NOVA SCOTIA COURT OF APPEAL
Citation: *Brekka v. 101252 P.E.I. Inc.*, 2015 NSCA 73

Date: 20150728
Docket: CA 420096
Registry: Halifax

Between:

Betty Ann Brekka

Appellant/
Respondent by Cross-Appeal

v.

101252 P.E.I. Inc.

Respondent/
Appellant by Cross-Appeal

Judges:	Fichaud, Saunders and Oland, JJ.A.
Appeal Heard:	February 17, 2015, in Halifax, Nova Scotia
Held:	**Appeals and cross-appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Oland, JJ.A. concurring.**
Counsel:	Gary A. Richard, for the appellant Ezra B. van Gelder and Nicholas Mott, for the respondent

Reasons for judgment:

[1] When mortgage payments owing on two, 6-unit apartment buildings fell into arrears, the mortgagee, a P.E.I. numbered company which had taken over the mortgages by way of assignment, foreclosed, and the dwellings were sold at public auction over the protests of the appellant owner and mortgagor who claimed to have concluded a binding settlement agreement with the President of the mortgagee which would have given her more time to arrange financing.

[2] The dispute led to a variety of motions and two separate hearings in the Nova Scotia Supreme Court.

[3] In the first, taken before Justice Michael J. Wood in Chambers, the appellant, Ms. Betty Ann Brekka brought a motion to enforce what she said was a settlement reached with the mortgagee. The company opposed the motion, saying a binding agreement had never been concluded and, in any event, the professed "settlement" failed to satisfy the **Statute of Frauds**, R.S.N.S. 1989, c. 442, in that it had never been reduced to writing. In a written decision (2013 NSSC 289) and confirmatory order issued November 12, 2013, Wood J. dismissed Ms. Brekka's motion.

[4] The second case was heard by Justice Patrick J. Duncan in Chambers, a few months later. There, the P.E.I. numbered company, as mortgagee, moved for an order confirming the Sheriff's sales of the two properties. Ms. Brekka challenged the application and brought her own motion asking that the proceedings against her be set aside because the mortgagee was not registered to do business in Nova Scotia. She sought a declaration that the two actions which had resulted in orders of foreclosure, sale and possession, be declared null and void, such that the mortgagee would have to recommence the actions after it properly registered to do business in this province. In his written decision (2013 NSSC 390) and confirmatory order issued December 20, 2013, Duncan, J. found that although the mortgagee had not complied with the provisions of the **Corporations Registration Act**, R.S.N.S. 1989, c. 101, as amended (the "**Act**"), that defect could be cured by adding the assignor as a plaintiff. The effect of the amendment was that the Sheriff's sales were ratified and confirmed.

[5] Ms. Brekka appealed the decisions of both Justice Wood and Justice Duncan. The P.E.I. numbered company filed its own cross-appeal to the decision of Justice Duncan.

[6] The appeals were consolidated by order of this Court and were considered by the panel together, at a single hearing.

[7] For the reasons that follow I would dismiss both appeals and the cross-appeal. I will begin by briefly considering the material facts which gave rise to this dispute. Where necessary, additional detail will be provided when I address the issues arising from counsels' submissions at the hearing.

[8] In my view, a single decision is justified in this case to dispose of both appeals. They involve the same parties. The proceedings spring from common, underlying facts. When deciding whether one judgment will suffice, convenience, efficacy and making the best use of judicial resources are always important objectives; provided the issuance of one set of reasons to dispose of multiple appeals will not be prejudicial to any of the parties whose conduct and interests are being judged. Here there can be no such concern. Each participant will clearly understand the basis for our decision. Accordingly, I will exercise my discretion by issuing a single judgment. (**National Bank Ltd. v. Barthe Estate**, 2015 NSCA 47 at ¶101, ¶120-121).

Background

[9] Ms. Brekka held a small portfolio of investment properties in Nova Scotia which she hoped would generate income through retirement. In May 2012 she mortgaged a number of properties located on MacIntosh Street in Halifax to Capital Direct Atlantic Inc. ("Capital Direct"). Capital Direct acted as a mortgage broker for 101252 P.E.I. Inc. ("P.E.I. Inc."), the company which provided the funds. Capital Direct assigned the mortgages to P.E.I. Inc. in July, 2012.

[10] Injuries sustained in a motor vehicle accident adversely affected Ms. Brekka's employment with the result that she defaulted on her mortgage obligations. Foreclosure proceedings on the MacIntosh Street properties were commenced in March, 2013. The proceedings were not defended. Foreclosure orders were issued.

[11] The Sheriff's sales were originally scheduled to take place on June 13, 2013. Those sales were postponed for reasons outlined by Justice Wood in his decision:

> [9] On June 12, 2013, Ms. Brekka's legal counsel, Mr. Colin Bryson, Q.C., negotiated a thirty day postponement of the sale in exchange for a payment of

> $5,000.00 in order to give her the opportunity to secure new financing. At that time, Mr. Glenn Hodge, counsel for the plaintiff, advised that his client would not agree to any further postponement beyond the new sale date of July 12, 2013.
>
> [10] On July 11, 2013, Mr. Bryson contacted Mr. Hodge's office to request a further postponement in order to allow Ms. Brekka to obtain financing.
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> [11] Messrs. Bryson and Hodge exchanged a number of e-mails on July 11 and 12, 2013. Four times Mr. Hodge indicated that his client was not prepared to postpone the sale which was scheduled to take place on July 12th at 12:30 p.m. Mr. Hodge's last e-mail confirming these instructions was sent at 12:03 p.m.
>
> [12] After hearing from Mr. Bryson that he was not successful in obtaining a postponement of the sale, Ms. Brekka tracked down the home phone number of the president of 101252 P.E.I. Inc., Mr. Geoffrey Boyle, of Charlottetown. Ms. Brekka called Mr. Boyle's home and obtained his cell phone number which she used to reach him at 12:19 p.m. Mr. Boyle had not been directly involved in the foreclosure process as he had left that to his mortgage broker, Mr. Trevor Bowie, and his legal counsel, Mr. Glenn Hodge. Mr. Boyle had never spoken with Mr. Hodge or given him direct instructions, that was the responsibility of Mr. Bowie. When Mr. Boyle spoke with Ms. Brekka, he knew the foreclosure sale was taking place on July 12 but he did not know at what time.
>
> [13] Over the next forty-five minutes, there were a number of telephone calls involving Ms. Brekka, Mr. Boyle, Mr. Bryson and Ms. Brekka's mortgage broker, Ms. Gurdeep Brar.
>
> [14] Ms. Brekka alleges that there was an oral agreement with Mr. Boyle to postpone the foreclosure sale for two weeks on the following terms:
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> 1) She would pay $10,000.00 as compensation for the postponement.
>
> 2) 101252 P.E.I. Inc. would "hold the deeds" to the MacIntosh Street properties to be returned to her if she paid the total amount of the outstanding mortgage balance, including interest, as well as the plaintiff's court costs.
>
> [15] While these telephone calls were occurring, the foreclosure sale took place and 101252 P.E.I. Inc. was the successful bidder on both properties. The Sheriff executed the deeds conveying the property to the company on July 12, 2013.
>
> [16] On July 15, 2013, 101252 P.E.I. Inc. entered into an agreement of purchase and sale, to sell the MacIntosh Street properties to a third party. ...

[12] After losing her two, 6-unit apartment buildings, Ms. Brekka brought a motion pursuant to **Civil Procedure Rule** 10.04 seeking an order enforcing the alleged settlement agreement. She asked that the foreclosure sales be set aside and that P.E.I. Inc. be ordered to convey the properties to her, upon her paying $10,000

as "compensation for the postponement", as well as the principal and interest owing under the mortgages, together with the mortgagee's costs.

[13] P.E.I. Inc. resisted Ms. Brekka's motion, saying her application was defeated by operation of s. 7(d) of the **Statute of Frauds** which reads:

> 7 No action shall be brought
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> ...
>
> (d) upon any contract or sale of land or any interest therein; or
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> ...
>
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.
>
> [Underlining mine]

[14] At the hearing before Justice Wood affidavits were filed and certain witnesses were cross-examined, including Mr. Boyle, Ms. Brekka and Mr. Bryson. Ms. Brekka said the legislation did not apply to the settlement she had negotiated with Mr. Boyle because it was "a security agreement" which would not be caught by the **Statute of Frauds**. Alternatively, she argued that there had been sufficient acts of part performance to take the negotiated agreement outside the statute.

[15] Wood J. rejected her arguments. He examined the telephone records. He considered and compared the evidence given by Ms. Brekka and Mr. Boyle. When it differed he preferred the evidence of Mr. Boyle. He found that Ms. Brekka's actions did not meet the legal test for part performance. While acknowledging that active negotiations had ensued between Mr. Boyle and Ms. Brekka and her representatives, nothing conclusive or binding was achieved. He said, in part:

> [53] I am not satisfied that Ms. Brekka has proven that she and Mr. Boyle reached an agreement in their phone call on July 12, 2013. At most, there was a discussion about the framework of an arrangement that might be acceptable, but I believe that there were a number of details to be resolved before Mr. Boyle was prepared to commit to the arrangement. In addition to a written agreement and conveyance of the property, details such as what was included in the costs to be paid had simply not been discussed. On July 12, 2013, Ms. Brekka and Mr. Boyle had different ideas about what would be included in that category.

[16] Justice Wood concluded:

> **CONCLUSION**
>
> [54] In order to succeed on her motion to enforce a settlement agreement, Ms. Brekka must establish part performance in order to avoid the application of s. 7(d) of the *Statute of Frauds*. She has not done so. Aside from that issue, the evidence does not establish that a binding agreement was entered into between Ms. Brekka and Mr. Boyle on July 12, 2013. As a result, I will dismiss Ms. Brekka's motion.

[17] Justice Wood ordered Ms. Brekka to pay costs of $850 inclusive of disbursements to P.E.I. Inc., in any event of the cause.

[18] Two weeks after Wood J. had filed his decision, Ms. Brekka brought a motion pursuant to **Civil Procedure Rule** 88.03 and ss. 13 and 17 of the **Act** to set aside the Sheriff's sales on the basis that P.E.I. Inc. was not registered to carry on business in Nova Scotia. For its part, P.E.I. Inc. sought an order confirming the sales.

[19] Each party filed affidavit evidence and extensive written briefs. Justice Duncan found that while P.E.I. Inc. had not complied with s. 17(1) of the **Act**, fairness and business efficacy dictated that the entire proceeding should not be quashed, which would have obliged the mortgagee to "start over". Rather, he concluded that the pleadings should be amended by adding and substituting Capital Direct Atlantic Inc. as the plaintiff such that any reference to P.E.I. Inc. would be read to mean Capital Direct as if it had originally been named as the plaintiff, at the outset.

[20] Following the amendment, Duncan J. ordered that the Sheriff's foreclosure sales, reports, and certificates be ratified and confirmed. He directed each party to bear their own costs.

[21] I will now consider the merits of each appeal. It makes sense to start with the case heard by Justice Wood, as it was commenced and heard first.

Analysis

*Decision of Wood J. in **101252 P.E.I. Inc. v. Brekka**, 2013 NSSC 289*

[22] Based on the appellant's grounds of appeal and counsels' submissions at the hearing, we are faced with two issues which I would frame as follows:

1. Did the motions judge err by failing to find that a binding agreement had been entered into by Ms. Brekka and Mr. Boyle on July 12, 2013?
2. Did the motions judge err by failing to find that Ms. Brekka had established part performance, so as to avoid the application of s. 7(d) of the **Statute of Frauds**?

[23] The first issue amounts to an attack on Justice Wood's findings of fact concerning the discussions that took place on July 12, 2013. On appeal, our review of such findings is limited to rectifying errors that can be characterized as palpable and overriding. The second issue relates to Justice Wood's articulation and application of the law relating to the doctrine of part performance. In that respect, his reasoning concerns an extractable question of law which is reviewable for correctness. However, his conclusion that Ms. Brekka's search for financing was not unequivocally referable to the alleged agreement, is an inference he drew from the facts and is therefore reviewable for palpable and overriding error. **Housen v. Nikolaisen**, 2002 SCC 33; **Gwynne-Timothy v. McPhee**, 2005 NSCA 80; and **National Bank Financial Ltd. v. Barthe Estate**, 2015 NSCA 47.

[24] In his decision, Justice Wood structures his analysis by dealing first with the parties' arguments surrounding the **Statute of Frauds**. He summarily rejected Ms. Brekka's first argument that what she negotiated was "a security agreement" which she said would not be caught by the provisions of the statute. Ms. Brekka did not provide any authority for that proposition and the motions judge refused to accept it. He found:

> [19] ... There is no doubt that the alleged arrangement reached between the parties is the type of transaction intended to be caught by that legislation.

[25] I agree.

[26] Wood J. then turned to Ms. Brekka's principal argument:

> [20] The primary position of Ms. Brekka is that there have been sufficient acts of part performance to take the agreement outside of the *Statute of Frauds*. ...

[27] Before considering the law, Wood J. identified the "acts" which Ms. Brekka relied upon as being sufficient to invoke the doctrine of part performance.

[28] At the hearing before Justice Wood, Ms. Brekka's counsel (not her lawyer on appeal) advanced the position in his written and oral submissions that the two

"acts" amounting to part performance on her part were: first, the transfer of title to the mortgagee through the foreclosure auctions; and second, her attempt to obtain additional financing beginning July 12.

[29] Justice Wood rejected Ms. Brekka's reliance upon the first event as being entirely without merit. It did not refer to conduct on her part at all. Rather, it referred to steps taken by the Sheriff to complete the sale. The fact that P.E.I. Inc. purchased the properties at foreclosure upon paying the minimum bids and receiving title by way of Sheriff's deeds, could not constitute an action by Ms. Brekka, or amount to evidence of part performance by her. Here is how Justice Wood described it:

> [26] In my view, the transfer of the property by the Sheriff cannot amount to part performance. The essence of the doctrine is that the party seeking to enforce the agreement has taken steps to fulfill their obligations. In this case, Ms. Brekka says that she had agreed to "give the deeds" to 101252 P.E.I. Inc. to be held for two weeks and returned to her if she paid the amount agreed. The purpose of the agreement was to avoid the foreclosure sale occurring. I cannot see how the completion of the sale by the Sheriff amounts to any act on the part of Ms. Brekka, let alone a step in completion of the postponement agreement.

[30] I agree, and have nothing to add to Justice Wood's analysis on this point.

[31] Ms. Brekka's second argument was that her attempts to secure additional financing, to make a payment, amounted to part performance, such as to avoid the rigours of the **Statute of Frauds**. It is evident from the exchanges between the court and counsel seen in the transcript, that Justice Wood found Ms. Brekka's submissions, perplexing. He repeatedly questioned Ms. Brekka's lawyer as to how her last minute efforts to poll money lenders and secure $1.3M in financing to save all five of her properties facing foreclosure could, in law, amount to part performance of a contract she said had been concluded with Mr. Boyle. In the face of such arguments by Ms. Brekka's counsel, which were unsupported by any authority, Wood J. provided a brief but accurate analysis of the doctrine of part performance. Quoting from his reasons, the judge said:

> [20] ... The doctrine of part performance is described in McCamus' *The Law of Contracts* (2d), Irwin Law, 2012 at p. 177-178:
>
> > Within a few years of the enactment of the statute, courts of equity began to develop a doctrine that would essentially waive compliance with the statute in circumstances where it would be unjust to refuse enforcement of the agreement. The principal doctrine of this kind is the doctrine of part

> performance. This doctrine holds that where one party to an oral agreement partially performs his or her undertaking, the oral agreement may be enforced in order to avoid injustice to the party conferring value. The doctrine is typically applied in the context of oral transactions concerning the transfer of land in return for the provision of services. Having provided that services in question, the service provider seeks the equitable remedy of specific performance of the agreement to transfer the land. If the doctrine is applicable, the oral agreement becomes enforceable. Articulation of the test for application of the doctrine rests on a determination of the nature of the part performance that must be demonstrated and its relationship to the unenforceable oral agreement.

[21] Traditionally courts held that in order to amount to part performance, the conduct in question had to unequivocally refer to the particular agreement alleged. In England, the standard has been relaxed somewhat since the decision of the House of Lords in *Steadman v. Steadman*, [1976] A.C. 536. In that case, the Court said that it was sufficient part performance if the acts relied upon were done in reliance on a contract relating to the land. It was not necessary that it be unequivocally referable to the specific agreement alleged.

[22] In Canada, the courts have not universally adopted the more relaxed approach. To date, the Supreme Court of Canada has not specifically accepted the *Steadman* test.

[23] The issue of the applicable standard for part performance was considered by the Honourable Justice Coady of this Court in *Self v. Brignoli Estate*, 2012 NSSC 81. After reviewing the English and Canadian cases, Justice Coady concluded as follows:

> [19] I submit that the law in Nova Scotia follows the more traditional test set out in *Deglman* and applied by Hallett, J. in *Carvery*. In order to avoid the *Statute of Frauds* a plaintiff must show acts of part performance that are unequivocally referable to the contract for land asserted by the plaintiff.

[24] I agree with Justice Coady that this reflects the current law in Nova Scotia. It is against this standard that I will assess the alleged acts of part performance put forward by Ms. Brekka.

[32] Having described the legal principles he intended to apply to the evidence, Justice Wood then proceeded to carefully trace what he termed "the evolution of Ms. Brekka's financing problems". He said:

> [27] The position most strongly advanced by counsel for Ms. Brekka was that the obtaining of financing amounted to part performance. In order to assess the strength of this argument, it is first necessary to understand the evolution of Ms. Brekka's financing problems.

> [28] Earlier in 2013, five of Ms. Brekka's investment properties were in foreclosure. She was seeking financing to pay out the mortgages and stop all of these foreclosures. As of July 12, 2013, she had not been successful. At 12:00 noon on that date, she was meeting with CIBC and was told that her request for financing had been turned down. The CIBC mortgage representative offered to refer Ms. Brekka to an independent mortgage broker who had successfully assisted other clients who had been refused financing by CIBC. That person was Ms. Gurdeep Brar, who was located in Yarmouth. Ms. Brekka called her from the CIBC office around noon, which was approximately thirty minutes before the scheduled start of the foreclosure sale. That was the first time she had ever spoken with Ms. Brar.
>
> [29] Ms. Brekka's request to Ms. Brar was to obtain financing for all five of the investment properties which were in foreclosure. The blanket financing total which was requested was 1.3 million dollars. The foreclosure orders fixed the mortgage debt for the two MacIntosh Street properties at approximately $155,000.00 as of May, 2013.
>
> [30] On July 19, 2013, Ms. Brar successfully obtained approval for the 1.3 million dollar financing from a private lender. According to Ms. Brar, the structure of the loan was that Ms. Brekka could draw down specific amounts for each of the five properties, and she has now done so with respect to three of them. According to both Ms. Brekka and Ms. Brar, there is a balance which remains available that is sufficient for Ms. Brekka to pay the principal and interest owing to 101252 P.E.I. Inc., as well as the $10,000.00 bonus and other legal expenses.
>
> [31] The financing secured by Ms. Brar was no different than what Ms. Brekka had been looking for all along -- an amount sufficient to stop all of the foreclosures. It was set up in a way that Ms. Brekka could access money for each property individually as needed. It is difficult to see how this could be categorized as unequivocally referable to the alleged agreement. It is equally consistent with the proposition that Ms. Brekka was trying to obtain sufficient money to stop the foreclosures in the event that she was successful in reaching an agreement with any of the lenders.
>
> [32] The fact that it was a blanket financing package, rather than a specific loan for the MacIntosh Street properties, also undermines the argument that it represents part performance of the alleged agreement.
>
> [33] I conclude that Ms. Brekka has not met the burden on her to show conduct which is unequivocally referable to the alleged postponement agreement, and so has not proven part performance. As a result, the provisions of s. 7(d) of the *Statute of Frauds* apply and she is not entitled to enforce the alleged agreement.

[33] Again I agree with Justice Wood's analysis. I cannot discern any palpable and overriding error in the manner in which he considered the facts surrounding Ms. Brekka's attempts to secure financing, or the inferences he was prepared to

draw from those facts. Neither do I see any error on his part in articulating or applying the law of part performance, as it has been interpreted and applied in Canada.

[34] During argument on appeal Ms. Brekka's counsel invited us to undertake what I would describe as an etymological odyssey, a kind of polysynthetic parsing of the phrase "unequivocally referable", suggesting that it really meant "unquestionably" which counsel said equated to "uniquely referable" which "was different than solely referable". The proposition put to us was:

> Simply because something can be unequivocally referable to one thing, does not necessarily mean it is inconsistent with another thing.

We were told the motions judge adopted a far too narrow definition of the phrase "unequivocally referable". He should have looked at the breadth of events confronting Ms. Brekka and considered the broad spectrum of activities in which she participated when trying to deal with those matters.

[35] When pressed to explain his position having regard to the facts in this case, counsel argued that by attempting to secure mortgage financing for her five properties, Ms. Brekka's actions were therefore uniquely referable to Lots A, B, C, D and E, or any combination thereof. We were told that all she had to demonstrate in order to establish part performance, was to present reliable evidence that she had attempted to secure mortgage financing for one, some, or all of her properties, or any combination thereof. In other words, if her efforts could be seen as referring to a dealing with her lands, that was all she had to show, in order to invoke the doctrine of part performance and avoid the rigours of the **Statute of Frauds**.

[36] I respectfully disagree. Ms. Brekka's submissions do not accurately reflect settled law. The putative part performer doesn't get to pick from a plethora of parts, ultimately choosing a favorite so as to avoid the **Statute of Frauds**. That is not how it works. In **Deglman v. Guaranty Trust Co. of Canada and Constantineau**, [1954] S.C.R. 725, Cartwright J. set out the test for part performance:

> An interpretation similar to that in *McNeil v. Corbett* was placed upon the decision in *Maddison v. Alderson* by Turgeon J.A., with whom Haultain C.J.S. and Lamont and McKay JJ.A. agreed, in *Re Meston, Meston v. Gray et al.*[[1925] 4 D.L.R. 887]. At page 888, Turgeon J.A. said:—

> …In order to exclude the operation of the Statute of Frauds, the part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land and to nothing else.

[Underlining mine]

[37] Similarly, in **Maddison v. Alderson**, [1881-85] All E.R. Rep 742 Lord O'Hagan:

> But there is no conflict of judicial opinion, and, in my mind, no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwike's words in *Gunter v. Halsey* (19) (West temp Hard at p 681):
>
> > "as could be done with no other view or design than to perform that agreement."
>
> It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract, the terms of which equity requires, if possible, to be ascertained and enforced. [pp.752-53]

[Underlining mine]

[38] This passage from Lord O'Hagan was also cited with approval by Rand J. in **Deglman** at p. 727.

[39] Thus the test for part performance and the meaning to be given to the phrase "unequivocally referable" is and remains that which was articulated by the Supreme Court of Canada in **Deglman**, and applied consistently by the courts of this province ever since. See for example, the analysis by Hallett J. (as he then was) in **Carvery v. Fletcher** (1987), 76 N.S.R. (2d) 307 (S.C.) and Coady J. in **Self v. Brignoli Estate**, 2012 NSSC 81.

[40] In my respectful view, Justice Wood was correct in his articulation and application of the law to the circumstances presented. I see no error in his conclusion that Ms. Brekka's efforts to secure financing were not, on the evidence, unequivocally referable to the settlement agreement she claimed to have negotiated

with Mr. Boyle to save the two MacIntosh Street properties. Accordingly she had not satisfied the requirements for part performance so as to avoid the requirements of the **Statute of Frauds**.

[41] The motions judge then went on to consider and reject Ms. Brekka's final submission, that is that she and Mr. Boyle had concluded a binding settlement, in any event. As he put it:

> **THE SETTLEMENT AGREEMENT**
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> 34 In the event that I am wrong in my conclusion that Ms. Brekka has not established part performance, I will consider the evidence with respect to the alleged settlement agreement.

[42] Again, with respect, I am not persuaded by the appellant's submissions. Over the course of several pages of his decision Wood J. carefully evaluates the evidence of both the appellant and Mr. Boyle, including their telephone records, as well as the evidence given by other affiants before ultimately accepting Mr. Boyle's position that:

> [45] ... They discussed a possible arrangement ... the starting point of any agreement, but that there were other details required, including a written document. He said that he would not agree to postpone the sale until these were in place.
>
> [46] ... he reiterated the requirement for a written agreement. ...
>
> [47] ... Mr. Boyle testified that he explained his frustration with Ms. Brekka and his desire to have a written agreement in place and the deeds executed prior to any postponement of the auctions. ...
>
> [49] Ms. Brekka's evidence is somewhat inconsistent in a number of respects... Her recollection of the sequence of calls is not supported by the objective information in Mr. Boyle's cell phone records. ...
>
> [51] I accept as credible his evidence that he never would have agreed to an adjournment without a high degree of comfort that he would ultimately be paid. He was dealing with a borrower who was seriously in default and had already received one thirty day extension to no avail. ...
>
> [53] I am not satisfied that Ms. Brekka has proven that she and Mr. Boyle reached an agreement in their phone call on July 12, 2013. At most, there was a discussion about the framework of an arrangement that might be acceptable, but I believe that there were a number of details to be resolved before Mr. Boyle was prepared to commit to the arrangement. In addition to a written agreement and conveyance of the property, details such as what was included in the costs to be

> paid had simply not been discussed. On July 12, 2013, Ms. Brekka and Mr. Boyle had different ideas about what would be included in that category.

[43] As a trial judge, Wood J. was in the best position to find facts, draw inferences, and come to his own conclusions concerning the credibility and reliability of that evidence. On appeal, great deference is paid to such assessments. Absent palpable and overriding error, we cannot intervene.

[44] In view of my earlier determination that Justice Wood was correct in his understanding and application of the law relating to part performance, there is then no merit to the appellant's collateral complaint that the judge erred by "conflating" it with his factual analysis, such that his factual findings were undermined, or that had he adopted the appellant's interpretation, he would have been driven to the conclusion that a binding settlement agreement had been negotiated.

[45] For all of these reasons I would dismiss the appeal.

Decision of Duncan J. in ***101252 P.E.I. Inc. v. Brekka****, 2013 NSSC 390*

[46] This hearing before Duncan J. was prompted by a motion filed by Ms. Brekka wherein she, as:

> ...the Defendant in this proceeding, moves to enforce s. 13(1) of the *Corporations Registration Act* in order to fine 101252 P.E.I. INC and also moves to enforce s. 17 of the *Corporations Registration Act* requiring 101252 P.E.I. INC. to re-commence its' action or to be subject to a remedy as this Honourable Court deems appropriate.

In simple terms, she argued that because P.E.I. Inc. was not properly registered to carry on business in Nova Scotia, the ensuing foreclosure proceedings were "null and void" and ought to be set aside with the requirement that P.E.I. Inc. be ordered to "start all over again" and re-commence its efforts to take over possession of the properties.

[47] Ms. Brekka's motion was countered by a subsequent motion filed a week later by P.E.I. Inc. which moved for confirmation of the Sheriff's sale pursuant to **Civil Procedure Rule** 72.

[48] The hearing proceeded on the basis of the affidavit evidence and extensive written briefs.

[49] After considering the evidence and the submissions of counsel, Justice Duncan found that P.E.I. Inc. had failed to comply with the registration requirements under the **Act**. He decided that such a failure would not impede the foreclosure proceedings. Duncan J. exercised his discretion and permitted an amendment to the pleadings. His order reads, in part:

> ...
>
> **AND UPON CONCLUDING** that the Plaintiff, 101252 PEI Inc., commenced the within proceedings in contravention of Section 17(1) of the *Corporations Registration Act*, RSNS 1989, c 101;
>
> **IT IS HEREBY ORDERED** that:
>
> 1. Capital Direct Atlantic Inc. be named as the plaintiff in these proceedings in substitution for 101252 PEI Inc. pursuant to Civil Procedure Rule 35.06, and that Ezra B. van Gelder be recorded as the solicitor for the plaintiff;
> 2. Any references to 101252 PEI Inc. as plaintiff in these proceedings shall be read as if Capital Direct Atlantic Inc. had originally been named as plaintiff herein;
> 3. The Sheriff's Report and all proceedings herein be and hereby are ratified and confirmed;
> 4. The parties shall bear their own costs on these motions.

[50] On appeal to this Court Ms. Brekka says the motions judge was right to find that the action taken against her by P.E.I. Inc. contravened the provisions of the **Act** but then was wrong to conclude that the violation did not prohibit (or, as a consequence, nullify) the foreclosure proceedings taken against her. Further, and in any event, Ms. Brekka says the motions judge erred in the exercise of his discretion by fashioning a remedy which was highly prejudicial to her "rights" as owner.

[51] In its cross-appeal P.E.I. Inc. says the judge erred in his interpretation of s. 17 of the **Act**. He ought to have concluded, in the circumstances of this case, that the registration requirements did not apply to P.E.I. Inc. and as a result there was no bar to proceeding against Ms. Brekka in the manner it did. Further, and in any event, P.E.I. Inc. says the judge made no error in the exercise of his discretion, such that the operative provisions of his order ought to stand and his validation of the Sheriff's sales, be affirmed.

[52] Based on the appellant's and cross-appellant's grounds of appeal and counsels' submissions at the hearing, the following issues emerge which I would frame as follows:

1. Did the motions judge err in finding that because P.E.I. Inc. was unregistered to carry on business in Nova Scotia it was precluded from taking foreclosure proceedings against Ms. Brekka?
2. Did the motions judge err in the exercise of his discretion when fashioning a remedy?

[53] The first issue relates to Justice Duncan's interpretation of the **Act**. This is a pure question of law and reviewable on a standard of correctness. The second issue concerns Justice Duncan's exercise of discretion pursuant to **CPR** 35.06(2) which of course is a situation where we will only intervene if the decision reveals an error of law or has produced a patently unjust result. **Innocente v. Canada (Attorney General)**, 2012 NSCA 36.

[54] In the circumstances of this case we are only concerned with s. 17(1) of the **Act**. It says:

> **Restriction on bringing court action**
>
> 17 (1) Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force ...

[55] Duncan J. was not persuaded by the argument that P.E.I. Inc. was exempt from registration on the theory that when Ms. Brekka gave the mortgage, it was a "stranger" to the contract and was not doing business here. He found that the respondent corporation carried on business in Nova Scotia because it collected mortgage payments on a property in Nova Scotia and later went into possession, which involved taking action to maintain Ms. Brekka's income properties. As a result, the motions judge concluded that the mortgage contract had become connected to the respondent's business carried on in Nova Scotia, and so the prohibition in s. 17(1) applied. The judge put it this way:

> [27] By the time these actions were filed, the management of the mortgage provisions had continued for several months after the assignment. The plaintiff

> collected mortgage payments under a Nova Scotia contract for a Nova Scotia property from a Nova Scotia resident. In time, the mortgagee went into possession under the terms of the mortgage and operated and maintained the business of the income properties. The mortgage therefore was a contract that, once assigned, became connected to the business of the plaintiff in Nova Scotia. It would seem contrary to the intention of the legislation that the assignee could commence an action in such circumstances.
>
> [28] I conclude that the plaintiff, as a non-registrant in Nova Scotia, has not met the pre-conditions set out in section 17(1) of the **Corporations Registration Act** and therefore could not have commenced or maintained these actions in its own name. I turn now to the remedy.

[56] On appeal the respondent says that the judge erred in failing to accept the argument that its activities were not caught by the **Act** and that it was exempt from registration. P.E.I. Inc. says s. 17(1) has very limited application and cannot serve as a bar to the proceedings it commenced against Ms. Brekka. At para. 60 of its factum, the respondent sets out five hypothetical scenarios to illustrate its interpretation. At the hearing before this Court, counsel advised that scenario "d" was the only one intended to describe the respondent's position on the facts of this case. It reads:

> A registered corporation makes a contract, assigns that contract to an unregistered corporation having no connection to the making of the original contract, and the assignee then sues on the contract.

The respondent argued that s. 17(1) cannot apply to an assignee in this position because "the contract on which it sues is not one made in connection with its business."

[57] With respect, I am not persuaded by the respondent's submissions. In my review of the authorities that have considered similar provisions throughout Canada I have not found a single case where such an argument was made or endorsed. Perhaps this is because the respondent's interpretation seems to me to be inconsistent with the wording in s. 17(1) in two separate but connected ways:

1. if the only relevant time at which to assess a corporation's business and its connection to the contract were the moment of formation, the phrase "while it did not hold a certificate of registration" would have little or no effect; and
2. the respondent relies on an unnecessarily restrictive understanding of the word "business".

Formation as the Only Relevant Time

[58] As explained above, the respondent contends that s. 17(1) cannot apply to an assignee in its position because "the contract on which it sues is not one made in connection with its business." However, isolation of the term "business" renders this interpretation inconsistent with the actual wording of s. 17(1). The question is not whether the contract was made in connection with a corporation's business enterprise or activities as they existed on that date, but whether the contract was connected to "any part of its business done or carried on in the Province *while it did not hold a certificate of registration that was in force*."

[59] The phrase beginning with "while" indicates that assessment of the business carried out is intended to encompass more than just the moment of formation. Any other meaning would lead to absurd results. For example, a duly registered foreign corporation could enter into a contract regarding ongoing business in Nova Scotia, let its registration lapse immediately after execution, and still not be caught by the prohibition. This is because the contract would not have been "made" in connection with business carried out while unregistered. Similarly, an unregistered foreign corporation that entered into a contract before carrying on business in Nova Scotia – even if it subsequently did so – would not be subject to s. 17(1) by the respondent's reasoning, because there would be no existing business done or carried out in Nova Scotia at the time the contract was "made."

Meaning Given to "Business"

[60] The respondent places significance on the fact that it was a stranger to the initial contract. However, this is only relevant if: 1) only the time of formation is relevant; and/or 2) the word "business" is understood as referring to the corporation itself, rather than any specific undertaking. The latter option is not consistent with s. 17(1)'s reference to "any part of its business done or carried on in the Province …"

[61] In my view, the flaw in the respondent's analysis becomes clear when viewed against the facts of this case. It is uncontested that the mortgage was made in Nova Scotia in connection with business carried on by Capital Direct. Similarly, no one disputes that Capital Direct assigned its rights and obligations as mortgagee to the respondent, who was found to have carried on business in that capacity in Nova Scotia. Therefore, the contract was made in connection with that part of the

respondent's business assigned to it by Capital Direct, which it carried out in Nova Scotia while unregistered.

[62] For these reasons, I do not accept the approach urged upon us by the respondent. I think Justice Duncan was correct in his interpretation of s. 17(1) of the **Act**. I would uphold his finding that because of the respondent's non-compliance with the registration requirements in carrying on business in Nova Scotia, it was precluded from taking foreclosure proceedings against Ms. Brekka. I will turn now to a consideration of the remedy he devised.

[63] On appeal, counsel for Ms. Brekka appears to challenge the judge's exercise of discretion on the basis of both an alleged error in principle and an argument that the decision produced an obviously unjust result. In argument, the alleged error in principle was described as the motion judge's "failure to consider preserving Ms. Brekka's rights under s. 42 of the **Judicature Act**", R.S.N.S. 1989, c. 240, as amended, and by not recognizing that any inconvenience to the respondent in having to re-commence the foreclosure proceedings could have been easily addressed by way of costs and prove to be far less prejudicial to Ms. Brekka than permitting Capital Direct to be added as a plaintiff, thereby ratifying and confirming the Sheriff's sales.

[64] I respectfully disagree. While it is true that the decision does not contain any explicit reference to what Ms. Brekka's counsel described as her "rights" under s. 42 of the **Judicature Act**, a fair reading of Justice Duncan's decision as a whole satisfies me that he very carefully considered and weighed the prejudice to both sides when fashioning a remedy. He specifically canvassed the factors listed in **CPR** 35.06. His analysis is replete with references to comparing and weighing the likely consequences to both parties. For example, he asked himself whether "forcing the plaintiff to repeat the entire process would be a waste of resources for the court and the parties" or would be "outweighed by the prejudice" to Ms. Brekka including her plea that she "now has the will and ability to redeem the properties and this is likely her last opportunity to get her properties back".

[65] Under s. 42 of the **Judicature Act**, among the factors to be considered if the court were inclined to discontinue an order for foreclosure and sale, is making the discontinuance:

> [3] ...conditional upon
>
> (a) the payment of all arrears of principal and interest and any other payments due under the mortgage;

> (b) the performance of the covenant in default;
>
> (c) the payment of any costs and expenses incurred by the mortgagee...

It seems to me that Justice Duncan clearly had these factors in mind when he said at ¶40 of his decision:

> [40] I find that this evidence does not give any confidence that the defendant will one day be able to redeem the properties if her objection is successful. In fact I would say it is speculative to say that, based on this document, the defendant will be able to find the necessary funds.

[66] After careful consideration Duncan J. concluded:

> [45] In my view, this case is one of those where defeating the proceedings would be disproportionate to the harm intended to be deterred. While it may be arguable that the proceedings could be saved by PEI Co registering, I conclude that the more appropriate resolution is to require that Capital Direct be added as a plaintiff. This has been made necessary by the fact that their assignee is not registered. As I have noted, the Assignment gives legal authority to the plaintiff to use the Capital Direct name. Counsel for the plaintiff advises that they also act for Capital Direct and that the necessary changes to add that company as a plaintiff can be made forthwith.
>
> [46] Therefore I order that pursuant to Rule 35.06(2) Capital Direct Atlantic Incorporated be added as a plaintiff. I will hear the parties as to the appropriate way in which to change the style of cause.
>
> **[DISCUSSSION AS TO STYLE OF CAUSE]**
>
> [47] The style of cause is amended by naming Capital Direct Atlantic Inc. as the plaintiff in these proceedings, and any reference to 101252 PEI Inc. shall be read as if Capital Direct Atlantic Inc. had originally been named as the plaintiff.
>
> **Motions to confirm sales**
>
> [48] I have reviewed the affidavit evidence of Shawna Bowlby and am satisfied that pursuant to the orders of foreclosure, sale and possession, notices of public auction were sent to all appropriate persons and were published in compliance with the orders. I have reviewed the Sheriff's reports of sales of the mortgaged properties and the certificates of taxation. I confirm the Sheriff's reports and all proceedings are ratified and confirmed, subject only to execution of the amendment of the style of cause to include Capital Direct as plaintiff.

[67] After reviewing Justice Duncan's decision in its entirety, I am satisfied that he thoroughly considered the consequences to both the appellant and the respondent and in fashioning a remedy he neither erred in principle, nor issued a directive which could be seen as producing a patent injustice.

[68] Accordingly, there is nothing here which would warrant our intervention.

Conclusion

[69] For these reasons Ms. Brekka's appeal from the decision and confirmatory order of Justice Wood is dismissed, with costs. Similarly, Ms. Brekka's appeal and P.E.I. Inc.'s cross-appeal from the decision and confirmatory order of Justice Duncan are dismissed with costs.

[70] At the appeal hearing both sides agreed on the amount of costs "win or lose". I accept their proposal and would award P.E.I. Inc. its costs of $2,000, which is intended to cover both appeals, and inclusive of disbursements.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Oland, J.A.