

1989

S.H. 70435

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Bank of Montreal v. Lucas, 1998 NSSC 81

BETWEEN:

BANK OF MONTREAL, one of the Chartered Banks of Canada

PLAINTIFF

- and -

DELBERT LUCAS

DEFENDANT

DECISION

HEARD: in Chambers at Halifax, Nova Scotia before The Honourable
Justice Walter R.E. Goodfellow on June 18, 1998

DECISION: June 18, 1998 (orally)

COUNSEL: J. Kevin Quigley
Solicitor for the Bank of Montreal

Colin M. Campbell
Solicitor for Yvonne MacGillivray, the Common-Law Widow of
Delbert Lucas

Brian MacLellan, Q.C.
Solicitor for Judgment Creditor, the Toronto-Dominion Bank

GOODFELLOW, J.

1. BACKGROUND

The Bank of Montreal obtained judgment on the 7th of December, 1989 against Delbert Lucas, in the amount of \$22,393.97 debt and \$393.00 cost for a total of \$22,786.97. There have been no payments made on the Bank of Montreal Judgment and the balance outstanding as of the 10th of May, 1998, with interest calculated pursuant to s.5 of the *Interest on Judgments Act*, 1989, at five percent is \$34,372.05.

A search at the Registry of Deeds discloses that recorded the 11th of June, 1986 is a judgment between a Marie V. Hennigar and Delbert Lucas in the amount of \$2,446.50.

In August 1992, Raphael Delbert Lucas, along with a Sheila Mary Illstone obtained a property, 10 Lakewood Drive, Fall River, Nova Scotia and mortgaged the property to the Canadian Imperial Bank of Commerce, which mortgage was subsequently assigned in November 1994 to the Toronto-Dominion Bank. Raphael Delbert Lucas provided a Statutory Declaration the 31st of August, 1992 declaring that he was not the Judgment Debtor in the Bank of Montreal judgment. He and Ms. Illstone acquired the property in August 1982 as joint tenants and on April 12, 1996, Ms. Illstone executed a Quick Claim Deed conveying her interest to Raphael Delbert Lucas.

Raphael Delbert Lucas died, and by his Will, September 29, 1997, devised the property to his trustee and common-law spouse Yvonne MacGillivray, with instructions to have the estate transferred to her.

Ms. MacGillivray first disputed the judgment and subsequently, after examining the Promissory Note for which the judgment was granted, filed an Affidavit acknowledging and confirming that the signature was that of her common-law husband Raphael Delbert Lucas. The result being that Delbert Lucas committed a fraud on the Canadian Imperial Bank of Commerce.

2. APPLICATION

The Judgment Creditor applies under the *Sale of Land Under Execution Act*, for leave to issue execution of its judgment against a deceased judgment debtor as required by s. 7 of the *Act*. Leave is also necessary due to C.P.R. 52.04(1)(a) where six or more years have elapsed since the Judgment Order was entered and also, C.P.R. 57.04(1)(b) where a change has taken place by the death of a party to a Judgment Order.

Ms. MacGillivray seeks an Exercise in Discretion by the court to deny leave for an order for sale of the land.

3. ISSUES

1. What is the position of the Hennigar Judgment?
2. Should the Bank of Montreal's request for an Order to a *Sale Under Execution* be granted in terminology that such sale is free and clear from all incumbrances?
3. What is the position of the Toronto-Dominion mortgage?
4. Should discretion be exercised as requested by Ms. MacGillivray?

4. ISSUE (1)

What is the position of the Hennigar Judgment?

Section 28(2)(b) of the *Real Property Act* provides:

RELEASES AND DISCHARGES BY THE COURT

28 ...

If release or discharge cannot be obtained

(2) Where the holder of an encumbrance cannot be found or is dead and there is no duly authorized personal representative available to act or where from any other cause a proper release or discharge of the encumbrance cannot be

obtained or cannot be obtained without undue delay or expense, the court may, upon application,

(b) where all money due on the encumbrance has been paid to the person entitled to receive the money or where in any other case it appears that all the money due on the encumbrance has been paid, order the release or discharge of the encumbrance.

The evidence before me by way of Affidavit is that the solicitor who possesses Marie V. Hennigar's file has advised that the Judgment has been paid in full and that Ms. Hennigar has been personally contacted and advises that the Judgment has been paid in full, but she is unwilling to execute a Satisfaction Piece because of claims she has unrelated to the subject matter of her Judgment.

I have no hesitation in granting an Order releasing or discharging this Judgment.

5. ISSUE (2)

Should the Bank of Montreal's request for an Order to a *Sale Under Execution* be granted in terminology at such sale is free and clear from all incumbrances?

The *Sale of Land Under Execution Act* provides:

Deed to purchaser

13 The Sheriff shall execute to the highest bidder, or his nominee, a deed of land so sold, which shall be sufficient to convey to the purchaser named in the deed all the interest of the judgment debtor in such land bound by the judgment. R.S., c. 275, s.12.

Deed as prima facie evidence

14 A deed executed by a sheriff, and purporting to convey land sold under execution, is *prima facie* evidence of the proceedings referred to therein, that the requirements of this Act were duly complied with and that the interest of the debtor bound by the judgment against the debtor had been conveyed by such deed to the purchaser. R.S., c.275, s.13.

It is noted that Section 13 prescribes that the deed conveys to the purchaser, "all the interest of the judgement debtor, in such land bound by the judgment". The Sheriff's deed, given to a purchaser pursuant to the *Act*, conveys no more, nor less than the interest of the judgment debtor in such land. The late Chief Justice Cowan in **Pat King Ltd. v. Moore et al (1970), 1 N.S.R. (2d) 837 at 845** observed that under s.13 (then s.12), the Sheriff's deed does not convey the land itself, but only the interest of the judgment debtor in such land.

Section 14 of the *Act* is consistent in that it creates a *prima facie* evidentiary position that the interest of the debtor bound by the judgment is what is being conveyed.

No where in the act is there any authority for the proposition that the court can order that the deed given, pursuant to the *Act*, shall be one that conveys not only the interest of the judgment debtor in such land, but makes such conveyance free and clear of all other incumbrances as requested.

The *Act* is clear that a deed pursuant to the *Act* conveys, what if any interest of the debtor in the land, nothing more.

6. ISSUE (3)

What is the position of the Toronto-Dominion mortgage?

The Toronto-Dominion takes the position that any sale must be subject to its mortgage.

The *Sale of Land Under Execution Act* provides:

Land subject to mortgage

6 Land subject to mortgage may be levied upon, sold and conveyed under execution. R.S., c.275, 2.5.

Land subject to mortgage

16 (1) The effect of the sale and conveyance of land subject to mortgage is to vest in the purchaser all the interest of the mortgagor therein bound by the judgment and to vest in such purchaser the same rights as such mortgagor would have had if such sale had not taken place.

Interpretation

(e) "mortgagor" includes the assigns of a mortgagor, and the heirs, executors or administrators of a deceased mortgagor;

This is not a case of a prior mortgage (unregistered see **Pat King Ltd. v. Moore et al (1970), 1 N.S.R. (2d) 837 at 845**). This mortgage is subsequent to the general charge of the prior Bank of Montreal judgment and when Delbert Lucas acquired the property in joint tenancy executed the CIBC, now TD mortgage, his equity of redemption was and remains subject to the prior general charge of the registered judgment of the Bank of Montreal.

The registered judgment of the Bank of Montreal only binds his general interest in land and is not an encumbrance upon Delbert Lucas' joint tenant's interest. When the joint tenant conveyed her interest to Delbert Lucas, it was at that point unencumbered by the Bank of Montreal judgment, which only became an instrument binding her interest after it became the interest of the judgment debtor, her former joint tenant, Delbert Lucas. The TD mortgage stands in priority to the Bank of Montreal judgment to the extent of the interest of the joint tenant conveyed to Delbert Lucas.

The Bank of Montreal judgment is not a specific charge against any specific realty of the judgment debtor, but became a general charge against the interest of the joint tenant

acquired by Delbert Lucas, subject to the prior interest of the Toronto-Dominion Bank. It is clear, therefore that a sale of this particular property under the act, will convey whatever interest Delbert Lucas had in his joint tenant interest, in priority to the Toronto-Dominion Bank mortgage and Delbert Lucas' interest in that which he obtained from his joint tenant, subject to the interest of the Toronto-Dominion Bank on that interest by virtue of their mortgage.

7. ISSUE (4)

Should discretion be exercised as requested by Ms. MacGillivray?

Mr. Campbell puts forward a forcible argument. Apparently, Ms. MacGillivray paid out some of her common-law husband's debts at the time of his death and she estimates the equity in the property at \$10,000.00 at the most. Ms. MacGillivray is to be commended for her readily acknowledging the comparison of the signature of Delbert Lucas on the Promissory Note, satisfies her that the judgment debtor, Delbert Lucas and her deceased common-law spouse are the same person.

If Ms. MacGillivray could establish an equitable interest in the property, for example, by the expenditure of money and energy to put on a new roof, add a deck, or whatever that contributed to the value of the property to a sufficient degree, then the court would have entertained serious consideration of granting her equitable relief.

There being no such evidence, the court can do no more than express some sympathy to her, with the recognition that it was the conduct of Delbert Lucas in swearing a false declaration that gave rise to her hopes and expectations and there is nothing in the conduct of the Bank of Montreal that in any way, disentitles it to the exercise of judicial discretion in the granting of leave to sell Delbert Lucas' interest.

8. CONCLUSION

The application for leave to sell the judgment debtor, Delbert Lucas' interests in the land is granted. Counsel have expressed concern that any member of the public bidding in at such sale, would not, unless it is brought to such prospective purchaser's attention, necessarily recognize what is being sold under execution.

The Court has an obligation to protect the public to the extent that is reasonable and accordingly, I direct that the Notice of Sale and advertisement prescribed by the *Act*, contain a clear notice that the sale is only of the interest of the judgment debtor and that part of that interest is subject to the prior Toronto-Dominion mortgage.

I am heartened to hear counsel for the Bank of Montreal is willing to consider a possible resolution of this matter, given the limited equity in the property. Such would appear to be a wise and beneficial course to all concerned and morally, the conduct and position of Ms. MacGillivray should, to some extent, be acknowledged.

9. COSTS

Counsel are always entitled to be heard on the issue of costs. I express my preliminary view that this is a probable case for each party bearing their own costs of this application.

J.