the seller has entered into a Standard OREA Agreement of Purchase and Sale. The goal of this paper is to discuss common pitfalls and steps that sellers, with the assistance of counsel must take to protect themselves, and the steps that counsel should take if they find themselves in a situation where an extension to the closing date is required.

Ready, Willing and Able to Close:

In most real estate transactions, the seller must prove that they are ready, willing, and able to complete the transaction on the closing date. Tender is the best and most obvious evidence of this fact. Proper tender by the seller's counsel involves providing all required standard closing documentation; including the statement of adjustments, access to the keys for the house, and messaging a copy of the transfer deed in Teraview to the buyer's lawyer. As the OREA standard Agreement provides that time is off the essence, the seller must show the "he/she is ready, willing and able to close on the date fixed for closing, that the default of the [buyer] was in no way attributable to the [seller's] fault, and that [the seller] continues to be ready, willing able to close perform the contract."[1]

A common mistake that has arisen is the failure to tender effectively and have the tender properly documented per case law guidelines. In *Azzarello v. Shawqi*[2] the buyer failed to complete the closing of a property, because he was unable to obtain the required financing to

[1] Time Development Group Inc. (In trust) v. Bitton, 2018 ONSC 4384 (CanLII) at paragraph 53, as followed and citied by Azzarello v. Shawqi, 2019 ONCA 820 (CanLII) at paragraph 30
[2] Azzarello v. Shawqi, 2019 ONCA 820 (CanLII)

complete his transaction. The case made its way to the Court of Appeal and the buyer argued that although he failed to complete the transaction, the seller did not tender, nor did the seller provide any signed closing documents or the keys to the property. As was argued, no damages or any cost award should be awarded against the buyer.[3] Ultimately, based on the record before the Court of Appeal, it was established that the buyer could not close because he did not have the required funds on the closing date, regardless of the seller conduct. This case was decided in favour of the seller and serves as a great example of the importance of tender. Had the seller tendered correctly, the seller may have avoided the appeal entirely, and may not have had to incur the expense and time required to appeal.

It is best practice in real estate, that all counsel representing a seller or sellers send their closing packages at least one business day before closing, with all required signed documentation, statement of adjustments, keys (or the lockbox code, as has become standard practice) and a screenshot of the messaged transfer deed. This is even easier to provide now that original wet ink closing documents are a thing of the past, and scanned copies of documents provide for the instantaneous sharing of documents. This is also helpful, as these electronic closing packages can easily be saved with both lawyers (buyer and seller) in their respective digital files.

Much like with the closing documents, transfer deeds should also be signed for completeness early on the day of closing or the afternoon before the closing date, with a screenshot of the same saved in the seller lawyer's file. In the event the seller's lawyer's office does not receive the required closing funds by 3:00 p.m., the sellers' lawyer should advise the buyers lawyer by email that the seller is "ready, willing and able to close" and attach the scanned closing documents to the email. While it is not everyday that a transaction does not close, this is a good practice to start, as you are preparing all correspondence for litigation if the transaction does not close.

[3] Ibid at paragraph 27

Anticipatory Breach

Where the buyer has made it clear that they have no intention of closing the transaction the seller is not required to tender on the buyer. This term is referred to as an anticipatory breach. In *Spiridakis v. Li*[4], a matter involving a summary judgment for a failed real estate transaction, Justice Boswell held that the law does not require a meaningless ritual to be performed where the buyer has established that they have no intention of closing the transaction. Justice Boswell concluded that the "tender issue does not require a trial to resolve. The plaintiffs were not required to tender". Importantly, where the buyer is unwilling or unable to close, for what ever reason, they may not rely on the time of the essence clause, when the seller does not tender.[5]

Before a seller writes to the buyer declaring an anticipatory breach, the seller's counsel must be certain that there is in fact an anticipatory breach and should take caution in insisting on strict compliance with the agreement, as insisting on strict compliance goes both ways. In *Kwon v. Cooper*[6] the buyer advised early on that they had no money to complete the transaction and the day before closing, the seller's lawyer wrote and advised that it would stand on the strict terms of the contract, requiring closing and suing for any damages if the transaction was not completed. However, on the closing date, the seller was himself not ready, willing able able to close as he did not have a discharge of the first mortgage on title. The court held that since the seller insisted on strict compliance, the seller was precluded from making a new closing date after defective tender. In the end, the buyer was able to get his deposit back and was not required to close.

When you are advising your client, as their counsel, you should act quickly if the buyer has advised that they anticipate breaching the agreement. You do not need to wait for the day of closing to commence proceedings for damages, you can prepare the file for litigation in advance.[7] In practise, a letter documenting the anticipatory breach should be delivered to the

[4] Spiridakis v. Li, 2020 ONSC 2173 (CanLII) at paragraph 61 – 62
[5] Di Millo v. 2099232 Ontario Inc., 2018 ONSC 816 (CanLII)
[6] Kwon v. Cooper, 1996 CanLII 1261 (ON CA)
[7] Roy v. Kloepfer Wholesale Hardware and Automotive Company Limited, 1951 CanLII 116 (ON SC),

buyer and if required, the seller's lawyer should put in writing any telephone discussions had with the buyer's counsel and not wait until the day of closing to either commence an action or attempt to resolve the matter, however the seller deems fit.

Extend or Terminate the Deal

Whether a seller wishes to extend or terminate a real estate transaction is fact specific and should be tailored to the needs and wants of the seller. Where the seller is relying on the sale proceeds to purchase another home, it would best for counsel to advise that an extension may essentially "save both deals", and the seller would not have to relist and resell a property. If the seller does not require the funds, normally because the involved property is an investment or secondary property, it may be in their favour to terminate the agreement and consider proceedings relating to the breach of contract and all related damages, should they choose to do so.

If the seller chooses to extend the transaction to a new closing date, it is preferable that the extension is drafted by counsel rather than real estate agents. Some clients prefer the agents to draft the new terms as they do not charge hourly for their services, however, as real estate agents are not often lawyers themselves, the terms that are agreed upon may not be effective in a practical sense, or even legally binding. For example, in a standard transaction, the initial deposit is held in the seller's real estate brokerage trust account. When asking for an extension, it is recommended that counsel draft one of the extension terms to state that the deposit should be transferred to the seller's lawyer's trust account. This is helpful because if the deal does not proceed, the deposit funds can be directed to the seller without having to involve the real estate brokerage further. Again, realtors would not necessarily think about what is in the best interests of their client if the transaction does not go through, but as the selling parties counsel, these are all terms that favour your client, and are in their best interests.

Extensions in real estate transactions were common during the COVID-19 Pandemic and have become more common lately. Whether it be due to an appraisal not being conducted in time by the mortgage company, or simply the buyer's inability to secure financing on time. Counsel must be able to enter into extension term negotiations at the eleventh hour. Having the

knowledge of what terms should be drafted into the extension agreement can save your client both time and money if they need to litigate.

If the seller chooses to terminate the agreement, the seller's counsel should document this in writing, either by way of letter or email correspondence, that the seller shall terminate the agreement if the buyer is unable to close on the closing date, as provided for in the agreement of purchase and sale. Ideally, the seller should provide evidence that they are ready, willing and able to close the deal and should commence court proceedings without delay. Ensuring that court proceedings take place as soon as possible, is advantageous for counsel as all the required documents and correspondence are readily available.

Given that the Bank of Canada's continued intention is to raise interest rates even further than they currently are, real estate practitioners throughout the province will no doubt experience an increase in transactions that do not close. It is vital that the seller's counsel tender properly or document an anticipatory breach in writing. Counsel should give serious consideration whether to terminate or extend a real estate transaction. Based on the review of the case law, proper documentation and organization are a key part of successful litigation on part of the seller. Even if you do not anticipate that you will be the counsel starting proceedings in court, it is best practice to prepare your client's files for court. Doing so will save them both time and money in the long run, while also ensuring that you are fulfilling all your duties and obligations as their counsel for the transactional aspect of the agreement.

COURT OF APPEAL FOR ONTARIO

CITATION: Scott, Pichelli & Easter Limited v. Dupont Developments Ltd., 2022 ONCA 757
DATE: 20221107
DOCKET: C70461

Lauwers, Roberts and Trotter JJ.A.

BETWEEN

Scott, Pichelli & Easter Limited as assignee for CAM Moulding & Plastering Ltd. and Gentry Environmental Systems Ltd. by its Trustee, Scott, Pichelli & Easter Limited

Plaintiffs (Appellants)

and

Dupont Developments Ltd., The Rose and Thistle Group Ltd., Florence Leaseholds Limited, Beatrice Leaseholds Limited and ADA Leaseholds Limited

Defendants (Respondents)

Antonio Conte and Ilona Isakovitch, for the appellants

Michael A. Handler and Emily Evangelista, for the respondents

Heard: October 11, 2022

On appeal from the judgment of the Divisional Court (Justices Michael A. Penny, Phillip Sutherland, and Lise G. Favreau), dated October 5, 2021, with reasons reported at 2021 ONSC 6579, allowing an appeal from a decision of Justice Lorne Sossin of the Superior Court of Justice, dated July 30, 2019, with reasons reported at 2019 ONSC 4555.

Lauwers J.A.:

[1] The appellants are construction lien claimants. The respondents are the mortgagees under a vendor-take-back mortgage registered on title to the property before the date on which the first lien arose. The property was sold under power of sale. On May 11, 2015, Newbould J. issued an Amended and Restated Approval and Vesting Order approving the sale. The order required the lesser of the net proceeds of the sale or the sum of $1,289,524.14 to be paid into court, pending resolution of the priority dispute between the lien claimants and the mortgagee. Eventually the net proceeds of sale in the amount of $608,119.43 were paid into court pursuant to Newbould J.'s vesting order. There is a shortfall in the remaining reserve. The issue is who gets the balance, the lien claimants or the mortgagee.

[2] Many pages of judicial text have been written in this saga, the most immediate being the Report of Master Albert determining the priorities, dated May 17, 2018 (2018 ONSC 3126), the motion judge's partial refusal to confirm the Master's Report, dated July 30, 2019 (2019 ONSC 4555), his reconsideration decision, dated November 6, 2019 (2019 ONSC 6118), and the Divisional Court's decision, dated October 5, 2021 (2021 ONSC 6579), reversing the motion judge in part and confirming Master Albert's Report. The courts below all decided that the vendor-take-back mortgage has priority over the liens, but they disagreed on the extent of that priority.

[3] In particular, the Master found that the mortgage principal, together with interest and related charges, has priority over the lien claims. The motion judge

agreed that the mortgage principal had priority over the liens but found that the lien claims had priority over the mortgage interest and other charges. The Divisional Court (per Sutherland J.) reversed and restored the Master's ruling.

[4] To be precise about what is at stake, I note that after the vesting order was executed and the required payments made, the net proceeds paid into court were $608,119.43. The Master's consent order dated June 13, 2016 permitted the payment out of court of $195,896.27 to the mortgagees following settlement of four of the lien claims, thereby reducing the amount held in court to $412,223.16.

[5] The competing claims are those of the lien claimants and the mortgagees. The Master valued the balance of the lien claims at $70,658.85 for CAM Moulding & Plastering Ltd. and $258,476.58 for Gentry Environmental Systems Ltd. for a total of $329,135.43. The mortgagees claim arrears in interest in the amount of $429,104.15, enforcement expenses in the amount of $463,892.46 for receiver's fees, and $108,676.64 for other charges.

[6] The stakes are these: if the lien claimants are successful, then they will recover the full amount of their liens at $329,135.43, leaving the balance for the mortgagees; but, if the mortgage interest has priority, then all the remaining funds will go to the mortgagees.

[7] This appeal turns on a question of law relating to the interpretation of s. 78 of the *Construction Act*, R.S.O. 1990, c. C.30, as amended by the *Construction Lien Amendment Act*, S.O. 2017, c. 24. More specifically, the question is whether

the priority that the prior mortgages have over lien claims extends to arrears in interest, fees, charges, and expenses that relate to the mortgage and its enforcement, under s. 78(3) of the *Construction Act*.

[8] The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it. The interpreter must attend to text, context, and purpose, to which I now turn: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 117, 118-124.

[9] The purpose of the *Construction Act* is to protect lien claimants by ensuring that they are compensated for the increase in the value of a property to which their work contributed. But this purpose is hedged about with exceptions. One exception is for mortgages. The policy orientation of the Act can be seen in s. 78(1) and the mortgage exception is found in s. 78(3):

> Priority over mortgages, etc.
>
> 78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.
>
> Building mortgage
>
> (2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.
>
> Prior mortgages, prior advances

> (3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,
>
> (a) the actual value of the premises at the time when the first lien arose; and
>
> (b) the total of all amounts that prior to that time were,
>
> (i) advanced in the case of a mortgage, and
>
> (ii) advanced or secured in the case of a conveyance or other agreement.

[10] The appellants urge this court to apply literally the language of s. 78(3)(b)(i), which protects only amounts that were "advanced in the case of a mortgage". The appellants present their arguments in two forms.

[11] The appellants' most radical argument is that a vendor-take-back mortgage is not a mortgage in which an advance of cash has taken place. Accordingly, the entire mortgage amount is subordinated to the interests of lien holders. The appellants argue that a vendor-take-back mortgage is the equivalent of a collateral mortgage where the subordination of the collateral mortgagee's interests is accepted law: *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) 294 (Ont. S.C.), aff'd (2004), 1 C.B.R. (5th) 159 (Ont. Div. Ct.). I would reject this argument. Giving effect to it would impair the use of vendor-take-back mortgages in the real estate market. In my view, a vendor-take-back mortgage is the equivalent of an advance for the purposes of the *Construction Act*.

[12] Both parties invoke the Supreme Court's decision in *M. Sullivan & Son Ltd. v. Rideau Carleton Raceway Holdings Ltd.*, [1971] S.C.R. 2, but take different views of its impact. The Supreme Court decided that principal and interest are equally secured by a mortgage:

> This legislation has been in force for a long time. Until the issue was raised in these proceedings, there was no case which drew any distinction between the rights of the mortgagee to priority for principal and his rights to priority for interest.
>
> Both the trial judge and the Court of Appeal in this case have rejected any such distinction and I agree with them. Principal and interest are equally secured under the mortgage. The right to interest is an essential, inseparable, constituent part of the advance made on account of the mortgage. Without such a right no building loans would ever be made in a commercial way. The registration of a claim for lien or notice in writing of such a claim cannot stop the running of interest or affect the mortgagee's priority for continuing interest on advances validly made under s. 13(1) of The *Mechanics' Lien Act*. [Emphasis added.]

[13] The appellants' second argument, which hearkens back to *Sullivan*, is that interest and other costs are not advances of funds to the mortgagor and are accordingly not given priority over liens under the *Construction Act*.

[14] The appellants submit that this expansive language was appropriate in *Sullivan* because at issue there was a building loan, which is a different thing than an ordinary mortgage, as in this case. Section 78(2) of the *Construction Act* affords better protection to building loans.

[15] I do not agree with the appellants' approach. Instead, I would accept the approach taken by Wilton-Siegel J. in *Re Jade-Kennedy Development Corp.*, 2016 ONSC 7125, 72 C.L.R. (4th) 236, at para. 49:

> *M. Sullivan & Son* and *XDG Ltd.* demonstrate that the concept of an "advance" is not limited to the principal amount advanced under a mortgage. It includes all amounts which the mortgagor is contractually obligated to pay in respect of any such principal amount advanced, including interest and the costs of registration, perfection and enforcement of the mortgagee's security for the advance irrespective of when incurred. As the Supreme Court noted, without such a right, building loans and other commercial loans would not be made in a commercial manner. [Emphasis added].

[16] I would reject the appellants' argument that *Sullivan*'s application is restricted to building loans, for three reasons. First, this argument has no support in the precedents. The practice has developed in accordance with the approach in *Sullivan* to extend beyond building loans, as Wilton-Siegel J. noted. The Supreme Court in *Sullivan* did not expressly limit its findings to building loans. In *Jade-Kennedy* Wilton-Siegel J. observed that without such priority, even "other commercial loans would not be made in a commercial manner."

[17] It would be unwise to interfere with settled practice. The *Sullivan* approach has already been followed by Ontario courts in the context of mortgage priority over construction liens. In *830889 Ontario Inc. v. 607643 Ontario Inc.* (1990), 43 C.L.R. 181 (Ont. Gen. Div.), Hoolihan J. held that because principal and interest are equally secured under a mortgage, and "advances" or "money advanced"

include interest, interest payments with respect to two non-building mortgages had priority over a construction lien. This finding has been accepted by text writers to stand for the principle that a mortgagee's "priority include[s] a continuing claim to interest": Harvey J. Kirsh & Matthew R. Alter, *A Guide to Construction Liens in Ontario*, 3rd ed. (Toronto: LexisNexis Canada, 2011), at § 10(B)(vi). It seems to be settled practice that a mortgagee's "priority also extends to any interest on an advance that is paid on account of a mortgage": *Halsbury's Laws of Canada*, "Real Property", (Toronto: LexisNexis Canada, 2021 Reissue), at HRP-99.

[18] I note that the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, April 1982), which led to the enactment of the *Construction Lien Act*, does not comment on the specific question of the priority of interest and other expenses. The Committee commented, at pp. 180-181, only on the relative priorities of prior and subsequent advances under what was then s. 80(3), now s. 78(3):

> "[P]rior" interests are generally accorded priority over the lien. However, under subsection 3 the priority of those interests is limited in the case of advances made prior to the commencement of the improvement of the actual value of the premises at the time when the making of the improvement commences. Where advances are made in respect of those interests after this date, they are entitled to priority in respect of those advances in accordance with much the same rules as apply under subsection 6, in respect to advances under subsequent interests.

[19] Second, the appellants were not able to point to textual support for the proposition that the statutory language in the *Mechanics' Lien Act* is sufficiently

different than the statutory language in the *Construction Act* such that the interpretation of the former in *Sullivan* does not apply to the latter. Section 13(1) of the *Mechanics' Lien Act* used the language of "payment or advances made on account of any conveyance or mortgage". Section 78(3)(b)(i) uses the language of "advanced in the case of a mortgage".

[20] Nor does the contrast between the subparagraphs (i) and (ii) of para. 78(3)(b) of the *Construction Act* assist the appellants. They submit that mortgage interest is "secured" by a mortgage but is not "advanced" under it, in the words of s. 78(3)(b)(i). They argue that the *Construction Act* makes the relevant distinction by using the words "advanced or secured" in relation to a conveyance "or other agreement" in s. 78(3)(b)(ii). I disagree. The "other agreement" language in subsection (ii) seems to refer only to a vendor's lien on property. The appellants were not able to provide any other examples of the operation of the language in subsection (ii). A vendor's lien is clearly not an advance.

[21] Third, the effect of adopting the novel interpretation that the appellants propose is not entirely clear, but it would impose additional risk on purchase money mortgagees, who might then be required to actively monitor properties to ensure that improvements made by owners did not deplete the mortgagee's entitlement to payment for interest. (The argument that an improvement might increase the equity to the mortgagee's ultimate advantage is not much comfort to a mortgagee.) The appellants' proposed approach would introduce a sea change in risk

assessment by mortgage lenders that is simply not warranted by the legislative history or long-standing practice. The possibility of inadvertently doing harm is very much present.

[22] The appellants also argue that the mortgage value prescribed in s. 78(3) (being "the lesser of, (a) the actual value of the premises at the time when the first lien arose; and (b) the total of all amounts that prior to that time were, (i) advanced in the case of a mortgage") functions as a cap to limit the amount the mortgagee can take out of the proceeds of sale to pay interest and the associated expenses of enforcing the mortgage. There is no support for this approach in the cases. Once the exigible value of the mortgage is capped, the normal incidents of mortgage law apply to that capped mortgage balance, including recovery of interest and enforcement costs.

[23] In conclusion, the priority created by s. 78(3) for prior mortgages extends to the arrears in interest and enforcement costs. I would dismiss the appeal with costs payable in the amount of $17,000 to the respondent, all-inclusive.

Released: November 7, 2022 "P.L."

"P. Lauwers J.A."
"I agree. L.B. Roberts J.A."
"I agree. Gary Trotter J.A."

Court File No. CV-23-00698539-00CL

Canadian Imperial Bank of Commerce Applicant	-and-	1340182 Ontario Limited et al. Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commencing in **Toronto**

SUPPLEMENTARY BOOK OF AUTHORITIES OF ARTHUR BRYAN

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