SUPREME COURT OF NOVA SCOTIA

Citation: Batdorf v. MacLean, 2010 NSSC 462

Date: 20101221
Docket: PtH Nos. 291613, 291335, 291337
Registry: Port Hawkesbury

Between:

Luke L. Batdorf
Plaintiff

v.

Charles MacLean
Defendant

Luke L. Batdorf
Plaintiff

v.

Gulf Trading Incorporated
Defendant

S. Teresa MacNeil
Plaintiff

v.

Gulf Trading Incorporated
Defendant

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: September 8 and 9, 2010, in Port Hawkesbury, Nova Scotia

Counsel: Hugh MacIsaac, for the plaintiffs
Duncan H. MacEachern, for the defendants

By the Court:

I. INTRODUCTION

[1] This matter originally involved three separate actions, which were consolidated prior to trial, including a foreclosure action and debt collection proceedings. Through the efforts of the parties and their counsel, substantial agreement was reached, narrowing significantly the issues for determination before the Court. The sole issue left for the Court to consider is whether the Plaintiff Batdorf is entitled to seek a deficiency judgment under a mortgage executed by the Defendant in November of 2004.

II. BACKGROUND

[2] The Court heard the evidence of the Plaintiff and Defendant. From the evidence, the Court has been able to make a number of factual determinations. However, much of the factual background relating to the relationship between the parties, is not refuted. A review of some basic background is helpful to put the issue for resolution in context, and to understand the respective positions of the parties.

[3] The Defendant MacLean is the operator of the Markland Resort, a commercial enterprise offering accommodation, located in Dingwall, Nova Scotia. Mr. MacLean, originally from Ontario, moved to Nova Scotia in the 1990's. Although a teacher by training, he has devoted his efforts to the development and operation of the resort property for the past number of years.

[4] At the time of trial the Plaintiff Batdorf was 83 years of age. He has been retired for some time from a position at St. Francis Xavier University. He has formal education in the field of psychology, but developed an interest and skill in business matters from an early age.

[5] The parties met in or around 1995. Mr. Batdorf took an interest in the resort and the potential for eco-business pursuits. He and Mr. MacLean became friends. In 1996 Mr. Batdorf and his spouse, Teresa MacNeill, invested funds into the resort operation, and became preference share holders in Gulf Trading Corporation, the entity which held title to the resort. In 2002, at Mr. Batdorf's request, the preference shares were converted to debt in the form of promissary notes. At that

time, the debt owing to Mr. Batdorf and his spouse was $53,300.00 and $15,300.00 respectively.

[6] In 2004, Mr. MacLean was experiencing business difficulties and required a significant injection of cash to meet the debt obligations incurred by the resort. He approached Mr. Batdorf and requested a significant loan in the amount of $150,000.

[7] On November 9, 2004, Mr. Batdorf advanced $100,000.00 to Mr. MacLean, with a further $30,000.00 being advanced on November 17th. Mr. Batdorf subsequently drafted a mortgage document in the face amount of $150,000.00 whereby the debt was secured against six cottage lots adjacent to the Markland Resort property. The mortgage was signed by Mr. MacLean on November 19, 2004 in Halifax, at the Royal Bank. That institution was not involved in the preparation of the document, but the manager simply served as a witness. Mr. MacLean did not receive any independent legal advice prior to executing the mortgage. Following the execution of the mortgage, Mr. Batdorf advanced an additional $20,000.00 which was held in escrow for the benefit of Mr. MacLean.

[8] The mortgage provided that "Charles MacLean will make a monthly payment of interest on the monthly anniversary of the 18th of each month at the rate of 6.5% per year on the total indebtedness. There is no requirement to make a capital payment until after a two year period at which time this note of agreement can be renewed if the debt is not repaid before that time". Mr. MacLean did not pay the indebtedness at the end of the two year term, nor did he respond to a Notice of Renewal sent by Mr. Batdorf.

[9] On February 4, 2008, Mr. Batdorf commenced an action for foreclosure and sale of the 6 lots secured under the mortgage, and further sought an "order for the deficiency, if any, between the amount realized after sale pursuant to the Order for foreclosure, sale, and possession and the aggregate due."

III. POSITION OF THE PARTIES

a) The Defendant MacLean

[10] The Defendant MacLean acknowledges that money was advanced to him by Mr. Batdorf in November of 2004, and acknowledges executing the mortgage document. He indicates however, that in signing the mortgage document, he

understood that if he could not repay the debt, that Mr. Batdorf would receive the 6 lots secured in the mortgage in full satisfaction of the debt. Mr. MacLean asserts that he never understood that Mr. Batdorf could claim a deficiency judgment against him in the event that the value of the lots was insufficient to cover the amount of the funds loaned to him.

[11] Mr. MacLean further asserts that he and Mr. Batdorf never discussed the issue of a potential deficiency prior to the mortgage being executed, nor does the mortgage document itself state that the Plaintiff can seek a deficiency upon default.

[12] In addition to the mortgage being silent regarding a deficiency, Mr. MacLean raises several other defences including undue influence by Mr. Batdorf, lack of independent legal advice, the existence of an oral agreement between the parties, promissory estoppel and laches.

b) The Plaintiff Batdorf

[13] The Plaintiff Batdorf asserts that the lack of a clause in the mortgage document referencing the right to claim a deficiency judgment is a non-issue. He asserts that the ability to seek a deficiency is not created by virtue of any specific term in a mortgage stating that such is available, but by virtue of the covenant to pay the original debt.

[14] Mr. Batdorf also refutes the basis of any of the other defences raised by Mr. MacLean.

IV. ISSUES

[15] Although the Court has been asked to only determine whether the Plaintiff Batdorf is entitled to a deficiency judgment, the positions advanced by the parties requires the following determinations to be made:

> a) Does the absence of a provision in a mortgage document specifically contemplating the seeking of a deficiency judgment, preclude a plaintiff from seeking same?
>
> b) Was there undue influence exerted upon Mr. MacLean in entering the mortgage?

c) Should Mr. MacLean be afforded relief due to the lack of Independent Legal Advice?

d) Was there an oral contract between the parties which varied or should supercede the written terms of the mortgage?

e) What is the application of the other equitable defences raised by Mr. MacLean?

V. DETERMINATIONS

a) Does the absence of a provision in a mortgage document specifically contemplating the availability of a deficiency judgment, preclude a plaintiff from seeking same?

[16] Neither party was able to provide the Court with recent case authority where this question has been specifically addressed. The Plaintiff asserts that the paucity of authority is attributable to the fact that it is obvious that the covenant to pay an indebtedness implicitly includes the right to seek a deficiency should the sale of security be insufficient to cover the debt. He asserts that there is however, some authority for this view.

[17] In the Plaintiff's supplementary written submissions, the following is put forward:

1. The Plaintiff wishes to provide information supporting the position that a mortgagee's right to a deficiency is based on "the covenant to pay in the Mortgage". In Briand v. Carver (1968) 66 D.L.R. (2d) 169, Chief Justice Cowan deals with a claim for deficiency and provides some of the history of the principles applied in foreclosure proceedings. He refers to the case of Gordon Grant & Co. v. Boos (1926) v. A.C. 781 (P.C.) and states at p. 177:

> "If, therefore, the decision in *Gordon Grant & Co. v. Boos, supra,* is applicable in Nova Scotia, it would appear that there is no discretion in the Court to refuse the mortgagee a judgment or a deficiency after a judicial sale at which the mortgagee has purchased the property for less than its apparent value, provided the mortgagor has been made a party defendant in the foreclosure proceedings and is shown to have covenanted to pay the amount secured by the mortgage.

2. And further at p. 178 he refers to Ryan et al v. Caldwell (1900) 32, N.S.R. 458 which was a foreclosure sale based on a private Mortgage where the Mortgagee recovered less than the amount owed on the Mortgage; C.J. Cowan in summarizing the case stated:

> The plaintiff then commenced an action to recover from the defendant the balance due on the mortgage after deducting the proceeds of the Sheriff's sale, the action being based on the covenant for payment contained in the mortgage.

4. In the text "Principles of Property Law" 4th Edition, Bruce Ziff makes it clear that a Mortgage is a debt instrument that provides security for payment of the debt. At p. 411 he states:

> "It is enshrined doctrine that a mortgage cannot be rendered irredeemable. Put another way, a mortgagee cannot contract out of the right to redeem. Again, that

> doctrine is designed to give integrity to the idea that a mortgage is merely a security device."

at p. 410 he states:

> "The maxim 'once a mortgage, always a mortgage' is a compendious expression of equity's tendencies to protect the mortgagor. To this can be added the trope that 'equity will not tolerate clogs or fetters on the equity of redemption'."

5. Also in <u>Nova Scotia Realty Property Practice Manual</u> by C.W. MacIntosh, he states:

> "It is rule of equity that a mortgagee is considered to be a trustee holding the estate by way of pledge and that a mortgage is but a security for the money lent and the mortgage conveys nothing in the land to the mortgagee."

All of the foregoing statements support the conclusion that land given in a Mortgage is given as security only for payment of the Mortgage debt provided for in the covenant to pay in the Mortgage. If the value of the land is insufficient to pay the debt, the balance of the debt is not extinguished and the Mortgagee is entitled to a Judgment for the remainder of the debt. These cases do not state or imply that the Mortgage document must refer to "deficiency" or state that the Mortgagee will sue for any "remainder" following a foreclosure sale of the property in order for a deficiency application to be allowed.

[18] The Court agrees with the position put forward by the Plaintiff that it is a mortgagor's promise to pay an indebtedness which provides the essential foundation for the seeking of a deficiency judgment. Although often specified, it is not mandatory, that a mortgage document contain a discrete provision

contemplating a deficiency judgment. It seems elementary by way of example, that a mortgagee who advanced $100,000.00 but only received $60,000.00 after foreclosure and sale of the security, should be able to enforce the covenant to pay given by the mortgagor to seek the unrecovered balance of the debt.

[19] Support for this view can also be garnered from a review of the ***Conveyancing Act***, R.S.N.S. 1989, c. 97. It is notable that there is no provision in either the long form, or short form for mortgages outlined therein, which specify the right to claim deficiency judgment. Should an explicit provision be required to give rise to such a remedy, one would expect to see such reflected in the standard form conveyances.

[20] In the case at bar, it is worthy of noting that the mortgage is not entirely silent regarding the possibility of remedies, other than foreclosure, or those specifically provided for in the document. It provides:

> ACCELERATION; REMEDIES. Upon borrower's breach of any covenant or agreement of borrower in this instrument, including, but not limited to the covenants to pay when due any sum secured by this instrument, lender at lender's option may declare all of the sums secured by this instrument to be immediately due and payable without further demand and may foreclose this instrument by judicial proceeding ***and may invoke any other remedies permitted by applicable law or***

> ***provided herein***. Lender shall be entitled to collect all costs and expenses incurred in pursuing such remedies including, but not limited to, attorney's fees, costs of documentary evidence, abstracts and title reports. (Emphasis added)

[21] The Court is satisfied that the absence of a specific provision in the mortgage document contemplating a deficiency judgment, does not bar the Plaintiff from advancing such a claim.

b) Was there undue influence exerted upon Mr. MacLean in entering the mortgage?

[22] As a starting point, the Court has turned its mind to whether, in the circumstances of the case before it, there is a presumption of undue influence. Oland, J.A. has recently re-iterated the correct approach for a trial judge to determine whether a plaintiff has triggered the existence of such a presumption. In ***Bank of Montreal v. Courtney***, 2005 NSCA 153, her Ladyship writes:

> 29 In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53 (QL version), Wilson, J. (Cory, J. concurring) addressed what a plaintiff had to establish in order to trigger a presumption of undue influence:
>
> > 43. ... In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the

> potential for domination inheres in the nature of the relationship itself. ...
>
> 44. Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. When dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. ...

Once this two-part test is satisfied and the presumption raised, then the onus moves to the defendant to rebut it.

30 In *Barclay's Bank plc v. O'Brien*, [1994] 1 A.C. 180, [1993] 4 All E.R. 417 (H.L.), at ss. 16 and 17 Lord Browne-Wilkinson first noted two classes of undue influence (actual and presumed). Then at ss. 18 and 19, he further divided presumed influence into two parts: Class 2A which encompasses those relationships which, as a matter of law, raise the presumption of undue influence; and Class 2B where the existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, raises that presumption. He continued at s. 21:

> Although there is no class 2A presumption of undue influence as between husband and wife, it should be emphasized that in any particular case a wife may well be able to demonstrate that de facto she did leave decisions on financial affairs to her husband thereby bringing herself within class 2B ie that the relationship between husband and wife in the particular case was such that the wife reposed confidence and trust in her husband in relation to their financial affairs and therefore undue influence is to be presumed. Thus, in those cases which still occur where the wife relies in all financial matters on

> her husband and simply does what he suggests, a presumption of undue influence within class 2B can be established solely from the proof of such trust and confidence without proof of actual undue influence.
>
> 31 The categorization of undue influence set out in *O'Brien* was accepted by the Supreme Court of Canada in *Gold v. Rosenberg* [1997] 3 S.C.R. 767, [1997] S.C.J. No. 93 (QL version) at s. 60 and ss. 78-79.

[23] Turning to the above, and in particular, the first branch of the test to raise a presumption of undue influence, I am not satisfied that the Defendant has, on a balance of probabilities, established that the nature of the relationship between he and Mr. Batdorf was such that it created a potential for domination. Although Mr. Batdorf may have possessed more business acumen than Mr. MacLean, I do not find that this equates to the relationship being one of domination and submission. In fact, the evidence suggests otherwise – that Mr. MacLean clearly possessed the ability to successfully negotiate with Mr. Batdorf. When Mr. Batdorf sought to have the mortgage be secured against the resort property, Mr. MacLean countered with the proposal that the six cottage lots be used as security. Clearly, Mr. MacLean was not in a weakened bargaining position.

[24] On the second branch, I am not satisfied, based on the evidence before me, that the mortgage "worked unfairness" as between the parties. The terms of the mortgage have not been shown by Mr. MacLean to be an undue disadvantage to him. In fact, the evidence disclosed that the security being taken by Mr. Batdorf was previously encumbered, and one of the six lots was owned by a third party, not Mr. MacLean. I reject that Mr. Batdorf was unduly advantaged by the terms of the mortgage.

[25] There is no presumption of undue influence in the circumstances before the Court, and accordingly, the burden remains with Mr. MacLean to establish on a balance of probabilities that Mr. Batdorf exerted undue influence over him. I am not satisfied that the evidence establishes undue influence as alleged by Mr. MacLean.

c) Should Mr. MacLean be afforded relief due to the lack of Independent Legal Advice?

[26] Regarding independent legal advice, Oland J.A. succinctly stated in ***Bank of Montreal v. Courtney, supra***, the following:

> 37 I turn then to the argument regarding independent legal advice. The absence of such advice does not automatically preclude recovery under a security document. In *Gold v. Rosenberg, supra*, Sopinka, J. for the majority stated at p. 803:
>
> > Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence. ...

[27] Neither party consulted with legal counsel prior to entering into the mortgage, which was drafted by Mr. Batdorf. Mr. MacLean asserts that the lack of independent legal advice should vitiate the mortgage, or serve as a bar to Mr. Batdorf's claim for deficiency judgment.

[28] Although asserting a lack of business "know-how", Mr. MacLean is clearly an intelligent person. He was articulate in his testimony and presented in all ways consistent with a person with post-secondary education. The evidence disclosed that he has either personally, or through corporate bodies, been involved with the

mortgaging of land on several occasions prior to November of 2004. He has, in the past, retained the services of lawyers for other matters.

[29] I am not satisfied that Mr. MacLean did not understand the nature of the transaction being proposed to him. As noted above, he actively negotiated some terms, most notably the nature of the security to be held by Mr. Batdorf. I also find that Mr. MacLean was not pressured into a quick execution of the documentation, preventing an opportunity for independent legal advice. The Court is mindful that this is not a situation where Mr. MacLean was desperately awaiting the receipt of funds which was to follow the execution. Here, Mr. MacLean had already received the lions share of the loan proceeds, well in advance of the mortgage execution. I find he had ample time to seek advice, should he have wished, and he freely chose to execute the documentation without doing so.

d) Was there an oral contract between the parties which varied or should supercede the written terms of the mortgage?

[30] The Defendant has put forward two assertions, alleging they constituted terms of an oral contract between the parties. Mr. MacLean asserts that Mr. Batdorf verbally represented to him that he would not call in the mortgage unless Mr. MacLean declared bankruptcy. Further, Mr. MacLean asserts Mr. Batdorf represented he would not seek payment under the mortgage without giving Mr. MacLean the opportunity to discharge the debt either by sale of land or obtaining alternate financing. Mr. MacLean asserts that Mr. Batdorf's present position, seeking a deficiency judgment, is contrary to the oral agreement.

[31] This defence gives rise to a consideration of the ***Statute of Frauds***, R.S.N.S. 1989, c. 442, and more importantly, the exception afforded to the requirements contained therein by the doctrine of part performance. A succinct description of the doctrine was provided in ***Carvery v. Fletcher*** (1987) 76 N.S.R. (2d) 307, where Hallett, J. wrote at paragraph 10:

> The plaintiffs rely on the doctrine of part performance to support an oral agreement for the sale and purchase of the Gerrish Street property. The so-called doctrine of part performance was developed by the Courts of Equity following the passage of the *Statute of Frauds* in 1677. The Courts quickly realized that the statute was a shield for persons who had orally agreed to sell lands but wished to resile from their agreement. As a result, the Courts of Equity invented the doctrine of part performance to make possible the enforcement of such oral contracts, the theory being that if a person went

> into possession and made improvements to property or did other acts, it could be evidence that would lead to the conclusion that there was the oral agreement alleged. The Courts quickly realized that the doctrine of part performance too had to have some limits. The doctrine and its scope is described in Di Castri's *Law of Vendor and Purchaser*, Second Edition, 1976, in paragraph 136:
>
> > ...in order to exclude the operation of the Statute of Frauds the part performance relied upon by the plaintiff must: (1) be unequivocally referable to the contract asserted, which must be one, if properly evidenced by a writing, would be specifically enforceable; (2) demonstrably, unmistakenly and exclusively point to this contract as affecting the ownership or the tenure of the land in question; and (3) be such that, to deny its recognition would be to permit the statute to be made an instrument by fraud by permitting the defendant to escape from the equities with which the acts of part performance have charged him.
> >
> > The doctrine is an invention of the Court of Chancery to ensure equity being done where the defendant has stood by and allowed the plaintiff, to his detriment, to fulfil his part of the oral contract, and where it would be unconscionable for the defendant to set up the statute by asserting that the contract is unenforceable so that he might retain benefits which have accrued to him from that contract.

[32] I cannot conclude based on the evidence before me, that the necessary elements to establish part performance have been established, and as such, I cannot find the alleged oral terms serve to vary those contained in the written mortgage.

[33] In reaching this conclusion, the Court viewed the two propositions being advanced by Mr. MacLean as terms of an oral contract, as somewhat inconsistent. If only a bankruptcy would trigger a calling in of the mortgage, one must question how then the second proposition - that Mr. MacLean would have the opportunity to seek other methods of honouring the debt such as land sale or re-mortgaging - could practically work? The terms of the purported oral contract are far from clear and unambiguous.

[34] Further, I reject that Mr. Batdorf's actions of extending time for payment and accepting irregular payments from Mr. MacLean constitute acts of part performance which are "unequivocally referable" to the alleged oral agreement. The mortgage document clearly contains provisions which contemplate that type of latitude, while still preserving enforcement remedies.

[35] Mr. MacLean has not met the burden of establishing part performance of the terms of an oral contract between the parties which would preclude Mr. Batdorf seeking a deficiency judgment.

e) What is the application of the other equitable defences raised by Mr. MacLean?

Mr. MacLean has raised the equitable defence of promissory estoppel as a means of preventing Mr. Batdorf from seeking a deficiency judgment. He asserts at paragraphs 21(b) and (c) of his written submissions:

> (b) Gulf Trading Incorporated did not pay its debts in full, including interest to Mr. Batdorf and Ms. MacNeil but made irregular payments since 1990. Regardless of the history Mr. Batdorf has forwarded additional funds to Gulf Trading Incorporated and has not enforced any penalties for payment of funds. He did not give notice of any intention to start a claim against Gulf Trading Incorporated and Mr. MacLean. His actions support Mr. MacLean's belief that it was accepted he would make payments when the finances of Gulf Trading Incorporated made it possible to do so. Therefore Mr. Batdorf is estopped from making a claim for payment in full of the promissory notes and for payment in full of the mortgage.
>
> (c) For estoppel to apply we must be satisfied that the conduct of Mr. Batdorf amounted to a promise or assurance, intended to affect the legal relations of the parties, that the land would be sufficient to satisfy the mortgage and that notice would be given and a reasonable opportunity to satisfy the debts by other means before claiming against Gulf Trading Incorporated. (*John Burrows Limited v. Subsurface Surveys Limited et al.*, [1068] S.C.R. 607.) Mr. Batdorf made a promise not to enforce his legal rights immediately but if he chose to pursue a claim against Mr. MacLean or Gulf Trading Incorporated he would give Mr. MacLean reasonable notice and he would allow an opportunity for the discharge of the debts. He also promised he

> would accept the land as sufficient to satisfy the mortgage against it.

[36] The nature of promissory estoppel, and its requisite elements was outlined by Chipman, J.A. in ***Kennie v. Ross-Ford*** 2002 NSCA 140. Also noting the distinction between various forms of estoppel, his Lordship writes:

> 38 Estoppel by representation results from the representation of a present existing fact, not an intention with respect to the future.
>
> 39 After a representation has been made, it must be shown that the representee relied thereon by altering his/her position on the basis thereof.
>
> 40 Finally, it must appear that a detriment has resulted to the representee as a result of such reliance, if the representor is allowed to resile from the position taken by the representation. The representation itself generally involves a benefit. The detriment lies in the injustice to the representee that would result if the benefit of the promise were withdrawn.
>
> 41 Promissory estoppel is distinguished from estoppel by representation in that it encompasses representations of intention or promises, not simply of fact. Hanbury and Maudsley: Modern Equity, supra, describe promissory estoppel at p. 892:
>
>> The doctrine expanded in equity, so as to include, not only representations of fact, but also representations of intention; or promises...Where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to affect the legal relations between the parties, and the representee alters his position in reliance on it,

> the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.

[37] In the matter before the Court, I am not satisfied on a balance of probabilities that Mr. Batdorf made the unequivocal representations as alleged by Mr. MacLean. I specifically reject that Mr. Batdorf, either before or after the execution of the mortgage document, unequivocally represented that he would accept the six lots in full payment of the debt secured. Even if such an arrangement was at any point contemplated by Mr. Batdorf, given that it was subsequently discovered that Mr. MacLean only held title to 5 of the lots, and had previously utilized them as security in another lending transaction, the Court would be very reluctant to enforce such upon him.

[38] Mr. MacLean also raises the equitable defence of laches, asserting that Mr. Batdorf’s delay in seeking remedy against him should bar the claim for deficiency judgment.

[39] Fichaud, J.A. has recently provided a succinct, yet thorough review of the doctrine of laches in ***Allen v. Royal Canadian Legion*** 2007 NSCA 44, at paragraphs 27 through 30 of the decision:

27 Second, laches is an affirmative defence, like a limitation, that the statement of defence must plead. Mew, The Law of Limitations (LexisNexis Butterworths, 2nd ed.), p. 41 says:

> Further, if the defendant does not plead laches, it cannot be invoked, ...

See also Mew, pp. 91-93 and C.P.R. 14.14(c). The chambers judge erred by invoking this unpleaded defence.

28 Third, the chambers judge assessed the merits of laches in this interlocutory motion.

29 In K.M. v. H.M., [1992] 3 S.C.R. 6, at pp. 77-78, Justice LaForest discussed laches:

> ... A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, supra, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
>> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. ...
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff

> constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

In Wewaykum Indian Band v. Canada, [2002] 4 S.C.R. 245, para 109, Justice Binnie reiterated Justice LaForest's comments.

30 Mew, pp. 39-40 says:

> Accordingly, in determining whether the doctrine of laches should be invoked to bar a plaintiff's remedy, the court will have regard, not only to the actual period of delay, but also to the affect upon third parties and the balance of justice or injustice to the parties that will result from its granting or refusing relief. In contemporary parlance, there must exist some prejudice to the defendant for equity to impose a bar.
>
> There is no fixed or optimum time-limit that governs the application of the doctrine of laches. Each case must be considered in the context of its surrounding circumstances. In the view of one judge:
>
> > ... in this realm of law [laches, acquiescence, and delay] each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist. [emphasis added]

[40] As noted above, the Court must give consideration to the facts of this particular case. In this instance, the mortgage document contains the following clause:

> FORBEARANCE BY LENDER NOT A WAIVER. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any right or remedy. The procurement of insurance or the payment of taxes or other liens or charges by the Lender shall not be a waiver of Lender's right to accelerate the maturity of the indebtedness secured by this Instrument.

[41] The above contemplates that Mr. Batdorf may choose to not exercise his rights under the mortgage immediately upon a breach by Mr. MacLean, and that such would not preclude him subsequently seeking a remedy. The evidence establishes that notwithstanding Mr. MacLean's difficulty in making payment under the mortgage, the parties continued to discuss, including after the expiry of the two year term, means for repayment of the debt. This included potential sales of the secured lots, as well as others owned by Gulf Trading Corporation, with Mr. Batdorf being paid in full. It was only after nothing developed from these efforts that Mr. Batdorf sought to enforce his security. I am not satisfied based upon the evidence before me, that the defence of laches has merit.

VI. CONCLUSION

[42] Based on the above, Mr. Batdorf is entitled to seek deficiency judgment against Mr. MacLean arising from the mortgage in question. It remains to be seen whether a deficiency will result upon the sale of the secured lots, however, the parties can bring the matter back before me for determination if necessary, as well as a consideration of costs.

J.