

The reasons for judgment of the Court were delivered orally by:

FLINN, J.A.:

On December 1, 1994, counsel for the parties to this appeal consented to an order granted by Justice Nunn of the Supreme Court of Nova Scotia in Chambers. The order arose out of an application by the respondent numbered company.

The numbered company wanted to refinance the mortgage debt on its property. This necessitated, among other things, obtaining a discharge of a second mortgage. There was a dispute between the second mortgagee (the appellant Strad) and the Canadian Imperial Bank of Commerce (the respondent Bank) as to who was entitled to the second mortgage proceeds.

The numbered company, therefore, made application to pay the money owing under the second mortgage into court so that the Bank and Strad could determine, among themselves, which one is entitled to the money. In exchange for this payment into court, the numbered company wanted a release of the second mortgage.

To complicate the matter, the numbered company was claiming duress in the initial execution of the second mortgage, and wished to reserve its rights to challenge the extent of its indebtedness under that mortgage.

The order, which counsel for the parties consented to, provided as follows:

"1. Upon payment of the sum of \$112,985.59 plus interest accruing at the per diem rate of \$57.20 from November 1, 1994, into court, with an additional per diem of interest charged if the payment into court is not made before 1:00 p.m. on the date of payment, all the lands mortgaged by the Mortgage ("Mortgage") made between **2048279 N.S. Ltd.**, mortgagor, and **Liberty Mortgage Corporation Limited**, mortgagee, which is dated the 23rd day of August 1991, and registered in the Registry of Deeds at Halifax, Nova Scotia in Book 5123 at Page 27, in respect of which an assignment to **Strad Realty Limited**, assignee, dated September 23rd, 1991, was registered in the Registry of Deeds at Halifax, Nova Scotia at Book 5137 at Page 85, be and is hereby released pursuant to s. 28 of the Registry Act, R.S.N.S. 1989, c. 385. The

benefit of the covenants of said Mortgage and any bond or security given collateral to the Mortgage be and is hereby also released.

{It is conceded that the reference in this clause to "**Registry Act**" is a clerical error, and it should read "**Real Property Act**" }

2. Any payment made by 2048279 Nova Scotia Limited pursuant to this Order shall be without prejudice to its rights to challenge its indebtedness under the Mortgage and/or the extent of its indebtedness, it being the intent that, in making such payment into Court, 2048279 Nova Scotia Limited is reserving all rights, including but not limited to, all rights of action it has or may have against the Defendants in relation to the Mortgage.

3. This Order shall be registered in the Registry of Deeds at Halifax, Nova Scotia. Registration of this Order at the Registry of Deeds office at Halifax, Nova Scotia shall be sufficient proof of the payment into Court by 2048279 Nova Scotia Limited and as to the release and discharge of the mortgage referred to in paragraph one of this Order.

4. The issue as to the priority of the claims to the funds paid into Court pursuant to this Order as between the **Canadian Imperial Bank of Commerce** and **Strad Realty Limited** shall be heard before this court, by the Judge then presiding in special chambers on Wednesday, December 14, 1994 at 2:00 p.m. The successful party in that application shall pay costs of this Interpleader Application (in addition to whatever other order for costs the court may make following the December 14, 1994 hearing) to **2048279 Nova Scotia Limited** in the amount of \$500.00 all inclusive."

The money was paid into court. The registration of the order, in the Registry of Deeds, effectively released the second mortgage on the numbered company's property. The hearing, to determine the priority of the claims to the funds paid into court, as between the Bank and Strad, never took place. Strad and the Bank reached an agreement as to how the funds were to be divided between them. We have been advised at this hearing that this agreement is now in question; however, the Chambers judge was advised that such an agreement existed.

The parties could not agree as to whether the consent of the numbered company was required before the funds were paid out of court to Strad and the Bank. On a further

application made by Strad, to Justice Nathanson in Chambers, for a declaration that the numbered company's consent was not so required, Justice Nathanson, referring to the numbered paragraphs of the order, said:

"With respect to paragraph 2, I cannot say what paragraph 2 means other than it appears to speak for itself and, secondly, since it is Number 2, that the clear intent was that the subject matter of paragraph 2 would be secondary and subsidiary to the subject matter of paragraph No. 1."

Strad appeals this decision.

Leave to appeal is granted, however, in our opinion Justice Nathanson made no reversible error in his consideration of this matter, and this appeal should be dismissed.

The only rights reserved to the numbered company by the order of Justice Nunn were personal, and could only be enforced by a separate action apart from the proceeding taken to obtain the release of the mortgage. There is, therefore no need to give notice to the numbered company before dispersal of the funds paid into court.

The record establishes that the original application for payment of money into court was not made pursuant to the provisions of the **Real Property Act**. The numbered company, therefore, has no claim under that Statute.

The appeal is, therefore, dismissed without costs.

Flinn, J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

