SUPREME COURT OF NOVA SCOTIA
Citation: ***CitiFinancial Canada East Corporation v. Touchie***,
2010 NSSC 149

Date: 20100422
Docket: Hfx No. 297572
Registry: Halifax

Between:

CitiFinancial Canada East Corporation

Applicant

v.

Colin W. Touchie and L. Clare Foley

Respondents

- and -

CIBC Mortgages Inc.

Intervenor

D E C I S I O N

Judge: The Honourable Justice Peter Bryson

Heard: March 24, 2010, in Halifax, Nova Scotia, in Chambers

Counsel: Nicholas Mott & Morgan Hicks, for CitiFinancial Canada East Corp.
W. Glenn Hodge, for CIBC Mortgages Inc.

By the Court:

[1] This motion raises a novel point about the priority of two mortgages against the same land under the relatively new *Land Registration Act*, 2001 S.N.S., c.6. The mortgages were granted by Colin Touchie and Clare Foley, who were notified but did not appear.

[2] The basic facts are uncontroverted.

[3] On May 17, 2005, Colin Touchie and Clare Foley granted a first mortgage to CIBC Mortgage Inc. ("CIBC"), in the amount of $223,488.58, secured by their property in Antigonish. Funds were advanced on May 17, 2005. Through inadvertence, this mortgage was not recorded under the *Act* until January 29, 2008.

[4] On March 9, 2007, Mr. Touchie and Ms. Foley granted what purported to be a first mortgage on their lands to CitiFinancial Canada East Corporation ("CitiFinancial"). This mortgage was duly recorded.

[5] On January 9, 2008, Mr. Touchie and Ms. Foley granted a further "first charge" to CitiFinancial on the lands for $228,486.59. Funds were advanced on the same day and were used in part to retire the 2007 CitiFinancial mortgage.

[6] On January 18, 2008, John Hopkins of FNF Canada, agent for CIBC, telephoned Allan Cameron, manager of CitiFinancial in Antigonish and asked if CitiFinancial would agree to a postponement of CitiFinancial's 2007 mortgage in favour of CIBC. There is a disagreement about what else was discussed which will be addressed later in this decision.

[7] On January 21, 2008, Mr. Cameron called Mr. Hopkins back and advised him that CitiFinancial would not agree to postpone its 2007 mortgage. Mr. Hopkins was not aware that CitiFinancial had advanced further funds to Mr. Touchie and Ms. Foley earlier that month and had taken another mortgage on the lands.

[8] On January 24, 2008, CitiFinancial recorded its January 9, 2008 mortgage. Subsequently, it released its 2007 mortgage.

[9] On January 29, 2008, CIBC recorded its 2005 mortgage. CIBC did not refinance that mortgage because it could not obtain a postponement agreement from CitiFinancial.

[10] The mortgages went into default. On September 18, 2009, CitiFinancial obtained an order for foreclosure and sale. CIBC agreed to the order on the basis that the respective priorities of the parties would be subsequently decided.

[11] The essence of CIBC's submission is that its 2005 mortgage has priority over CitiFinancial's 2008 mortgage because CitiFinancial became aware of CIBC's 2005 mortgage when Mr. Hopkins called Mr. Cameron on January 18, 2008. Therefore, CitiFinancial could not acquire priority over the 2005 mortgage by recording its 2008 mortgage a few days later. CIBC says that the CitiFinancial mortgage did not create a security interest in the lands until the January 24 recording and that prior to the recording, CitiFinancial had acquired "actual knowledge" of the 2005 CIBC mortgage.

[12] CIBC concedes that priority under the *Act* is normally determined by the order of recording. In this case, CitiFinancial's mortgage was recorded prior to CIBC's mortgage. The ordinary rule would give CitiFinancial priority. But CIBC argues that in this case CitiFinancial cannot rely upon the normal priority rule because its knowledge of CIBC's mortgage prior to recording its own constitutes "fraud" within the meaning of s. 4 of the *Act*. Specifically, CIBC relies upon s-s. 4 of s. 4, which says that a person obtains an interest through fraud if that person "at the time of the transaction" has actual knowledge of an unrecorded interest.

[13] CitiFinancial replies that the 2008 mortgage constituted an interest once it was executed by Mr. Touchie and Ms. Foley. The transaction had already occurred. Therefore the conversation between Messrs. Hopkins and Cameron was immaterial. Alternatively, CitiFinancial argues that the conversation did not pass to Mr. Cameron knowledge constituting "fraud" within the meaning of the *Act*.

[14] Accordingly, the issues before the court are:

(1) When did the "transaction" described in s. 4 of the *Act* occur?

(2) Did the knowledge acquired by CitiFinancial on January 18, 2008 result in CitiFinancial acquiring its mortgage by “fraud” within the meaning of s. 4 of the *Act*?

Priorities Under the *Act*

[15] It is common ground that the mortgaged lands were registered under the *Act*. Therefore, s. 44 governs. It says:

> Where a parcel is registered pursuant to this Act, the *Registry Act* ceases to apply to the parcel, except with respect to the interpretation of documents recorded pursuant to that Act.

[16] Section 49(1) of the *Act* states the priority principle:

> 49 (1) A recorded interest shall be enforced with priority over a prior interest where the subsequent interest was
>
> (a) obtained for value;
>
> (b) obtained without fraud on the part of the owner of the subsequent interest;
>
> (c) obtained at a time when the prior interest was not recorded; and
>
> (d) recorded at a time when the prior interest was not registered or recorded.

From this it is plain that when Citifinancial recorded its 2008 mortgage on January 24, it acquired priority over the 2005 CIBC mortgage, unless CitiFinancial obtained its 2008 mortgage fraudulently.

[17] Section 4 of he *Act* defines fraud as follows:

> 4 (1) In this Act, the meaning of "fraud" is subject to this Section.
>
> (2) For the purpose of this Act, the equitable doctrines of "notice" and "constructive notice" are abolished for the purpose of determining whether conduct is fraudulent.
>
> (3) A person who engages in a transaction with the registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the

transaction, other than an overriding interest, in the absence of actual knowledge of the interest that is not registered or recorded

(a) may assume without inquiry that the transaction is authorized by the owner of any interest that is not registered or recorded;

(b) may assume without inquiry that the transaction will not prejudice that interest; and

(c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is the subject of the transaction.

(4) A person obtains an interest through fraud if that person, at the time of the transaction,

(a) had actual knowledge of an interest that was not registered or recorded;

(b) had actual knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and

(c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.

(5) A person does not obtain an interest through fraud if the interest that was not registered or recorded was not enforceable against the person who transferred the interest. 2001, c. 6, s. 4.

[18] Subsection 3 of s. 4 of the *Act* subordinates a prior mortgage that is not recorded "at the time of the transaction," to a later recorded mortgage, if the later mortgagee is unaware of the prior mortgage. However, s-s. 4 subordinates a subsequent mortgagee to a prior, unrecorded mortgage, if that subsequent mortgagee knows of the prior mortgage when it obtains its "interest." This makes the *timing* of the transaction important.

Transaction

[19] CIBC says that the “transaction” contemplated by s. 4 of the *Act* includes the recording of the mortgage. No security interest is created until that event occurs (s. 37(3)).

[20] Subsection (ad) of s. 3(1) of the *Act* defines “transaction” as follows:

> (ad) "transaction" means an event or a dealing affecting an interest;

[21] The *Act* defines “interest’ in s-s. 3(1)(g) as follows:

> "interest" means any estate or right in, over or under land recognized under law, a prescribed contract or a prescribed statutory designation, including a right or interest under the Canada-Nova Scotia Offshore Petroleum Resources Accord (Nova Scotia) Implementation Act, but excludes any interest under the Gas Storage Exploration Act, the Mineral Resources Act, the Petroleum Resources Act or the Treasure Trove Act;

[22] Section 45(1) of the Act says:

> Except as against the person making the instrument, no instrument, until registered or recorded pursuant to this Act, passes any estate or interest in a registered parcel or renders it liable as security for the payment of money.

[23] The Act also defines "instrument" in s-s. (f) of 3(1) as follows:

> "instrument" means every document by which the title to land is changed or affected in any way;

[24] Section 37(3) addresses mortgages in particular. It says:

> Subject to Section 46A, a mortgage of a parcel entered into after the coming into force of this subsection, and after the county in which the parcel is situated is designated by the Governor in Council pursuant to subsection 128(2), does not create a security interest in that parcel until title to the parcel is registered and the mortgage is recorded pursuant to this Act.

[25] Section 3(1)(Y) says a “security interest” means a consensual interest recognized by law that secures the payment of an obligation.

[26] CIBC’s argument can be recapitulated as follows:

(a) A “transaction” is a dealing affecting an interest, (3(1)(ad));

(b) An “interest” is an estate or right in land (3(1)(g));

(c) A “security interest” is a type of interest in land;

(d) No security interest exists until the mortgage is recorded, (37(3));

(e) Therefore the transaction affecting an interest (CitiFinancial’s 2008 mortgage) is not complete until the mortgage is recorded;

(f) The mortgage was not recorded until January 24;

(g) CitiFinancial acquired knowledge of CIBC’s mortgage on January 18, (s.4);

(h) Therefore, CitiFinancial loses priority.

[27] The reply to CIBC’s argument is as follows:

(a) The definition of “instrument” contemplates a document that changes or affects title (3(1)(f));

(b) A mortgage is clearly an “instrument;”

(c) An instrument can pass title and therefore “affect an interest” including a “security interest” *as between* principal parties before being recorded, (45(1));

(d) Therefore the CitiFinancial mortgage was a transaction *affecting an interest* which was complete when the mortgage was executed for valuable consideration.

[28] The biggest impediment to the foregoing interpretation remains s. 37(3) which says a mortgage ". . . does not *create* a security interest in that parcel . . . until the mortgage is recorded . . . ." (Emphasis added). It does not simply say ". . . does not bind third parties." This apparently contradicts s. 45(1), which appears to recognize a security interest without recording, *at least between the parties*, when it uses this language: "*except as against the person making the instrument*, no instrument, until recorded . . . renders [a registered parcel] liable as security for the payment of money." (Emphasis added). The word "create" in s. 37(3) implies that there is no binding obligation *even between the parties* unless the mortgage is recorded. This would contradict the general common law proposition that an instrument such as a mortgage, transfers a proprietary interest, at least between the parties, once the mortgage is executed and delivered.

[29] Perhaps the apparent contradiction can be explained this way. The focus of s. 37(3) is on a security interest in the *parcel* of land. Section 45(1) talks about the obligation between the *parties*. The first is proprietary, the second, personal. Language similar to s. 45 (1) has been interpreted by the Supreme Court of Canada to pass title between the principals: *Davidson v Davidson* [1946] S.C.R. 115 at p. 119.

[30] It would seem that the intention of the legislature was to recognize an obligation between the parties (s. 45) that would not bind third parties until the mortgage was recorded (s. 37). In an earlier and unofficial, annotated version of the *Land Registration Act*, the following comment appears summarizing s. 45:

> Instruments affecting title to land to be registered or recorded.
>
> The person making an instrument passes the subject estate or interest to the person receiving the instrument as per the law currently in place in Nova Scotia. However, the instrument must be registered or recorded, as applicable, in order to bind third parties. Thus, there is no change from the Registry of Deeds system on this point.

While the commentary is obviously not binding on the court, it does provide a sensible reconciliation of ss. 37 and 45.

[31] In my view, once the CitiFinancial mortgage was executed on January 9, 2008, it constituted an "event . . . affecting an interest" in "land" within the

meaning of a transaction (3(1)(ad)) and an interest in land (3(1)(g)), respectively. It could not bind third parties until it was recorded, but was binding between the principals to the "transaction," (s. 45(1). Even on CIBC's own interpretation of s. 4, an unrecorded mortgage must be an interest in land. That section refers to "fraud" as knowledge "of an interest." It does not say knowledge of a "security interest." If CIBC's unrecorded 2005 mortgage was not an "interest," then there would be nothing of which CitiFinancial's Mr. Cameron could have had notice when he spoke to Mr. Hopkins on January 18, 2008. So the CitiFinancial mortgage must be an "interest." That brings us to the definition of a transaction, which is "an event or dealing affecting an interest." Since the granting of a mortgage by the legal owner affects that owner's interest as between the parties (s. 45(1)), the meaning of "time of the transaction" in s. 4 of the *Act* must mean the time at which there is a transaction or exchange between the principals affecting that interest. In this case, the principals are Mr. Touchie and Ms. Foley, as mortgagors, and CitiFinancial as mortgagee. They got the money and CitiFinancial got the mortgage. Certainly this 'transaction" does not include CIBC or the registrar under the *Act*.

[32] The word "transaction" cannot include the mere act of recording. That is an administrative act. It does not involve a "transaction" or an "exchange" between anybody. The difficulty of CIBC's interpretation of "transaction" came out in argument when the court posed the question that since CIBC had not recorded its 2005 mortgage, therefore no "transaction" had occurred even though the mortgage had been advanced, the mortgage instrument had been signed and the mortgage had been at least partly repaid. To extend this logic, a mortgage could be fully advanced, fully repaid and even released, without the transaction being concluded.

[33] The foregoing also accords with the policy reasons for creating a "fraud" exception to the priority rule. CIBC itself acknowledges an analogy between s. 49(1)(b) of the *Act* and s. 18 of the *Registry Act* which provides as follows:

> Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent interest affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument.

[34] Section 18 protects the *bona fide* purchaser who might acquire a deed or a mortgage from an owner without notice of a prior unregistered instrument. In

Maitland's colourful expression, the *bona fide* purchaser for value without notice was "equity's darling." At common law the *bona fide* purchaser acquired title when monies were exchanged for a deed or other instrument, as the case may be. His "*bona fides*"could not be affected by subsequent knowledge of a prior interest: *Anger and Honsberger Law of Real Property*, 2nd Ed., Vol. 2, ¶ 30.30.10(d) citing *Paramount Theatres Ltd. v. Brandenberger* (1928), 62 O.L.R. 579 (H.C.); also see *Laidlaw v. Vaughan-Rhys* (1911) 44 S.C.R. 458 at 468 - purchaser's "good faith" is determined when he pays. Likewise, here, it cannot have been the intention of the legislature to deprive someone like CitiFinancial of its interest, because they acquire knowledge of a prior interest *after* they had already prejudiced themselves by funding the mortgage and taking an instrument in return. That simply punishes an innocent party who is not able to recover from the prejudice in which they find themselves. The interpretation which CIBC would place on s. 4 would victimize parties in the position of CitiFinancial, who cannot retrieve that prejudice when they learn of a prior unrecorded interest, after the fact. This also emphasizes the need for prompt recording because "equity's darling" can lose priority if the earlier unknown interest is recorded first.

[35] CIBC cites *Royal Bank of Canada v Head West Energy Inc.*, 2007 ABQB 188, for the proposition that CitiFinancial was not a "*bona fide* purchaser for value without notice" when the 2008 mortgage was executed and funds were advanced because the mortgage was not recorded at that time. The *ratio* of *Head West* was that time of registration determined priority, which is consistent with the *Alberta Land Titles Act.* The comments about good faith purchasers in *Head West* are clearly *obiter*. Nor is it obvious that *Head West* says that no interest passes between principal parties until registration. But if that was the court's intention, it is at variance until *Davidson, supra* and I would not follow it.

[36] To conclude on this issue: the "time of the transaction" within the meaning of s. 4 of the *Act* is when an instrument affecting an interest is executed in return for valuable consideration. If the purchaser (a mortgagor here) has no knowledge of a prior unrecorded interest at that time, he does not come within the statutory definition of fraud in s. 4 of the *Act* and cannot subsequently do so because he later learns of a prior unrecorded interest before recording his own.

Meaning of "Fraud"

[37] In the alternative, if the mortgage transaction here was not concluded until the recording of the mortgage, then it becomes necessary to determine what exactly CitiFinancial knew and whether it constituted fraud within the meaning of s. 4 of the *Act*.

[38] In its submission, CIBC raised the question of onus of proof where a party seeks to take the benefit of s. 4 of the *Act*. Although the authorities are not unanimous, generally at common law the party claiming not to have been aware of a prior unrecorded interest has the onus of proving that he is a good faith purchaser, without knowledge of that prior interest, (*Winter v. Keating and Gillis* (1977) 24 N.S.R. (2d) 644 and the cases cited therein). However, the onus in s. 49 of the *Act* appears to be different. Section 49 of the *Act* presumes that registration establishes priority unless the person registering does so fraudulently. On a strict reading of s. 49 of the *Act*, the party alleging fraud must prove it. In this case, it would be CIBC's burden to prove that CitiFinancial acquired its interest through fraud within the meaning of s. 4 of the *Act*.

[39] Section 4 of the *Act* does two things to assist in determining what "fraud" is. One is negative, the other positive. First, s. 4(2) makes it clear that the equitable doctrines of "notice" and "constructive notice" are abolished for the purpose of determining whether conduct is fraudulent. Second, s. 4(4) defines the type of knowledge required to fix a subsequent transferee with fraud.

[40] At common law, constructive notice was a means by which equity constrained the favoured position of a *bona fide* purchaser for value without notice. If such a person had knowledge of facts which, if investigated, would have given actual knowledge of a prior interest, or that person wilfully abstained from inquiry to avoid notice, the court would constructively impose that knowledge on such a purchaser so that he could not say he had no knowledge of that prior interest: *Anger and Honsberger,* Law of Real Property, 3rd Ed., 30.30 10(a). In contrast, actual notice was defined as knowledge of the prior claim itself. Actual knowledge did not require knowledge of the instrument, but merely of the claim embodied in the instrument, (*Robertson v. McCarron* [1975], 71 N.S.R. (2d) 34, (N.S.T.D.) ¶ 72. However, some cases have blurred the line or distinction between actual and constructive notice. In *Grant v. Gillingham* (1942) 1 D.L.R. 421, (N.S.S.C.), the court held that the purchaser who knew that a third party was in possession of the land he was buying had actual notice of the possessor's interest, and took subject to it. It is clear that in such a case the purchaser would not know precisely what the

possessor's interest was without further investigation, which is typically characteristic of constructive notice.

[41] Uncertainty of application of the doctrine of notice may have led the legislature to define fraud in the *Act* and to exclude the common law definitions of notice and constructive notice. There are two ways that s. 4 does this. First of all, in s-s. 3, the *Act* says what a purchaser is entitled to assume as against an unrecorded interest:

> A person who engages in a transaction with a registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the transaction, other than an overriding interest, in the absence of actual knowledge of the interest that is not registered or recorded,
>
> (a) may assume without inquiry that the transaction is authorized by the owner of an interest that is not registered or recorded;
>
> (b) may assume without inquiry that the transaction will not prejudice that interest; and
>
> (c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is subject to the transaction.

From the foregoing, it is obvious that absent actual knowledge of an unrecorded interest, a purchaser may make broad assumptions and is relieved of any obligation to make inquiry. This implies that a purchaser may well have *some* knowledge of a possible unrecorded third party interest in the lands in question. But the legislation makes it clear that such a purchaser has no obligation to make any inquiries. The onus is plainly placed upon the person with an unrecorded interest to either record or provide actual knowledge to a potential purchaser. There is no onus on the purchaser to ascertain anything. Short of actual knowledge, registration and recording are everything.

[42] Then s-s. 4 provides a positive definition of "fraud" by discussing "actual knowledge." That sub-section says:

> A person who obtains an interest through fraud if that person, at the time of the transaction,

> (a) had actual knowledge of an interest that was not registered or recorded;
>
> (b) had actual knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and
>
> (c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.

To establish fraud, s-s. (a) and (b) require both that the purchaser be personally aware of the unrecorded interest and that the owner of the unrecorded interest had not authorized the prospective transaction. The only element of "constructive notice" that might survive is the inferential knowledge that is imposed under s-s. (c) with the words "knew or ought to have known" that the transaction would prejudice the recorded interest.

[43] In this case, we have a difference in the evidence between CitiFinancial and CIBC with respect to what transpired during the January 18 conversation. CIBC's agent, Mr. Hopkins, filed an affidavit in which he alleged that when he spoke to CitiFinancial's Mr. Cameron on January 18, he ". . . advised Mr. Cameron of CIBC's prior security interest under the 2005 CIBC mortgage, the fact that the 2005 CIBC mortgage had not been recorded but had been fully advanced and was still outstanding, and requested a postponement from CitiFinancial of the 2007 CitiFinancial mortgage." He says he followed the conversation up with a letter to Mr. Cameron on January 18, 2008.

[44] For his part, Mr. Cameron says that in his conversation with Mr. Hopkins he was asked for a postponement of the 2007 CitiFinancial mortgage and that he did not understand that CIBC already had a mortgage on the property. His understanding of the conversation was that the CIBC was considering financing. He says he did not see Mr. Hopkins' letter. He denies that he was told that CIBC already had an unrecorded mortgage of the property. He says that if he had been aware of CIBC's earlier unrecorded mortgage, he would never have authorized the release of CitiFinancial's 2007 mortgage. He would have referred the matter to CitiFinancial's regional manager.

[45] In any event, it is clear that Mr. Cameron did not immediately follow-up his conversation with Mr. Hopkins by expediting the recording of the 2008 mortgage because it was still unrecorded when he called Mr. Hopkins on the 21st to advise that CitiFinancial would not agree to a postponement. This, combined with the fact that CitiFinancial did release the 2007 mortgage, is more consistent with Mr. Cameron's ignorance of the 2005 CIBC mortgage than the alternative.

[46] Mr. Cameron was cross-examined on his affidavit, but his evidence did not change in any way and he was convincing to the court. Mr. Hopkins was not cross-examined.

[47] In my view, Mr. Cameron could not have been aware of the 2005 CIBC mortgage as a result of the conversation with Mr. Hopkins on January 18, or his reaction to that knowledge would have been much more dramatic than the actions he did take. It is likely that he would not have released the 2007 mortgage. It is likely that he would referred the obvious problem of two first mortgages on the same property, to his superiors. He might not have called Mr. Hopkins back until he had ensured that CitiFinancial's 2008 mortgage had been recorded. I accept Mr. Cameron's evidence.

Conclusion

[48] For the foregoing reasons, CitiFinancial's mortgage has priority over CIBC's 2005 mortgage. CitiFinancial had no actual knowledge of CIBC's mortgage at the time of the transaction, which was January 9, 2008. Alternatively, CitiFinancial did not acquire actual knowledge of CIBC's mortgage during the January 18th conversation. The onus of proving fraud is on CIBC and that onus had not been discharged. But even if the onus were otherwise, I find that CitiFinancial did not have actual knowledge, constituting fraud within the meaning of s. 4 when the transaction occurred.

[49] Prior to turning the property over to CitiFinancial, CIBC incurred certain protective disbursements which are set out in Exhibit "D" of the Hassan affidavit. CitiFinancial's mortgage will be subject to prior payment of those protective disbursements.

[50] As CitiFinancial has been successful, it is entitled to costs. If the parties cannot agree, I will entertain written submissions on same.

Bryson, J.