NOVA SCOTIA COURT OF APPEAL
Citation: Fawson v. St. Clair, 2013 NSCA 123

Date: 20131030
Docket: CA 413065
Registry: Halifax

Between:

James Robert Fawson, Lynda Fawson and David Neville

Appellants

v.

Anna St. Clair

Respondent

Judges:	Saunders, Beveridge and Farrar, JJ.A.
Appeal Heard:	June 18, 2013, in Halifax, Nova Scotia
Held:	**Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Saunders, J.A.; Beveridge and Farrar, JJ.A. concurring.**
Counsel:	Keith MacKay, for the appellants Sean Foreman and Jason May, for the respondent

Reasons for judgment:

[1] The appellants bring this appeal from a Chambers judge's decision that dismissed their motion to distribute the surplus left over from a foreclosure sale. The appellants based their claim to the money on an "implied trust". They said the beneficial interest in the property had remained throughout with a company they had formed, and that the surplus stood in place of the foreclosed equity of redemption. In denying their motion the judge determined that the surplus ought to be paid instead to a fourth investor who had asserted a legal claim to the funds.

[2] For the reasons that follow I would dismiss the appeal. I will begin my analysis by briefly reviewing the facts which led to this dispute.

Background

[3] This appeal arises in the aftermath of a foreclosure action. The three appellants and the single respondent were the four defendants in that litigation. The sheriff's sale resulted in a surplus of funds over and above the claim initiated by the plaintiff bank, the Canadian Imperial Bank of Commerce. The parties disagreed as to how that surplus ought to be distributed. To better understand the nature of that dispute one needs to know the circumstances which drew the parties together.

[4] They had agreed to participate in a venture whose objective was to acquire land and develop a cottage rental business. To that end, a company – River John Oceanfront Resort Ltd. ("RJOR") – was incorporated. By 2003 some land had been acquired, but the company fell short of capital necessary to complete the development plan.

[5] The parties agreed to use their personal credit to assist the company in raising additional capital. They arranged for a transfer of the legal title of the lands owned by RJOR to them so that they could personally grant a mortgage in favour of the lender bank and assume liability for the debt. The funds from the mortgaged

lands were then transferred to RJOR to be used by it in the development of the property and the business.

[6] The terms of this arrangement were set out in a lawyer's letter dated November 5, 2003, which was signed by all four investors, and which later came to be known as the "trust agreement". Among its terms was a provision which declared that their agreement was void if the company failed to maintain the mortgage in good standing.

[7] The business failed, RJOR became insolvent, and the mortgage went into default. The bank foreclosed. Hoping to avoid or at least reduce her exposure and recoup her own losses for funds she had loaned to the company, the respondent attended at the Sheriff's sale and bid up on the property until the amount payable significantly exceeded the amount owing to the bank on the mortgage. The eventual sale of the property resulted in a surplus of approximately $88,000.

[8] The parties later agreed to the distribution of three-quarters of the surplus funds (that being approximately $66,000). The confirmatory order of Nova Scotia Supreme Court Justice Kevin Coady dated March 23, 2010, contains recitals which reflect that settlement. The material provisions of that order declare:

> BETWEEN:
>
> CANADIAN IMPERIAL BANK OF COMMERCE, a body corporate
>
> PLAINTIFF
>
> - and -
>
> JAMES ROBERT FAWSON AND LYNDA FAWSON, DAVID NEVILLE, AND ANNA ST. CLAIR
>
> DEFENDANTS
>
> **ORDER**
>
> **...**

WHEREAS James Robert Fawson, Lynda Fawson, David Neville and Anna St. Clair pursuant to a Deed registered at the Colchester County Land Registration Office on November 18, 2003 as document number 75109380 were the registered owners, as tenants in common, of certain lands located at Waldegrave, Nova Scotia;

AND WHEREAS the said lands were acquired by James Robert Fawson, Lynda Fawson, David Neville and Anna St. Clair from River John Oceanfront Resort Limited;

AND WHEREAS James Robert Fawson, Lynda Fawson, David Neville and Anna St. Clair granted a mortgage of the said lands to the Canadian Imperial Bank of Commerce that was registered at the Colchester County Land Registration Office on November 18, 2003 as document number 75109406:

AND WHEREAS the said mortgage was foreclosed by the Canadian Imperial Bank of Commerce pursuant to the Amended Order for Foreclosure, Sale and Possession granted by the Honourable Justice Gregory M. Warner on September 5, 2008 and the said lands were sold by the Sheriff at a public auction;

AND WHEREAS ... the surplus funds available for distribution to the Defendant's after the deduction of the Plaintiff's claim and costs as the only encumbrancer were calculated to be $88,608.43;

AND WHEREAS James Robert Fawson, Lynda Fawson, David Neville and Anna St. Clair have agreed that 3/4th of the remaining surplus funds may be paid to River John Oceanfront Resort Limited with any remaining balance to be held pending further Order of the Court;

AND WHEREAS the amount of the said surplus funds, which includes applicable interest, held by the Prothonotary of the Supreme Court of Nova Scotia, in Truro, is now $88,884.74;

...

IT IS ORDERED as follows:

1. The balance of the sale proceeds held in Trust by the Prothonotary of the Supreme Court of Nova Scotia, in Truro, be disbursed as follows:

    (a) The amount of $66,663.56 (representing ¾ of the funds being held) shall be paid to River John Oceanfront Resort Limited;

> (b) The remaining $22,221.18 (representing ¼ of the funds held) shall remain held by the Prothonotary pending further Order of the Court.

[9] Two years later the appellants moved for an order seeking distribution of the residue of the surplus to RJOR. The respondent, Ms. Anna St. Clair, opposed the motion, asserting that she was legally entitled to the funds.

[10] The motion was heard by Justice Coady on December 3, 2012. At the hearing, affidavits dated April 11, 2012, were filed by each of the appellants. A fourth affidavit, supporting the appellants' motion, was filed by Mr. Michael Dudka, a past-president and shareholder of the company. The respondent filed her own affidavit sworn June 6, 2012. At the hearing, Mr. Dudka, Mr. Fawson, and Ms. St. Clair were all cross-examined on their affidavits. Counsel made detailed written and oral submissions. Justice Coady reserved his decision and filed written reasons two weeks later (now reported at 2012 NSSC 444). He dismissed the appellants' motion and ordered the prothonotary to release the remaining surplus of $22,221.18 plus interest to Ms. St. Clair. His confirmatory order dated February 21, 2013, also awarded Ms. St. Clair costs of $2,000 payable by the appellants jointly and severally, forthwith.

[11] Having previously recovered all of its security under the mortgage, the Canadian Imperial Bank of Commerce took no part in the initial hearing, or this appeal.

[12] Justice Coady's decision offers a more detailed summary of the evidentiary record and will provide further context for my analysis of his reasons. He wrote:

> BACKGROUND
>
> [1] In 2001 a group of individuals incorporated River John Oceanfront Resort Limited (R.J.O.R.). The defendant's Fawson, Fawson and St. Clair were part of that group. The defendant Neville was an acquaintance of the group. The business plan of RJOR was to acquire land and to develop a cottage rental business. Michael Dudka was the driving force behind this enterprise. There were several other investors/shareholder in addition to Fawson, Fawson and St. Clair.
>
> [2] RJOR commenced acquiring land and building chalets. In 2003 it became apparent that RJOR required capital to drive the development. RJOR

was not in a position to borrow sufficient funds. A plan was hatched that resulted in four lots of RJOR being conveyed to the defendants. The defendants then secured a $200,000 mortgage from the Canadian Imperial Bank of Commerce (CIBC). The proceeds of the mortgage were paid to RJOR.

[3] On November 5, 2003, Mr. Dudka's lawyer drafted a trust agreement that reflected RJOR's arrangement with the defendants. The document was signed by all four defendants. The following represents the terms of that agreement:

> •The defendants would not pay anything to RJOR for the land transferred to them.
>
> •The defendants would not deal with the land in any way other than to mortgage it.
>
> •The defendants would deliver the mortgage proceeds to RJOR to use to develop its business.
>
> •RJOR would make all payments on the mortgage and the defendants were not to be personally liable.
>
> •The defendants were to transfer the four lots to RJOR when the mortgage was repaid.

[4] The following additional term appeared in the trust agreement:

> •This [agreement] is void if River John fails to maintain the CIBC encumbrance in good standing.

The agreement encouraged all four defendants to seek independent legal advice and offered them no opinion as to the viability of the arrangement or the risks attendant thereto.

[5] The arrangement was implemented in all respects. RJOR serviced the mortgage until 2006 and continued with their development. A point in time came when RJOR was financially unable to service the mortgage. CIBC commenced a foreclosure action against the four defendants. On July 30, 2008 a foreclosure order issued with a settled sum of $239,591.88. The court subsequently issued an amended order with a settled sum of $225,210.33

[6] In time the property came to a public auction. Two bidders participated in the auction. Ms. St. Clair bid in order to drive up the price to avoid a deficiency judgment and to protect other obligations owed to her by RJOR.

> Mr. Dudka's representative bid the property to $335,000 on behalf of a company owned by Mr. Dudka. The latter was the successful bidder and effectively Mr. Dudka became the owner of the subject lots without an encumbrance. CIBC was fully paid and the sale produced a surplus of $88,608.45. Given there was no agreement among the defendants as to distribution, the funds were deposited with the court.
>
> [7] On March 23, 2010, a consent order issued which transferred 3/4 of the surplus ($66,663.56) to RJOR. All four defendants consented to this partial distribution. These funds were given to Mr. Dudka to apply to a judgment he held against RJOR.
>
> [8] On April 11, 2012 Fawson, Fawson and Neville filed a motion for an order transferring the remaining $22,221.18 to RJOR. The applicants all indicated they had no claim to these funds. They all acknowledged that given RJOR was insolvement, the funds would go to Mr. Dudka to be applied to his RJOR judgment. Ms. St. Clair opposed the motion and claimed she was entitled to these funds.

[13] I will turn now to a consideration of the appropriate standard of review.

Standard of Review

[14] In their written and oral submissions to this Court counsel for both the appellants and the respondent took the position that this was an appeal from an interlocutory, discretionary order, such that obtaining our leave to appeal was a necessary first step. While acknowledging that Justice Coady's decision and order was "final" in the sense that it effectively resolved entitlement to, and distribution of, the last remaining portion of the surplus funds, counsel for the appellants told us at the hearing that he had approached this appeal as if it were from an interlocutory order "out of an abundance of caution". Thus he had proceeded on the basis that his clients required our first granting leave before we would be prepared to consider the appeal on its merits.

[15] Whether one might characterize the effect of Justice Coady's order as being "interlocutory" or "final", it cannot be doubted that in certain respects the appellants' motion engaged the judge in the exercise of his discretion. The motion was brought pursuant to *Civil Procedure Rule* 72.14(3) and (4) which state:

> (3) A subsequent encumbrancer or other party may make a motion for payment of the surplus funds.
>
> (4) A judge may take accounts, make inquiries, tax costs and order distribution of the surplus. (Underlining mine)

[16] It is settled law that any decision based on the judicial exercise of discretion is entitled to considerable deference on appeal. In such circumstances an appellant bears a heavy burden. It is no longer necessary to concern oneself with an inquiry as to whether or not the effect of the impugned order had a final, terminating effect on the proceedings. There is now but one standard of review in such matters. We will not intervene unless the judge erred in principle or, to the extent to which the judge was exercising a discretion, a patent injustice has occurred. See for example **Innocente v. Canada (Attorney General)**, 2012 NSCA 36, and most recently, **Burton Canada Company v. Coady**, 2013 NSCA 95.

[17] This, however, tells only half the story. To the extent the judge was exercising a discretion, his decision will be reviewable on such a standard. But one must not lose sight of the function Justice Coady was performing. Having been asked to distribute the surplus left over after the lands were sold by the Sheriff at a public auction, the judge was bound to decide the validity and priority of competing claims to that surplus in accordance with long-established legal principles grounded in this province's statutory and common law. To that extent the judge's disposition had to be right and is reviewable by this Court on a standard of correctness. See for example: **Pew v. Zinck and Lobster Point Reality**, [1953] 1 S.C.R. 285; **Traders Group Ltd. v. Mason and Mason** (1974), 10 N.S.R. (2d) 115 (N.S.S.C.A.D.); **A.V.G. Management Science Ltd. v. Barwell Developments Ltd.**, [1979] 2 S.C.R. 43; **State Mutual Life Assurance Co. of America v. Clam Bay Estates Ltd.** (1980), 39 N.S.R. (2d) 131 (N.S.S.C.A.D.); **Devan Properties Ltd. v. Metropolitan Stores of Canada Ltd.** (1988), 88 N.S.R. (2d) 129 (N.S.S.C.A.D.); **Credit Union Atlantic Ltd. v. Bonang** (1995), 145 N.S.R. (2d) 175; **Bank of Nova Scotia v. 1890486 Nova Scotia Ltd.**, 2003 NSSC 119, appeal dismissed 2004 NSCA 6; **Hants Kings Business Development Centre Ltd. v. Arenburg**, 2012 NSSC 105; and **Xceed Mortgage Corp. v. Baker**, 2012 NSSC 221.

[18] These then are the standards I will apply when considering the merits of this appeal.

Issues

[19] I would distil the variety of arguments and issues raised by the parties to two simple questions:

i. Should leave to appeal be granted?
ii. Did the Chambers judge err in dismissing the appellants' motion and ordering that the surplus be paid to the respondent?

Analysis

i. ***Should leave to appeal be granted?***

[20] I am satisfied that the appellants have raised an arguable issue such that leave ought to be granted and the merits of this appeal considered. See for example **Nova Scotia v. Roué**, 2013 NSCA 94; and **Burton, supra**.

ii. ***Did the Chambers judge err in dismissing the appellants' motion and ordering that the surplus be paid to the respondent?***

[21] The appellants ground their appeal in s. 41(d) of the *Judicature Act*, R.S.N.S. 1989, c. 240 which provides:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> ...
>
> d) the Court shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any proceeding, in the same manner in which the court of equity judge, or the said Court of Chancery, would have recognized, and taken notice of the same, in any suit or proceeding duly instituted therein before the first day of October, 1884;

[22] The appellants complain that Justice Coady's decision fails to make any reference to "equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any proceeding". This they say constitutes reversible error and obliges us to intervene. The appellants go further and raise a collateral argument. In their factum they say Justice Coady's:

> 32. ... failure to recognize and take notice of equitable considerations led him to make the additional error of giving no weight to evidence relevant to the issues involved in the appellants' motion. If there were equitable considerations incidental to the circumstances and evidence of facts bearing on those considerations was presented but given no weight, then it is arguable that the decision was based on an error in law.

[23] With respect, I am not persuaded by the appellants' arguments.

[24] I start with an obvious, but nonetheless important principle of appellate review. Judges are presumed to know the law. That presumption places a heavy burden upon any litigant who is dissatisfied with the outcome, to satisfy us that the judge has tripped in applying the law and that the slip is serious because it affected the result. Respectfully, I see no such error in this case.

[25] At the hearing before Coady, J. the applicants/appellants relied upon two cases, **Credit Union Atlantic Ltd. v. Isenor (Trustee of)**, 2012 NSSC 183; and **MacLeod v. MacLeod**, [1983] Carswell NS 115 (S.C.). Respectfully neither case advances the appellants' position. In the **Credit Union** case, Justice Gerald R.P. Moir said:

> (3) Surplus funds after foreclosure and sale stand in the stead of the foreclosed equity of redemption. ...

That may be, but of course the question in this case is not *what* it is, but *whose* it is? The issue comes down to a matter of entitlement among claimants jostling for priority upon distribution. Similarly, **MacLeod, supra,** is easily distinguishable. There were many unique and significant factors in that case, which do not appear in this one. In particular were the trial judge's findings in **MacLeod** that by the terms of their contract the defendants undertook to convey the property to the plaintiffs provided the plaintiffs fulfilled their promise to cover the mortgage and bank loan payments as well as all costs of maintenance and repair; that while the plaintiffs had not satisfied all these conditions their failure to do so had been

waived by the defendants; and that the defaults which had occurred from time to time had all been cured by the time of trial. Because of these and other factors I need not address, the analysis and result in that case have no bearing on this one.

[26] While it is true that Justice Coady did not mention explicitly the words lifted by the appellants from s. 41(d) of the **Judicature Act**, I do not think it can be fairly suggested that he failed to appreciate or take into account the nature of the appellants' claim to the surplus. On the contrary, having regard to the record, the whole of the judge's reasons and counsels' very detailed written and oral submissions, I am satisfied that the judge turned his mind to the so-called "maxims of equity" in resolving this dispute between the parties.

[27] For example, Justice Coady specifically referred to the mortgage, the so-called trust agreement and other particulars which informed and defined the relationship among the parties. His decision expressly recognized (and distinguished) the parties' respective positions:

> **APPLICANTS POSITION:**
>
> [11] The applicants argue that the trust agreement dictates that the surplus belongs to RJOR. It is their view that the beneficial interest in the subject lands remained with RJOR notwithstanding the transfer of the legal title to the defendants.
>
> [12] The applicants argue that the surplus funds stand in the place of the equity of redemption. They cite *Credit Union Atlantic Ltd. v. Isenor*, 2012 NSSC 183 where Justice Moir stated at paragraph 3:
>
> > Surplus funds after foreclosure and sale stand in the stead of the foreclosed equity of redemption.
>
> The applicants stipulate that these funds are not theirs and belong to RJOR.
>
> **ANNA ST.CLAIR'S POSITION:**
>
> [13] Ms. St. Clair argues that she is not advancing an equitable claim, rather she has a legal claim to the funds. She suggests that the actual mortgagors own any equity of redemption. She argues that the only way RJOR could be entitled is if the trust agreement remains in effect and provides for such.

> [14] Ms. St. Clair argues that she has always asserted her 1/4 interest in the surplus funds. She states that such is supported by her 2010 agreement to release the other 3/4s of the surplus funds.

[28] Based on the record and Justice Coady's decision as a whole, I am satisfied that he did not "fail to recognize" the "equitable considerations" put forward in argument by the appellants. Rather, he simply rejected the appellants' equitable theory based on what they characterized as an implied trust, finding instead that Ms. St. Clair's entitlement to the surplus was based on a legitimate, legal claim to the funds.

[29] As noted earlier, the distinction between the appellants' equitable claim, and the respondent's legal claim was front and center in this dispute. Both counsel emphasized the difference in their submissions. In his written pre-hearing brief to the Chambers judge Mr. MacKay, counsel for the appellants, referred to the definition of "implied trust" as it appears in D.M.W. Waters, *Waters' Law of Trusts in Canada* , 3d ed. (Toronto: Thomson Carswell, 2005) and concluded his submission:

> Argument
>
> 17. All elements of the circumstances indicate that the beneficial interest in the land remained with the company, River John Oceanfront Resort Ltd., after the legal title was transferred to the defendants.
>
> 18. There is no basis in the circumstances for any of the defendants to assert a personal interest in the land sold by the sheriff or in the surplus proceeds of that sale.

[30] In his subsequent oral submissions at the Chambers hearing Mr. MacKay (referring to the respondent Ms. St. Clair's position) said this:

> In this situation, Anna St. Clair's assertion, her claim against the remaining surplus depends, then, on at its foundation (sic) an equitable interest and this trust agreement that came into existence nine years ago, and in particular to the default provision that it contains.
>
> Now because we're in the Court's equitable jurisdiction, the maxims of equity have some relevance here. They provide guidance to the Court for the purpose of analyzing the competing claims to these remaining funds. There are

> three maxims of equity that I submit with respect are called into question or invoked by the circumstances that we have before the Court.

Counsel for the applicants then challenged the *bona fides* of Ms. St. Clair's actions and referred the Chambers judge to the "three maxims of equity" (intent over form; delay defeats equity; and he/she who comes to equity must come with clean hands) as supporting the applicants' assertion that Ms. St. Clair was not entitled to the surplus.

[31] Mr. Foreman, counsel for Ms. St. Clair, took a different tack. He began his submissions by pointing out that in their affidavits and their counsel's pre-hearing brief the appellants had failed to make any reference to the 2003 agreement. Thus, Mr. Foreman argued that the appellants had presented a select and incomplete version of the circumstances surrounding their dealings and the nature of their relationship. He then opened his remarks by presenting the Chambers judge with a clear statement of their position:

> **MR. FOREMAN:** And I guess I'd start that, My Lord, by saying I don't actually take issue with these maxims that have been brought forward. But the critical distinction here, My Lord, is that Anna St. Clair is not advancing an equitable claim. The Applicants are advancing an equitable claim to the funds.
>
> As outlined in our written submission, and as is very relevant when you look at these various equitable maxims – as an example, the laches maxim where a Plaintiff delays in pursuing his rights, such delay may furnish a defence in equity to an equitable claim – my client has a legal claim to those funds.
>
> ...
>
> But it's crucial for you to understand, My Lord, and to see that distinction, that Ms. St. Clair has a legal claim to those funds. The four named individuals that owned the title to the land and were subject to the mortgage as the mortgagors, they're the parties that actually own any equity of redemption.
>
> The issue raised by essentially River John Oceanfront Resorts or on behalf of the company is that it had an equitable claim based on some form of trust, whether it's implied trust or a resulting trust ....That's where equity comes into it.

> ... it was just these four individuals, ... this is a legal issue with respect to their legal rights as the four owners holding the property as tenants-in-common, each having an undivided one-quarter interest.
>
> And as Ms. St. Clair stated clearly in her affidavit and even on cross-examination, she frankly didn't care what those three-quarter funds were used for. If those three individuals – Mr. and Ms. Fawson and Mr. Neville – wished to turn those funds over ultimately to Mr. Dudka as has happened, my client, while she might not agree with that and perhaps doesn't understand why they would do that, she is not asserting a hundred percent claim over the surplus. She has simply and consistently asserted her one-quarter interest, legal interest in those funds.
>
> It's the company that's here putting forth an equitable claim based on trust principles. It is claiming ultimately it was and should have been the beneficiary of whatever this trust arrangement was ...
>
> .. we are not asserting an equitable claim. We have the legal claim over the funds. It's the company through the three individuals that are asserting the equitable claim.

[32] After making those submissions which based Ms. St. Clair's claim to the surplus upon her legal status as mortgagor and holder of an undivided one-quarter interest in the lots in question, Mr. Foreman then argued in the alternative that if the court were disposed to consider the equitable issues raised by the three appellants, then the application of such principles would favour Ms. St. Clair. Mr. Foreman put it this way:

> And frankly, the issue of delay is an issue that has been raised before in proceedings with these parties. When Ms. St. Clair was advancing her foreclosure application, the issue of delay was raised as a way to defeat her enforcing her legal rights under her mortgage against the company.
>
> And there's been no delay in asserting and continuing to assert her interest or right over this one-quarter surplus funds. We were not the first to make the formal Court motion, but we've had a lot of other things going on, swirling around. And there's no prejudice, My Lord. And it's not like anybody suffered anything.
>
> ... So of course she attended at the foreclosure sale, particularly when she heard and learned from Mr. Gillis that Mr. Dudka was going to try and buy the lands.

Mr. Dudka out of anyone has benefited the most. We've heard the evidence. Those lands may be worth 600,000 or more. His judgement is for 170-something thousand. He alone attended and now owns those lands. Nobody, according to Mr. Fawson, is involved.

My client is one of the active six former directors and the shareholders praised in the January 2006 letter, were not invited to participate in that to try and allow everyone to reduce their liabilities. They have fought her tooth-and-nail every step of the way, entrench, warfare litigation, for her to try and recover some of her investment.

So you know, she may not have been as wily or I would put it perhaps underhanded as Mr. Dudka in some of the actions that have taken place in protecting your interests. But again, if Your Lordship is looking at this from an equitable perspective and a balancing of equities and clean hands, I put it to you, My Lord, that Ms. St. Clair I was going to say has the cleanest hands. ...

That was her one avenue to try and re-gain some financial reimbursement from this mess herself as approved by the shareholders in February 2006, as outlined and consistent with the trust agreement, and as was her legal right, not her equitable right.

So you know, we have a very, very different position and perspective on that. It's far from being implausible. It's completely understandable as to why Ms. St. Clair acted as she did and why she's asserting the claim to this one-quarter.

If she was simply out for selfish reasons and to try and pull a fast one, we would have been claiming 100 percent of the surplus or other actions. We have been very consistent throughout in what the legal interest was and why it's been done. And I would submit that no matter what the questions were on cross, the evidence that she's put forward in her affidavit and her position is very clear. ...

And for that, she's been ostracized and kept to the side, and that's fine. But all she's done is try without bankrupting herself to assert her various legal interests – the foreclosure, and her claim in this circumstance.

There's nothing improper, illegal, or inequitable about what Ms. St. Clair is asking the Court to provide. And in providing that Order, My Lord, and in agreeing that she should receive that one-quarter surplus

> funds, again either Ms. St. Clair or Mr. Dudka. Mr. Dudka's already receive 66,000 to pay towards that judgement that was placed.
>
> He also owns now through his numbered company, completely separate and apart from River John Oceanfront, and presumably at his agreement as to who he may or may not allow to benefit from that in other business dealings, will benefit, if you look at the numbers we've heard about, substantially from that arrangement.
>
> To suggest that by allowing my client to take this remaining one-quarter surplus is somehow inequitable or illegal or selfish on her part is absurd if I can use that strong word. But that's our position, My Lord. ...

[33] Had there been any lingering confusion surrounding the differing theories put forward by the parties (which I find there was not) it was dispelled by Mr. MacKay's final reply for the applicants/appellants when he said:

> I agree with Mr. Foreman's emphasis on the distinction to be drawn or recognized between legal interest and equitable interest. I agree with him whole heartedly that it's an important distinction, and it's at the center of this dispute.

[34] From all of this it seems obvious to me that Coady J. was well aware of the distinct positions adopted by the parties. He addressed the merits of their arguments and based upon his view of the evidence came to accept the position put forward by Ms. St. Clair. He reasoned:

> [13] Ms. St. Clair argues that she is not advancing an equitable claim, rather she has a legal claim to the funds. She suggests that the actual mortgagors own any equity of redemption. She argues that the only way RJOR could be entitled is if the trust agreement remains in effect and provides for such.
>
> [14] Ms. St. Clair argues that she has always asserted her 1/4 interest in the surplus funds. She states that such is supported by her 2010 agreement to release the other 3/4s of the surplus funds.
>
> **THE 2003 TRUST AGREEMENT:**
>
> [15] There is no doubt in my mind that the 2003 document was a trust agreement. It clearly states that "this [agreement] is void if River John fails to maintain the CIBC encumbrance in good standing." This document was drafted by RJOR's solicitor. There is nothing in the document that limits the

import of the above referenced sentence. There is no dispute that RJOR failed to pay on the CIBC mortgage. I conclude that the trust agreement ended when RJOR defaulted on their obligations to service the CIBC mortgage.

THE 2006 LETTER AND COMPANY MINUTES:

[16] On January 30, 2006, RJOR sent a letter to shareholders as a result of the companies financial difficulties. This letter advanced three options for RJOR. The first two options were bankruptcy and refinancing. The third option was stated as follows:

> Surrender all the lands and buildings to the aforementioned individuals as of March 1, 2006 thus allowing them to protect themselves and their good credit by liquidating the entire assets over a period of time or by continuing to operate the business as they see fit. We have a duty as shareholders and as a company to protect these people. They are willing to put the financial resources in place to pay off all past due real property taxes and liabilities associated with the buildings and land. They will also release us, as shareholders, from everything on March 1, 2006. Any bills up to March 1, 2006 belong to RJOR Ltd. Any bills after March 1, 2006 will belong to the six people aforementioned.

[17] A special shareholders meeting was held on February 16, 2006 at which time the following resolution was passed:

> Option #3. Be it so moved that the shareholders of RJOR Ltd. give authority to the group of shareholders and David Neville, who the company is indebted to by mortgages, loans, or any other form of debt, the following lands and buildings allowing them to have control of generating financial resources, operating the business, liquidating the entire assets, contingent upon the proper approval of any government agencies, securities commission or other laws of the province of Nova Scotia.
>
> Motioned by Mike Dudka
> Seconded by Bill Graham

The above letter and resolution supports the position that the 2003 trust agreement was viewed by all the players as terminated when RJOR ceased paying the CIBC mortgage.

CONCLUSION:

> [18] I dismiss the motion of Fawson, Fawson and Neville. I order the prothonotary to release the remaining surplus plus interest to Ms. St. Clair. I will hear the parties on costs should they be unable to agree.

[35] In my respectful view, Justice Coady's decision is sound and finds ample support in the record. Whether the "lawyer's letter" dated November 5, 2003, and which was signed by all four of the parties amounted to a binding "trust agreement" need not be resolved for the purposes of this appeal. Evidently Justice Coady was satisfied it did (see ¶15 of his reasons, supra). What is significant in this case is that the parties had included as an express term of their agreement the provision that their arrangement would be void if RJOR failed to make the required mortgage payments to the bank. Default occurred. As soon as it did, the parties' agreement came to an end. Ms. St. Clair was still a mortgagor on the mortgage with the Canadian Imperial Bank of Commerce on the lots for which she and the other three individuals had acquired title as tenants-in-common. She never waived or forfeited her legal rights to her undivided one-quarter interest in the property. Ms. St. Clair and the three appellants, as mortgagors, were the holders of any equity of redemption; not the company. Whatever previous arrangement the four mortgagors had with the company died when RJOR defaulted in making the required payments under the mortgage, thus voiding the agreement.

[36] However one might characterize RJOR's "interest" at the time the 2003 agreement was executed, that "interest" ended when the trust agreement was voided by RJOR's default. Upon default, whatever "interest" RJOR may have had pursuant to the trust agreement came to an end. It follows therefore that the company had no "interest" in the property when the Sheriff's hammer fell while selling the lands at public auction years later.

[37] Based on the course of action chosen by the shareholders at a special meeting held on February 16, 2006, it was certainly open to the Chambers judge to conclude that as far as the risk-taking shareholders were concerned, they were free to take whatever actions they thought appropriate to recoup their losses, or protect themselves from further claims. That is precisely what Ms. St. Clair chose to do.

[38] I am not aware of any prejudice the appellants suffered on account of the respondent's actions. Neither could appellants' counsel articulate any when invited to do so at the hearing.

[39] Nor am I persuaded that in seeking to protect her own financial interests Ms. St. Clair - as the appellants tried to suggest in argument - "failed" to do something. In any event, it would be sheer speculation to now attempt to conjure up things she might have done, or done differently, or what the results might have been had she taken a different tack.

[40] On this record I see no error in the judge's ruling or disposition. I would dismiss the appeal with costs in the amount of $3,000 inclusive of disbursements payable by the appellants, jointly and severally, forthwith.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.