SUPREME COURT OF NOVA SCOTIA

Citation: *Project Forest Lakes Pte. Ltd. v. Terra Firma Development Corporation Limited,* 2021 NSSC 350

Date: 20211217
Docket: Hfx. No. 494688
Registry: Halifax

Between:

Project Forest Lakes Pte. Ltd. (also known as Project Forest Lakes Pty Ltd.)
Plaintiff

v.

Terra Firma Development Corporation Limited
Defendant

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	November 30, 2020 and August 12, 2021 in Halifax, Nova Scotia
Written Decision:	December 17, 2021
Counsel:	Nicholas Mott, Cox & Palmer for the Plaintiff James MacNeil and Ian Brown, Boyne Clarke for the Defendant E. Patrick Shea, Gowling WLG for MNP Ltd. (trustee in bankruptcy for Terra Firma Development Corporation Limited)

McDougall, J.

Introduction

[1] Project Forest Lakes Pte. Ltd. (also known as Project Forest Lakes Pty. Ltd.) ("PFL" or the "plaintiff") seeks an order to confirm foreclosure.

[2] The motion was initially made ex-parte following an Order for Foreclosure granted by the Honourable Justice John P. Bodurtha on February 18, 2020. Justice Bodurtha's order provided for notice of this motion to go to the defendant – Terra Firma Development Corporation Limited ("Terra Firma") and preceding lien holders by ordinary mail. It further provided that notices to subsequent encumbrancers were to be sent by registered mail. Notices were sent as required.

[3] Justice Bodurtha's order further provided that upon issuance of a Confirmatory Order, confirming compliance with the terms of his order *nisi*, title to the mortgaged property would vest in the plaintiff.

[4] A Notice of Contest was filed on behalf of various persons and corporate entities (the "Encumbrancers") claiming relief that included recognition of equitable liens based on partial payments made to the developer – Terra Firma- pursuant to unregistered agreements of purchase and sale. Further particulars of the Grounds of Contest are as follows:

1. Blubrix Limited, Special Transactions and Negoce (S.T.A.N.) Ltd., Peter and Barbara Strobl, Martin Schmidt and S.G. Invest SRAL (the "Encumbrancers") each entered into agreements of purchase and sale to purchase condominium units located in a building referred to as "The Edgewater", currently located at 311 Eagle View Drive, Ardoise, Hants County, Nova Scotia PID 45401965 (the "Property") from Terra Firma Development Corporation Limited ("Terra Firma").
2. Each of the Encumbrancers made payments under their respective agreements of purchase and sale with Terra Firma.
3. The Encumbrancers please that their respective agreements of purchase and sale form an equitable Purchaser's Lien on the Property, each of which predate the mortgage which Project Forest Lakes Pte. Ltd. seeks to foreclose in this proceeding (the "Mortgage").
4. The Encumbrancers plead that the Mortgage is not valid due to a lack of consideration.
5. The Encumbrancers plead that at the time Terra Firma entered into the Mortgage it was insolvent or on the bring of insolvency, and that its mortgage of the Property was intended to defeat, hinder, delay and/or prejudice Terra Firma creditors.
6. The Encumbrancers plead that Terra Firma entered into the Mortgage to give Project Forest Lakes Pte. Ltd. a fraudulent preference over other creditors.
7. The Encumbrancers plead and rely upon the *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25, as amended, and the *Statute of Elizabeth*, 1571 (Eng.) 13 Eliz. 1, c.5.
8. In the alternative, should this Honourable Court find that the Mortgage is a valid mortgage over the Property, the Encumbrancers plead that the Plaintiff's request for an Order for Simple Foreclosure is neither a just nor an appropriate remedy in this matter.

[5] This contested motion was argued before me on Monday, November 30, 2020. Terra Firma had not filed a defence to the foreclosure action and did not participate in this motion nor the initial hearing that led to Justice Bodurtha's Order for Foreclosure.

[6] After hearing from counsel for PFL and the Encumbrancers, the court reserved its decision. Up until then, the court was not aware that a Bankruptcy

Order, naming MNP Ltd. (the "Trustee") as trustee of the assets of Terra Firma, had been issued on 22nd September, 2020. It was not until March 25, 2021 that correspondence from the trustee was hand-delivered to the court. There was no prior notice given nor was there any attempt by MNP Ltd. to seek the court's permission to intervene.

[7] The March 25, 2021 correspondence from the trustee was copied to counsel for PFL and the Encumbrancers. This prompted further correspondence which raised concerns with some of the assertions made by the trustee as well as the way in which the trustee inserted itself in the proceeding that had already been argued and was simply awaiting my decision.

[8] The court next heard from counsel for MNP Ltd. explaining that the trustee had not received formal notice of the November 30, 2020 hearing and "believed that the most effective way of making your Lordship aware of that linkage was to write to you in its capacity as an officer of the court [see correspondence from E. Patrick Shea to the court dated 31st March 2021].

[9] In correspondence, dated June 4, 2021, and sent to all counsel including Mr. Shea, the court set out its views on how the matter should proceed. This was followed by an audio-appearance, on-the-record, to set further filing deadlines and

a date and time for a hearing to address the concerns raised by the trustee in the correspondence sent by its Senior Vice President – Mr. J. Eric Findlay, CIRP, LIT, CPA – dated 25 March, 2021. That subsequent hearing took place on August 12, 2021.

[10] The Motion advanced on MNP Ltd.'s behalf, as trustee in bankruptcy of the estate of Terra Firma Development Corporation Limited, does not object to "simple" foreclosure by PFL. It does, however, request the court to make an order that no determinations are being made in the foreclosure proceedings that are binding on the Trustee with respect to: (a) the quantum of PFL's claim against Terra Firma and any such determination will be made pursuant to s.135 of the BIA: or (b) whether the PFL Mortgage is "valid" in the sense that it is not subject to attack by the Trustee pursuant to s.96 of the BIA.

[11] It further requests the court to consider:

> (a) making an Order requiring that PFL account for any amounts recovered through the exercise of foreclosure against the other two properties that stood as security for the debt obligations secured by the PFL Mortgage prior to foreclosure of Terra Firma's right to redemption in the remaining property being effective; and
>
> (b) if the court orders foreclosure, sale and possession, providing that the purchase price paid by PFL or any part not dealing with PFL at arm's length not be submitted by either PFL or the Trustee as evidence of the fair market value of the subject property for the purposes of any proceeding taken pursuant to s.96 of the BIA.

[12] I will address these requests for relief in my discussion of the third issue as set out later in my decision.

[13] I will now turn my attention to providing additional background. I will then lay out the three issues, as I see them, followed by an analysis of each.

Background

[14] Terra Firma, the Defendant, is a property developer for a condominium project located at 311 Eagle View Drive, Ardoise, Nova Scotia (PID 45401965) ("Property"). Between 2015 and 2018, several companies and individuals located outside of Canada ("Encumbrancers") entered into written agreements of purchase and sale with Terra Firma to purchase condominium units that were being developed at the Property. Each of the Encumbrancers has paid substantial amounts or completed full payment for their respective units. Some of the Encumbrancers also purchased furniture and appliances for these units. The closing dates for these agreements ranged from September 30, 2016 to December 15, 2018.

[15] The Plaintiff, Project Forest Lakes ("PFL"), issued four loans to Terra Firma for this project.[1] Two promissory notes, both dated November 15, 2018, evidenced

[1] Affidavit of Tew See Mong, filed October 2, 2020, exhibits "A"-"D".

a loan totalling $610,000, plus interest of 8% per annum, in Singapore Dollars. That loan would mature on November 15, 2019. Then, by agreement dated March 1, 2019, PFL and Terra Firma executed a financing agreement for SGD $750,000, plus 15% interest p.a., maturing in three years from the first advance. The financing agreement granted PFL a collateral mortgage over another property (PID 45406345) with a principal of SGD $2,250,000. A third agreement was executed as a bridging loan, dated April 22, 2019, in the amount of SGD $1,200,000, plus 5% interest per month, maturing 60 days after Terra Firma received the funds.

[16] On August 2, 2019, PFL and Terra Firma entered into a Refinancing Mortgage, supported by a promissory note dated August 6. The Refinancing Mortgage states that its purpose is to assist with "[r]efinancing of existing loans issued by [PFL]" and with Terra Firma's "working capital requirements and other general corporate purposes". PFL agreed to provide SGD $3,327,000 "to refinance the loans set out in Schedule B" and CAD $400,000, of which $300,000 was advanced. Schedule B lists the promissory notes, the financing agreement, and the bridging loan, referenced above, plus the interest accrued for each, respectively. The Mortgage was secured by "[a]ll security presently granted by [Terra Firma] to [PFL]", a first-ranking mortgage of $20,000,000 over the three PIDs now foreclosed upon (including the Property), and a first-ranking registered security

interest in all present and after-acquired personal property of Terra Firma. The previous debts were consolidated, totalling SGD $3,327,000, plus 8% interest per year.[2]

[17] Terra Firma had laid off most of its 23 employees in the summer of 2019 and by November, the remaining seven employees were terminated. On December 6, 2019, Terra Firma's debt to PFL came due, totalling CAD $3,415,720.[3] PFL then filed an *ex parte* motion requesting an order for default judgment and simple foreclosure against Terra Firma on February 7, 2020.

[18] On February 18, 2020, Justice Bodurtha issued an order for default judgment against Terra Firma for $3,542,702.54, plus interest, totalling over $3.6 million dollars. That same day, Bodurtha J. also issued an order for simple foreclosure regarding the three parcels owned by Terra Firma which PFL had security in, including the Property. The order required that PFL notify any subsequent encumbrancers of the hearing for the final foreclosure order. The Encumbrancers filed a notice of contest on March 5, saying that the Mortgage was not valid and

---

[2] The interest rate in the August 2 Refinancing Mortgage document states 8% half-yearly, while the August 6 promissory note states 8% per year. I do not think anything turns on this discrepancy and it appears PFL believes the per annum rate applies.

[3] Notice of Action, filed by PFL on December 6, 2019.

that it gives PFL a fraudulent preference over the other creditors. They say that their agreements of purchase and sale establish a purchaser's lien against the property, preventing the remedy of simple foreclosure.

[19] By order on March 20, 2020, Justice Moir confirmed the foreclosure on the PIDs 45382736 and 45407459 only. To date, none of the transactions for the Encumbrancers' condo units have closed. However, the following Encumbrancers have filed certificates of *lis pendens* against Terra Firma over the Property:

- Gerhard Peter & Barbara Strobl, *lis pendens* filed December 19, 2019 for $438,025; each recorded December 30, 2019[4]
- Jurgen Stephan/STAN Ltd., *lis pendens* filed January 24, 2020 for $340,499; recorded February 19, 2020
- Martin Schmidt, *lis pendens* filed March 4, 2020 for $284,800; recorded March 10, 2020
- Dr. Paul Solvi, *lis pendens* filed March 11, 2020 for $470,025; recorded March 11, 2020

[20] The evidence of Malcolm Storey/Blubrix Ltd. does not disclose a certificate of *lis pendens*. The Encumbrancers do not argue that these recorded certificates of *lis pendens* give them priority against the PFL Mortgage.

[4] Affidavits of: Martin Schmidt, filed Sept. 11, 2020; Malcolm Storey, filed Sept. 14, 2020; Jurgen Stephan/STAN Ltd., filed September 14, 2020; Peter & Barbara Strobl, filed September 16, 2020; Dr. Paul Solvi, filed March 17, 2020.

Issues

[21] The issues are as follows:

1. Do the Encumbrancers have purchaser's liens over the Property?

2. Does PFL's mortgage constitute an unjust preference amounting to a void transfer of property under the Assignments and Preferences Act? and,

3. Is simple foreclosure a just and equitable procedure for foreclosure in this case?

Law & Analysis

Issue#1: Do the Encumbrancers have purchaser's liens over the Property?

Position of the Parties

[22] The Encumbrancers say that they have purchaser's liens over the Property which makes them secured creditors. This lien arises not out of the contractual obligations between the parties, but rather the equitable interest that crystallized when each Encumbrancer paid Terra Firma for the condo units. Because these liens came into existence prior to the PFL mortgage, they should rank in priority over the PFL mortgage.

[23] The Encumbrancers cite *Pan Canadian Mortgage Group Inc v 679972 BC Ltd*, 2014 BCCA 113, for the argument that purchaser's liens are valid law in provinces where a land registry system is in place. They argue that the Nova Scotia *Land Registration Act*, SNS 2001, c 6, does not preclude the availability of purchaser's liens, as s. 3(1)(h) defines "law" to include the principles of equity. Furthermore, they say that the phrase "subject to any subsequent qualifications" in s. 20 must include equitable liens that are not registered or recorded. They say that the decision in *Royal Bank of Canada v Marmura*, 2014 NSSC 17, does not refer to equity and therefore does not apply.

[24] PFL argues that, pursuant to the *LRA*, any interest – whether equitable or legal – cannot be enforced against third parties unless it is recorded on the parcel register. They say that s. 20 provides that the parcel register is a "complete statement of all interests affecting the parcel", and therefore if the purchaser's lien is not recorded, it cannot affect the parcel. The agreements of purchase and sale were never recorded, so whatever interest they provide cannot take priority over PFL's first-ranked Mortgage. Pursuant to s. 45, the agreements of purchase and sale are only enforceable against Terra Firma, not PFL.

[25] PFL cites the trial and appellate decisions in *Royal Bank of Canada v Marmura*, 2014 NSSC 17, aff'd 2015 NSCA 12.[5] This case holds that unrecorded purchase and sale agreements do not create an interest in land that is enforceable against third parties. The Encumbrancers could have recorded their interests but did not because they agreed under the contract not to. This court should not now relieve the Encumbrancers of their voluntarily-assumed risk at the expense of the innocent third party, PFL.

Discussion

[26] The Encumbrancers have equitable purchaser's liens on the property. However, pursuant to the *Land Registration Act*, that interest is not valid as against PFL because the Act clearly provides that only registered or recorded interests affect title. Assuming the certificates of *lis pendens* filed against the Property by the majority of the Encumbrancers evidence the equitable purchaser's liens, the earliest of these was not recorded until December 30, 2019. Therefore, their lien, recorded or unrecorded, does not rank in priority to the Refinancing Mortgage.

[27] The Property is registered under the *Land Registration Act* and therefore the *LRA* applies to this situation. The purpose of the *LRA* as stated at s. 2 is:

---

[5] Leave to appeal to SCC refused, 2015 CarswellNS 606.

> (a) provide certainty in ownership of interests in land;
>
> (b) simplify proof of ownership of interests in land;
>
> (c) facilitate the economic and efficient execution of transactions affecting interests in land; and
>
> (d) provide compensation for persons who sustain loss in accordance with this Act.

[28] Like other systems of land registry based on the Torrens System, our system is predicated on the principles of “mirror” (that the registry reflects all property interests in a parcel of land) and “curtain” (that any dealings not reflected do not affect title).[6] These principles give effect to the purpose stated at s. 2 of the Act: certainty, simplicity, and efficiency. The mirror and curtain principle is codified at s. 20 of the Act, which states:

> 20. A parcel register is a complete statement of all interests affecting the parcel, as are required to be shown in the qualified lawyer's opinion of title pursuant to Section 37, subject to any subsequent qualifications, revisions of registrations, recordings or cancellation of recordings in accordance with this Act.

[29] This has been called the “heart of the *LRA*” because it “achieves the "certainty of ownership" in s. 2(a)'s statement of purposes. The parcel register is a root of title” (*Brill v Nova Scotia (Attorney General)*, 2010 NSCA 69, para 72). A purchaser or lender is entitled to review the parcel registration and rely on it for its

---

[6] C.W. MacIntosh, Q.C., *Nova Scotia Real Property Practice Manual* (Toronto: LexisNexis Canada 2020) (loose-leaf release 120), ch 16 at 16.2.

accuracy and completeness, something our Court of Appeal has confirmed numerous times. Section 20 qualifies itself in that subsequent charges may affect the title, so long as they conform to the Act. In *Brill*, Justice Fichaud, for the court, reviewed the legislative debates surrounding the enactment of the *LRA* (para 69):

> ... This bill would make substantial changes to the process of regulating properties in Nova Scotia, moving from what is essentially a 250 year old paper based system to a modern, electronic format. Most importantly, the new legislation would provide greater certainty about property ownership across Nova Scotia. ...
>
> […]
>
> Let me recap what our legislation proposes. Firstly, Mr Speaker, the government would guarantee ownership of all parcels of land registered in the system. ... Secondly, the state of title would be certified by lawyers in the private sector, performing the same investigations that they do today. Parcels of land would be registered after one final historic title search and the lawyers' certificates would form the basis of the government guarantee of ownership. Thirdly, the registration of a property in the system would be conclusive as to the ownership of their land.
>
> [Nova Scotia House of Assembly, Hansard, No. 01-4, March 27, 2001, pp. 205-206]

[30] Clearly, the enactment of the *LRA* made sweeping changes to the law in Nova Scotia. An example of this change is at s. 4(2), where the equitable doctrines of “notice” and “constructive notice” are expressly “abolished for the purpose of determining whether conduct is fraudulent”. Subsection 3 continues:

> 4(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.

[31] This removes the equitable concept of “purchaser for value without notice”. Unless the purchaser has actual knowledge of an unrecorded interest, they are not required to look beyond the registry.

[32] In *Marmura*, the Nova Scotia Court of Appeal discussed other changes to the common law:

> 26 There were many aspects of the common law that were retained when the *LRA* came into effect. The intention to retain is reflected in discussion papers and legislative debates.
>
> 27 In the *Registry 2000, Land Records Reform, "Discussion Paper on Land Registration Act for Nova Scotia"* (Land Records Reform Office, Halifax, January 200), p.ii, it was noted under the heading of "**Highlights of the Proposed Land Registry System**":
>
>> **Evolutionary not revolutionary:** The substantive law is virtually unchanged. The system "floats" on existing law. (emphasis in original)
>
> Within the *LRA* "law" is defined to mean:
>
>> 3(1) In this Act
>>
>> (h) "law" means the law in force in the Province, including enactments and principles of common law and equity.

> 28 The above-noted discussions are clearly reflective of an intention of the legislators to retain at least some of the common law as it relates to real property in Nova Scotia. Although it was intended that some of the substantive law remain unchanged, it was also intended that some be altered, including that involving constructive notice and the effect of a recorded mortgage on title. I am satisfied the position of judgment creditors and the effect of recording a judgment in a judgment roll has also been altered by the *LRA*.
>
> [bolding original; underling added]

[33] Section 3(h) defines "law" to include "principles of equity". The Encumbrancers essentially argue that because this definition includes "principles of equity", this means that select principles of equity override the clear text and purpose of the Act. This, however, cannot be true. While the *LRA* "floats" on existing law, there is nothing in the Act (or any principle of law that I am aware of) to support the Encumbrancers' proposition. Rather, the principles of equity are present throughout the Act and are not a separate legal system that operates notwithstanding the express statutory language found in the Act.

[34] Under modern land registration systems, there is little distinction between legal and equitable interests. From *Megarry & Wade: The Law of Real Property*[7] at page 141:

> **3. Legal and equitable rights.** The classical doctrine that legal rights bind all the world while equitable rights do not bind a bona fide purchaser of a legal estate without notice is now of only residual importance in dealings with unregistered land. It has no role to play in the scheme of registered conveyancing. **Indeed where title**

[7] Charles Harpum, Stuart Bridge, Martin Dixon, *Megarry & Wade: The Law of Real Property* (London: Sweet & Maxwell, 2012) at 141.

> **is registered the difference between legal and equitable rights is now much diminished. Where title is registered, whether a right is legal or equitable is relevant only to the remedies that exist to enforce that right and to the nature of any entry that is made on the register to protect that right.**
>
> [bolding alone original; other emphasis added]

[35] The Act defines "interest" to include "any estate or right in [land]", without distinguishing between legal or equitable interests (s. 3(g)). The Act defines a "lien" as "an interest created by operation of law that secures the payment or other performance of an obligation" (s. 3(1)(i)). A lien is therefore a right in land that is recognized by law, which includes principles of equity. A purchaser's lien would fall into this category.

[36] A purchaser's lien exists where the purchaser has paid money to the vendor for an interest in land, and through no fault of the purchaser, the agreement of purchase and sale falls through. This creates an equitable charge in favour of the purchaser on the land, which arises not from the contract, but out of the transaction itself:[8]

> **HRP-204 Payment in portions and deposits.** Where the money for the purchase of land is to be paid in portions every payment is part performance of the purchase contract and in equity transfers to the purchaser a corresponding portion of the estate. The basis of the purchaser's lien for deposit money, which is an equitable charge on land created by equity and not by the document, is that the purchaser is to be regarded as a secured creditor in respect of the deposit "if the contract goes off otherwise than

[8] Halsbury's Laws of Canada (online), *Real Property*, "Sale of Land: Interests and Obligations of Parties Pending Closure: Equitable Liens: Purchaser's Lien" (II.3(2)(b)) at HRP-204 "Payment in portions and deposits".

> through the purchaser's default". The lien therefore depends on whether the default in meeting the final payment of the purchase price, and the conduct of the purchaser, can be treated as a repudiation of the purchase contract such as to entitle the vendor to treat the contract at an end.
>
> [footnotes removed]

[37] Of the position that the purchaser's lien arises not from the contract, but the transaction, the British Columbia Court of Appeal in *Pan Canadian Mortgage Group Inc v 679972 BC Ltd* clarified at paragraph 38:

> As for the chambers judge's observation that a purchaser's lien arises "not as a result of contract but through equity" (see para. 135), I suggest with respect that the more complete statement was made by Farwell J., the judge at first instance in *Whitbread*, who wrote:
>
>> The lien is created by the contract under which the money is paid as part of the purchase-money, and on the faith that the contract will be carried out, and not by the default of the vendor. The default gives rise to the necessity for enforcing the lien, <u>but the lien arises from the contract.</u> [At [1901] 1 Ch. 911, at 915; emphasis added.]
>
> Farwell J.'s judgment was expressly approved by the English Court of Appeal in *Whitbread*, and was endorsed again by that court more recently in *Chattey v. Farndale Holdings Inc.* [1997] 1 EGLR 153 at 156.
>
> [emphasis original]

[38] While the charge may arise from equity, the binding agreement of purchase and sale is a necessary element for a purchaser's lien. While the equity may arise from the transaction, the obligation arises from the contract. In that case, the Court of Appeal overturned the trial decision, finding that the agreements did not create an interest in land, but were rather investment agreements.

[39] A purchaser's lien has the same effect as a mortgage executed in the purchaser's favour over the land (*Pan Canadian*, para 1 (BCCA)). As stated by the British Columbia Court of Appeal at paragraph 32, "[T]he purchaser's lien developed from the principle that as between the contracting parties, equitable title transferred to the buyer under a contract, but closing - the transfer of legal title - failed."

[40] As with other equitable liens, the vendor holds the legal title to the land in trust for the purchaser, pending completion of the agreement. This was the subject of the *Marmura* appeal – "whether the common law "relation back theory" applies so that upon signing of the purchase and sale agreement the vendors held the lands in trust for the purchasers" (para 10). The Nova Scotia Court of Appeal quoted MacDonald A.C.J.S.C.'s (as he was then) decision in *Clem v Hants-Kings Business Development Centre Ltd*, 2004 NSSC 114, where he said:

> [11] This trust relationship between vendor and purchaser dates back to the 19th century. In *Lysaght v. Edwards* (1876), 2 Ch.D. 499 (Ch.D.) Jessel, M.R. developed the principle this way:
>
>> **[The] moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold**, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of the purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, **the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a**

> **mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money**... "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser - a contract binding upon both parties...

[emphasis added]

[41] MacDonald A.C.J. in *Chem* went on to say that this has been approved of in Nova Scotia and other Canadian jurisdictions:

> [14] In *V. Rankin's Mechanical Contracting Ltd. v. First City Developments Ltd.*, [1985] N.S.J. No. 94, Hallett, J. (as he then was) referred to the *Lysaght* principle (albeit in a different context). At paragraph 27, he noted:
>
> > The cases establish that there is an equitable relationship (akin to a trust) between a vendor and a purchaser in an ordinary real property transaction in the period between sale and closing. It has the earmarks of a constructive trust because the obligations on the vendor are imposed by the Court (*Waters' Law of Trusts in Canada*, p. 20).

[42] The remedy for a purchaser's lien is the return of deposited money, plus interest. There are no damages available for a purchaser's lien (*Landford v 1734141 Ontario Ltd*, [2008] OJ No 5182, paras 13-19 (ONSCJ)).

[43] The "relation-back" theory is that where the agreement of purchase and sale is not completed, but some or all of the money has been paid, the common law will provide that the trust relationship existed retroactively from the moment the agreement was signed. Therefore, a subsequent judgment against the vendor will

not attach to the lands because the vendor has actually been holding the land in trust for the purchaser (*Marmura*, NSCA, paras 16-18). However, the Court of Appeal in *Marmura* agreed with Justice Boudreau at trial that this "legal fiction" does not override the clear wording of the *Land Registration Act* whereby interests must be registered or recorded on the registry to be effective against third parties (para 30). Pursuant to s. 45 of the Act, the trust is only effective as against the other party to the trust instrument:

> 29 **There are several provisions within the *LRA* that limit the effect of unrecorded instruments such as the purchase and sale agreement in this case.** I refer to s. 45(1) which provides:
>
> > 45(1) 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.
>
> 30 **This section suggests that while an unrecorded purchase and sale contract may be effective as against the vendor, it does not pass title.** The "relation back theory" relies upon the notion that upon signing a purchase and sale agreement a trust was created and the vendor is left with no beneficial interest for the judgment to attach to. The creation of that trust required at least transfer of an interest. **Section 45(1) of the *LRA* makes it clear that such transfers are only effective as against the person making the instrument.**
>
> [emphasis added]

[44] The Encumbrancers have paid the full purchase price of the agreements of purchase and sale for their respective interests in the Property. There is no evidence that they had anything to do with the eventual default of these

agreements, and so they therefore have purchaser's liens on the Property in the amount paid, plus interest, which grants them a secured equitable interest in the land. Section 20 of the *Land Registration Act* provides that a parcel register is a complete statement of all interests that affect the parcel. If an interest does not appear on the registry, subject to few exceptions, it does not affect title. Therefore, because a lien is an interest in land, it must be recorded and form part of the parcel registry before it can affect title.

[45] This is supported by other sections of the Act. "Instrument" is defined as "every document by which the title to land is changed or affected in any way" (s. 3(1)(f)). The Act defines "document" broadly as follows (s. 3(1)(c)):

> "document" means a writing, a plan, a map or any information in a form that can be converted into a writing, a plan or a map by a machine or a device, and includes information
>
> (i) on microfilm,
>
> (ii) in electronic, mechanical or magnetic storage, or
>
> (iii) in electronic data signals;

[46] Both parties appear to accept that the agreements of purchase and sale are documents.

[47] Section 28(1) was not raised by either party, however it provides that if an instrument discloses that a party holds an interest in trust, the party's interest shall be registered or recorded:

> 28 (1) Where an instrument discloses that a party to an instrument is a trust, or holds an interest in trust, the party's interest shall be registered or recorded in the name of the trustee or trustees only, followed by a notation that the interest is held in trust.

[48] The agreements of purchase and sale are documents which purport to provide the Encumbrancers an interest in the land. It is out of this document that the obligation to pay the deposit and purchase price to the vendor, and the corresponding obligation to hold the Property in trust for the purchasers, arose. Although the trust crystalizes upon payment, the contract is still the foundation of the agreement between the parties. The agreements of purchase and sale evidence the trust and are therefore instruments falling under s. 28. Pursuant to the word "shall", these agreements must be recorded to be effective against a subsequent mortgagee like PFL.

[49] This follows the reasoning of Justice Allan Boudreau in the trial decision of *Marmura*. Despite the Encumbrancers' arguments to the contrary, Boudreau J. expressly dealt with the issue of an equitable trust arising separately from the contractual obligations required by the agreements of purchase and sale:

> 19 If one accepts that the Agreement does create some form of trust, as opposed to simple contractual rights and obligations, then section, 28 (1) of the *LRA* would require that those agreements be registered:
>
> > **Trusts**
> >
> > 28 (1) Where an instrument discloses that a party to an instrument is a trust, or holds an interest in trust, the party's interest shall be registered or recorded in the name of the trustee or trustees only, followed by a notation that the interest is held in trust.
>
> 20 While the *LRA* does not specifically address the consequences for failure to register a trust agreement, on can assume that section 45 (1) dealing with unregistered instruments would govern, and the agreement would be such an unregistered instrument.

[50] Therefore, even if the Encumbrancers' purchaser's liens arise out of equity and not contractual principles, the liens are only enforceable against Terra Firma. Section 49(1) provides that recorded interests take priority over unrecorded interests, and it makes no distinction between legal or equitable interests:

> 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.
>
> (2) Subsection (1) applies with respect to conflicting interests of successors to the owner of the recorded interest.
>
> (3) In this Section,

> (a) where a subsequent interest will not be enforced with priority for an owner of that interest because the requirements of sub section (1) have not all been satisfied, it shall be enforced with priority for a subsequent owner of that interest when the requirements of subsection (1) are first satisfied; and
>
> (b) once an interest is entitled to priority of enforcement, it remains so entitled when acquired by a successor.

[51] The purchaser's liens, although secured, are not effective against, or rank subordinate to, PFL's recorded Mortgage. As stated by the Court of Appeal in *Marmura*, "It is hard to imagine anything that clouds the issue of ownership more than unregistered purchase and sale agreements that may pass a beneficial interest without notice" (para 31).

[52] There is nothing in the Act or any principle of law that I am aware of which would allow the unrecorded purchaser's liens in this case to obtain priority over a recorded mortgage. For example, s. 73(1) provides for a closed list of "overriding" interests – which includes some liens – that shall be enforced with priority over all other interests according to law, whether or not they are recorded:

> 73 (1) Notwithstanding anything contained in this Act, **the following interests, whether or not recorded or registered, and no other interests, shall be enforced with priority over all other interests according to law**:
>
> (a) an interest of Her Majesty in right of the Province that was reserved in or excepted from the original grant of the fee simple absolute from Her Majesty, or that has been vested in Her Majesty pursuant to an enactment;
>
> (b) a lien in favour of a municipality pursuant to an enactment;

(c) a leasehold for a term of three years or less if there is actual possession under the lease that could be discovered through reasonable investigation;

(d) a utility interest;

(e) an easement or right of way that is being used and enjoyed;

(f) [Repealed 2002, c. 19, s. 31.]

(g) any right granted by or pursuant to an enactment of Canada or the Province

(i) to enter, cross or do things on land for the purpose expressed in the enactment,

(ii) to recover municipal taxes, duties, charges, rates or assessments by proceedings in respect of land,

(iii) to control, regulate or restrict the use of land, or

(iv) to control, regulate or restrict the subdivision of land;

(h) a lien for assessments pursuant to the *Workers' Compensation Act*;

(i) an interest created by or pursuant to a statute that expressly refers to this Act and expressly provides that the interest is enforceable with priority other than as provided in this Act.

[emphasis added]

[53] The legislature contemplated situations where interests that are not recorded ought to be enforced with priority over all other interests “according to law”. These are the only interests that can be enforced with priority whether or not they are recorded. If a purchaser’s lien was an interest that the legislature believed should be effective whether or not it is recorded, it would have been included here.

[54] I also note the case of *Harrell v Mosier*, [1956] OR 152, where the Ontario Court of Appeal dealt with the priority between a registered mechanic's lien and an unregistered purchaser's lien. At the time, the *Mechanics' Lien Act* provided that once a lien is registered, the holder of the lien enjoys all the rights as if it was a purchaser of the property. The Court quoted another Ontario Court of Appeal decision, *Pannill Door Co Ltd v Stephenson*, [1931] OR 594, for the following:

> At the time of this transaction, the exact date of which was somewhat uncertain, mechanics' liens for a large amount were outstanding which were not registered until November 1928, but Middleton J.A. stated that this was not, in his view, material. **He held that the liens which were registered prevailed against the unregistered equitable charge.** His reasons on this point, appearing at pp. 597-8, are pertinent to the issues here, and are most illuminating and helpful in resolving the problem which confronts the Court in the present case. As was stated by Mr. Justice Middleton at p.597: **"His right is at most an unregistered equitable right and cannot confer upon him any greater right that [*sic*] if he had an unregistered legal mortgage. He could acquire under this equitable right no greater right than Mr. Beaty Snow [the owner] himself possessed."**
>
> [emphasis added]

[55] The Encumbrancers appear to argue that because "law" is defined to include "equity", that this Court has the power to ignore the clear statutory provisions in the *LRA*. This is simply not the case. Although the Encumbrancers stress the uniqueness of this factual situation, the Act expressly provides for the recording of trusts, which the purchaser's lien creates. The Encumbrancers' unrecorded purchaser's liens are, pursuant to s. 45, only effective against Terra Firma. Although this was not stressed by counsel for the Encumbrancers, if the certificates

of *lis pendens* now reflect the recorded equitable liens against the property, that interest does not take priority against PFL's Mortgage, pursuant to s. 49 of the *LRA*.

Issue #2: Does PFL's mortgage constitute an unjust preference amounting to a void transfer of property under the Assignment and Preferences Act?

[56] The Encumbrancers claim that due to the lack of consideration in the August 2019 Refinancing Mortgage, it renders the mortgage void under the *Assignments and Preferences Act*, RSNS 1989, c 25, and unenforceable against the Encumbrancers. They say that Terra Firma was or knew it would soon become insolvent, and therefore it executed the Refinancing Mortgage with the intent of giving PFL an unjust preference over Terra Firma's other creditors. To support this, the Encumbrancers cite the affidavit of Sheri Coleman, former senior accountant at Terra Firma, who deposed that in the summer of 2019, Terra Firma let go most of its employees. The rest were terminated in the fall. This evidence is sufficient to show that Terra Firma at least knew it would soon become insolvent when the Refinancing Mortgage was executed.

[57] The Encumbrancers say that s. 5 of the *APA* cannot save PFL's Mortgage because the $300,000 advance does not reflect the "reasonable relative value to the

consideration"; for example, the tax assessed value of the property is approximately $2.7 million. If the court finds that the transfer was not void, then the Encumbrancers say the security should be limited to the $300,000 advance, which constitutes the fresh consideration.

[58] PFL says that there was no breach of the *Assignments and Preferences Act*, and that the Refinancing Mortgage constitutes a valid agreement supported by adequate consideration. The Mortgage was a refinancing of three past debt obligations between Terra Firma and PFL, which totalled SGD $3,327,000 of debt. PFL agreed to forebear on a debt totalling approximately $1.6 million that came due in June 2019, while extending deadlines to pay for others. The rate of interest was also reduced for one of the debts from 15% to 8%. PFL argues that the evidence does not support that Terra Firma was insolvent at the time the Refinancing Mortgage was executed. PFL cites *Kent Building Supplies v Cumberland Builders* (1997), 163 NSR (2d) 289 (NSSC), for the test to be applied under the *APA*.

Discussion

[59] The relevant provisions of the *Assignments and Preferences Act* are as follows:

2 In this Act,

(a) "insolvent person" means any person who is in insolvent circumstances, or is unable to pay his debts in full, or knows himself to be about to become insolvent;

[…]

(d) "transfer" includes gift, conveyance, assignment, delivery over or payment of property.

…

4 (1) Every transfer of property made by an insolvent person

(a) with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them; or

(b) to or for a creditor with intent to give such creditor an unjust preference over other creditors of such insolvent person, or over any one or more of such creditors,

shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

(2) If any transfer to or for a creditor has the effect of giving such creditor a preference over the other creditors of such insolvent person, or over any one or more of them, the transfer shall

(a) in and with respect to any action or proceeding which is brought, had or taken to impeach or set aside such transfer within sixty days after the giving of the same; or

(b) if such insolvent person makes an assignment for the benefit of his creditors within sixty days from the giving of such transfer,

be presumed to have been made with intent to give such creditor an unjust preference as aforesaid, and to be an unjust preference, whether such transfer was made voluntarily or under pressure.

(3) Where the word "creditor" in this Section indicates the creditor to whom a preference is given over the other creditors of the insolvent person such word shall be deemed to include any surety, and the indorser of any promissory note or bill of exchange, who would upon payment by him of the debt, promissory note or bill of exchange, in respect to which such suretyship was entered into or such indorsement

> given, become a creditor of the person giving the preference within the meaning of this Section.
>
> **5** Nothing in Section 4 shall apply to
>
>> (a) any assignment made to an official assignee for the county in which the debtor resides or carries on business for the purpose of paying rateably and proportionately, and without preference or priority, all the creditors of the debtor their just debts;
>>
>> (b) any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties;
>>
>> (c) any payment of money to a creditor; or
>>
>> (d) to any *bona fide* gift, conveyance, assignment, transfer or delivery over of any property which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of property; provided that the money paid, or the property sold or delivered, bears a fair and reasonable relative value to the consideration therefor.

[60] The *APA* defines "insolvent person" broadly to include anyone unable to pay their debts in full, or that will soon become insolvent. There is little evidence on this point that would show conclusively whether Terra Firma was insolvent or knew it was about to become insolvent at the time of the transfer, such as financial records or valuations of its other assets. There is no direct evidence or argument filed in this matter on behalf of Terra Firma. Therefore, it is unclear whether Terra Firma was in a position to pay its debts in full in August 2019 when the transfer occurred.

[61] As admitted by PFL, however, the Mortgage was a refinance of three other debts with Terra Firma. The principal of the Refinancing Mortgage was $3,327,000, which was the total of the principals of the past debts plus their respective interests; this evidence suggests that Terra Firma allowed the debts and interest in the previous three agreements accrue without payment. But for this Mortgage, $1.2 million plus interest was due in June 2019, and another $610,000 plus interest would become due in November 2019. There were also several recorded interests in place against the Property before the Refinancing Mortgage was executed in August 2019. These include builders'/mechanics' liens and certificates of *lis pendens*, totalling over $200,000.[9] Then, from August 29, 2019 to January 20, 2020, numerous other liens, certificates, and judgments were registered against the Property and/or against the company itself, totalling in the millions of dollars. If Terra Firma was able to service its debts around August 2019, it is clear that it did not.

[62] We also know that by the end of 2019, foreclosure and bankruptcy were a reality for Terra Firma. The evidence we do have paints a picture of a company with large debts and little interest, let alone ability, to repay them. Therefore, for

---

[9] Affidavit of Nicholas C.G. Mott (counsel), filed February 7, 2020, exhibits "A" and "B".

the purposes of the *APA*, it is open to you to find that Terra Firma was an insolvent person at the time the Refinancing Mortgage was executed.

[63] For our purposes, s. 4 provides that every transfer of property made by an insolvent person shall be void against any creditor that is prejudiced by this transfer in two circumstances: (a) if the transfer intended to "defeat, hinder, delay or prejudice" creditors or (b) if the transfer intended to give one creditor an "unjust preference" over other creditors. Both parties appear to agree that executing a mortgage involves a transfer of title sufficient for the *APA*.

[64] The test for whether a transfer triggers s. 4 of the *APA* was stated by Nathanson J. in *Kent*:

> 28. Determination of the issue depends upon whether Cumberland Builders transferred property, whether it was then an insolvent person, and whether it did so within intent to defeat, hinder, delay or prejudice its creditors, or any one or more of them. If all three questions are answered in the affirmative, then the transaction is utterly void against a creditor or creditors injured, delayed, prejudiced or postponed. This Court has concluded that all three questions must be answered in the affirmative.

[65] Although the Encumbrancers argue that the above language deals too specifically with the facts of that case to be considered a "test", I disagree. The above passage merely recites the requirements as they are found in the *APA* itself. Furthermore, this passage has been cited in other decisions as a "test". See

MacArthur Estate, Re, 2013 NSSC 157, at paragraph 22 and *Pentagon Investments Ltd (Trustee of) v Kwan*, 2003 NSSC 169, at paragraph 12.

[66] Section 4(2) provides the rebuttable presumption that if a transfer has the effect of preferring one creditor over the others, it is deemed to have been done intentionally, and that such preference is "unjust". If the conditions in s. 4(2) are not met, then the burden of proving intent rests on the claimant (*Whiteway v Courtland Properties Inc* (1997), 162 NSR (2d) 161 (NSSC), para 13). Section 4(2)(a) does not help the Encumbrancers because they did not file their Notice of Contest until March 5, 2020, which far exceeds the sixty-day timeframe set out in this section. Section 4(2)(b) also does not apply because there is no evidence that Terra Firma made any assignment to benefit PFL. Therefore, like in *Whiteway*, the Encumbrancers do not fall within this presumption and the burden of proving intent is theirs.

[67] In my opinion, the Encumbrancers have not met their burden of proving Terra Firma intended to prejudice creditors other than PFL by executing the Refinancing Mortgage in August 2019. Intention can be inferred in some circumstances, as was discussed in *Whiteway*:

> 19 The effect of a transfer is one of the considerations in the determination of whether or not Ms. Whiteway has met the onus upon her. *Burchell v. Morrison*

> (1978), 33 N.S.R. (2d) 261 (N.S. T.D.). The factual situation in a given case is also capable of being weighed to draw the inference of intent to defeat, hinder, delay or prejudice the creditor. *Rimco Ltd. v. Leon Development Ltd.* (1971), 4 N.S.R. (2d) 592 (N.S. T.D.).

[68] Put another way, "The Court is entitled to draw reasonable inference from proven facts to ascertain the intention of the grantor in making the conveyance. Suspicious circumstances surrounding the conveyance require an explanation by the grantor" (*Bank of Montreal v Crowell* (1980), 37 NSR (2d) 292 (NSSC), para 36).

[69] The "badges of fraud", which normally arise in *Bankruptcy and Insolvency Act* or *Fraudulent Conveyances Act* situations, are also relevant for the analysis of whether intention can be inferred for the *APA*: see *Montor Business Corp (Trustee of) v Goldfinger*, 2016 ONCA 406, para 82; see also *Pentagon Investments*, para 17.

[70] The Ontario Court of Appeal in *Montor* set out a non-exhaustive list of the "badges of fraud":

> 73 Case law has identified the following, non-exhaustive list of "badges of fraud" (see *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052 (Ont. S.C.J. [Commercial List]), at para. 67; *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160 (Ont. S.C.J.), aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110 (Ont. C.A.), at para. 52):

- the transferor has few remaining assets after the transfer;

- the transfer was made to a non-arm's length person;

- the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking;

- the consideration for the transaction was grossly inadequate;

- the transferor remained in possession of the property for his own use after the transfer;

- the deed of transfer contained a self-serving and unusual provision;

- the transfer was secret;

- the transfer was effected with unusual haste; or

- the transaction was made in the face of an outstanding judgment against the debtor.

[71] Aside from the issue of insolvency, none of these “badges” obviously applies to the facts of this case. There is little evidence showing the extent of Terra Firma’s assets or their respective values, although we do know that two other properties were foreclosed upon. PFL is an arm’s-length lender, not a family member or related company, which was the case in many of the decisions where intent was inferred. There is no suggestion the parties were running a Ponzi Scheme. The Refinancing Mortgage was recorded on the Land Property Registry shortly after it was executed and was therefore not secret. The evidence does not disclose any outstanding judgments against Terra Firma at the time the Mortgage was executed. There are no terms of the Mortgage which are alleged to be unusual

or self-serving. There is no evidence to suggest that the Mortgage was made with unusual haste, because it was essentially a continuation of past obligations between the parties. While counsel for the Encumbrancers alluded to suspicious circumstances, none were argued before the court.

[72] The consideration for the transfer was not "grossly inadequate". There is no doubt that things like forbearance from suit and extension of time can be considered good and valuable consideration. Several recent decisions provide that Canada is moving away from a strict interpretation of the law of consideration to allow for less obvious forms, such as implied forbearance from suit (see the discussion in *Greater Fredericton Airport Authority Inc v NAV Canada*, 2008 NBCA 28, at paras 24-31). For the purposes of inferred intent under the *APA*, the consideration should evoke a fair exchange (*Feher v Healey*, 2006 CarswellOnt 5203, aff'd 2008 ONCA 191):

> 45 Where, however, a transaction is attacked as a fraudulent conveyance, the court is required to examine the adequacy of the consideration. Although the courts do not weigh the adequacy of consideration "in too nice scales", **nominal or grossly inadequate consideration is not sufficient and can be an indication or badge of fraud. The court's examination of adequacy is thus an attempt to ensure that there is a *bona fide* exchange and a reasonable *quid pro quo* for the impugned transfer of property**: see generally Springman, Stewart and MacNaughton, *Fraudulent Conveyances and Preferences* (1994) at pages 14-22 to 14-29, and *Dougmor Realty Holdings Ltd., Re* (1966), [1967] 1 O.R. 66 (Ont. H.C.)
>
> [emphasis added]

[73] Taken together, the “fresh” consideration of (a) forbearance from suing on the $1.2 million loan due in June 2019; (b) reducing an interest rate on a loan from 15% to 8%; (c) extending the time to repay the debts and (d) cash advances totalling $300,000 is a fair exchange for the security over the Property.

[74] That Terra Firma was an “insolvent person” for the purposes of the *APA* is not sufficient in my opinion to create a presumption that it intended to unjustly prefer PFL. The innocent explanation for executing the Refinancing Mortgage – that Terra Firma needed more cash to complete its project, while PFL was interested in seeing the project completed so Terra Firma could start repaying its debts – is perfectly plausible based on these facts. It is not uncommon for a property developer to seek refinancing of its debts with its largest lender to stave off insolvency. Doing so is not illegal or fraudulent. In my opinion, the facts do not support that Terra Firma intended to prejudice its other creditors by executing the Refinancing Mortgage in favour of PFL in August 2019. There are no “suspicious circumstances” which PFL has failed to explain (see *Crowell*, para 36; see also *MacArthur Estate*, para 20).

[75] Finally, I am not convinced that the transfer – that is, the Refinancing Mortgage – actually had the effect of defeating, hindering, delaying, or prejudicing the Encumbrancers, nor did it give PFL an “unjust” preference. The

Encumbrancers have not provided any evidence that their claims have been prejudiced by the transfer. The remedy of simple foreclosure has the effect of prejudicing the Encumbrancers' claims, as there will be no equity left in the property after PFL takes title. The recording of the Mortgage on the registry also had the effect of prejudicing the Encumbrancers' claims, because that ensured PFL had priority ahead of all unrecorded and subsequent interests. But the transfer itself only put PFL in the pool with the other secured creditors; until the Mortgage was recorded, the Encumbrancers had higher priority because their lien arose first in time. It was not the transfer itself that put the Property out of the Encumbrancers' reach. For similar reasons, I do not believe that the transfer gave PFL a preference that was unjust. PFL is a major lender for this project on the Property. It is not unjust that they would want to secure the debt obligation, now in the millions of dollars, against the Property and then record that interest to ensure some return.

[76] Put another way, it is not the *transfer* that the Encumbrancers take issue with, but the priority achieved by recording the Mortgage on the land registry. Intent cannot be inferred, particularly where there was no effect of prejudice. This is not the type of transaction that the *APA* appears designed to capture and I do not believe it is necessary to turn to whether the transfer is saved under s. 5 because the

requirements of s. 4 are not made out. Furthermore, I believe that our situation falls short of being saved under s. 5.

[77] Section 5 renders s. 4 inoperable if certain factors are present. Section 5(d) of the Nova Scotia *APA* is as follows:

> 5 Nothing in Section 4 shall apply to
>
> […]
>
> > (d) to any *bona fide* gift, conveyance, assignment, transfer or delivery over of any property which is made in consideration of any present actual bona fide payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual bona fide sale or delivery of property; provided that the money paid, or the property sold or delivered, bears a fair and reasonable relative value to the consideration therefor.
>
> [emphasis added]

[78] The language excludes other forms of consideration that might also be exchanged for the security, such as forbearance, as was the finding in *Harry Snoek Limited Partnership, Re*, 2011 ONSC 6667, where the court interpreted a similarly worded version of this section[10]:

> 51 First, section 5(1) of the *Act* requires a "present actual advance of money." The Blokhuis Lenders take the position that this term "present actual advance of money" can include a forbearance to sue upon a debt. **Thus, they argue that their reduction of interest rate, and extending the time for repayment was sufficient consideration to save the transaction from being set aside.**

---

[10] *Assignments and Preferences Act*, RSO 1990, c A.33, s. 5.

> 52 In *Dapper Apper* the court held that an advance of *money* had to occur at or around the same time as the security agreement was signed in order to engage the exception. Similarly, in *Grep Properties (II) Ltd. v. 371154 Alberta Inc.* the court considered a provision of the Alberta statute like our section 5(1). There, the court held there had to be an advance of *money* to be saved. Here, there was no advance of money at all. **I assume the section means what it says. It could easily have provided an exception for a contemporaneous advance of money, or money's worth. It could have expanded the plain meaning of "money" to include other sorts of consideration. It did not. I therefore conclude the section requires money to be advanced in order to engage this saving provision.**
>
> [footnotes removed; emphasis added]

[79] That monetary advance must be relatively equal in value to the security exchanged:

> 44 Simply put, if security is given at the same time as the advance of money, and the value of the security given is the same as the amount advanced, there is no preference.
>
> [footnote removed]

[80] However, in situations where money is advanced, which is secured by a property, each advance will normally only be worth a fraction of the property secured. Transactions like this one will almost never be saved by this language. This is why the Ontario version of the *Assignments and Preferences Act* makes further express exceptions:

> **5(5) Exceptions**
> Nothing in this Act,
>
> […]

> (d) **certain securities to be valid**
> — invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full.

[81] Therefore in Ontario, security given for past debt in the good faith belief that the money advanced will help the debtor carry on business and pay down the debts will not run afoul of the *APA*. There is no such provision in the Nova Scotia statute. For our purposes, the cash advance of $300,000 is not relatively equal in value to the security, being the Property. The transaction in this case is not saved by s. 5, regardless of whether the other forms of consideration are adequate for other purposes.

Issue #3: Is the procedure of simple foreclosure a just and equitable procedure for foreclosure in this case?

Parties' Positions

[82] The Encumbrancers argue that this court has the authority to amend the foreclosure procedure ordered by Justice Bodurtha on February 18, 2020 from the "simple" foreclosure requested by PFL to the foreclosure, sale and possession procedure set out in the *Civil Procedure Rules*. They say that the mortgage

agreement in this case does not allow for simple foreclosure, relying on *CIBC Mortgages v Dima Estate*, 2019 NSSC 61. As a simple foreclosure would deprive the Encumbrancers of any further interest in the property, thus giving PFL an unfair advantage, equity principles would allow this court to "look behind the procedure" to do justice for Terra Firma's other creditors (*Toronto-Dominion Bank v MacLean*, 2016 NSSC 221, para 32).

[83] PFL says that simple foreclosure is an appropriate remedy in this case. Both the Mortgage agreement and the *Civil Procedure Rules* provide for this remedy, and a judgment in favour of PFL has already been issued. It is for the mortgagee to elect the procedure under which it will foreclose on its security. PFL also notes that, as a significant and competing creditor, the Encumbrancers will not have to compete with PFL's interest at bankruptcy.

[84] Neither party deals with whether this court has jurisdiction to amend, vary, or stay Justice Bodurtha's order.

Discussion

[85] In *Dima Estate*, Justice Campbell sets out the two main steps of procedure for a simple foreclosure:

> 2 The first step is the granting of an Order for Foreclosure. That order declares that the mortgage being foreclosed is in default. The mortgagee then must give at least 15 days' notice to the Defendant and to subsequent encumbrancers of a hearing at which a second order, the Confirmatory Order is sought. The Confirmatory Order confirms the possession of the property by the mortgagee. There is no process of a public auction and sale.

[86] Unlike the confirmatory order, the order for foreclosure is not a final order. The Nova Scotia Court of Appeal discussed the difference between an order for foreclosure and a final order in the context of its inherent jurisdiction in *Wolfridge Farm Ltd v Bonang*, 2016 NSCA 33:

> 36 The purpose of the doctrine of *functus officio* is to ensure that final judgments remain final. The fundamental flaw in Wolfridge's argument is that **orders for foreclosure and sale are not final, but rather an interim step in the process leading to concluding a sale. As such, a foreclosure order is subject to variation in appropriate circumstances.** In *Golden Forest Holdings Ltd. v. Bank of Nova Scotia*, 1990 CanLII 2489 (NSCA), Justice Hallett explained:
>
>> Apart from those matters covered by Rules l5.07 and l5.08, **the inherent jurisdiction of judges of the Supreme Court of Nova Scotia does not extend to varying "final" orders of the Court disposing of a proceeding unless the order does not express the true intent of the Court's decision.** If it were otherwise, there would not be the certainty or finality to Court orders that the Judicial process requires. **However, a foreclosure order is not a final order disposing of a proceeding; it merely fixes the amount due on a mortgage and forecloses the right of a mortgagor to redeem the property unless the amount due on the mortgage plus costs is paid before the property is sold by the Sheriff.** The foreclosure order provides for a Court-directed sale by the Sheriff in the county where the property is situated after the mortgagee has complied with the Court's directions, including advertising the date and time of the sale in newspapers. The practice requires the plaintiff to apply to the Court after the sale for an order confirming the sale, which order is granted if all the requirements of the foreclosure order respecting the sale have been complied with. **In short, the foreclosure order itself is not an order finally disposing of a proceeding** but an order which, among other things, initiates a Court-ordered sale by the Sheriff, which sale is under the supervision of the Court; it is an ongoing process that culminates with the

> Sheriff's sale and the confirming order. **Therefore, prior to sale, the Court has jurisdiction to amend or vary its order respecting the advertising requirements in a proper case. This power exists because of the Court's inherent jurisdiction to control its own processes.** [Emphasis added]

> 37 Although *Golden Forest* was decided under the 1972 *Civil Procedure Rules*, **I am satisfied that there is nothing in the current Rules or practice memorandum which serves to change the nature of a foreclosure order as described therein, or extinguish the inherent jurisdiction of the court to control its own processes**. As such, the chambers judge was not *functus* and could exercise the inherent jurisdiction of the court to amend the Order for Foreclosure, Sale and Possession.

[87] Therefore, there are clearly situations where this court can exercise its inherent jurisdiction to amend or vary an order for foreclosure. The question is whether this is such an appropriate situation.

[88] In this case, there is already an order for foreclosure granted in favour of PFL. That order provides for simple foreclosure, as opposed to foreclosure, sale, and possession, and would not result in a public auction whereby anyone could bid on the foreclosed property. Simple foreclosure vests the title of the foreclosed property in the mortgagee in complete satisfaction of the mortgagor's debts, and the mortgagee is not obliged to sell or otherwise obtain value from the property. It is theirs outright. There is therefore no accounting for whether the property obtained exceeds the debt owed, and other interested parties have no chance to obtain any surplus. Similarly, if the property value falls short of the debt owed, then the mortgagee cannot seek a deficiency judgment.

[89] I have not been able to find a case in Nova Scotia where the procedure for foreclosure was converted between the foreclosure order and the confirmatory order. However, there is nothing in our *Civil Procedure Rules* or statutory law that precludes converting a simple foreclosure to a foreclosure, sale, and possession before the confirmatory order is issued. The Ontario Rules expressly provide for this:

> **64.03(22)** On the motion of any party, made to the court before judgment or to the referee after judgment, a sale may be directed instead of foreclosure and an immediate sale may be directed without previously determining the priorities of encumbrancers or giving the usual or any time to redeem.

[90] An order for foreclosure by sale may be *reconverted* to a simple foreclosure if it appears that the property's value at sale is unlikely to satisfy the mortgage:

> **64.03(23)** In a foreclosure action that has been converted into a sale action, on the motion of any party, made to the court before judgment or to the referee after judgment, the action may be converted back into a foreclosure action where it appears that the value of the property is unlikely to be sufficient to satisfy the claim of the plaintiff.

[91] Therefore, knowing the value of the property relative to the value of the mortgagee's claim is essential to this request (see *Montreal Trust Co of Canada v Olympia & York Developments (Administrator of)*, [1998] OJ No 1958 (ONCJ-GD), para 15).

[92] The Ontario *Rules* also provide a specific process for a subsequent encumbrancer who is added after the initial foreclosure order is issued to request a foreclosure by sale:

> **64.03(19)** A subsequent encumbrancer added on a reference in a foreclosure action who wishes a sale shall within ten days after service on the encumbrancer of notice of the reference, or where served outside Ontario, within such further time as the referee directs,
>
> > (a) pay into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and
> >
> > (b) serve on the plaintiff, and file with proof of service, a request for sale (Form 64F), together with particulars, verified by affidavit, of the claim and the amount owing,
>
> and where the subsequent encumbrancer attends and proves a claim on the reference, the referee shall make an order amending the judgment from a judgment for foreclosure to a judgment for sale.

[93] Therefore, in Ontario, where the encumbrancer files, serves, and argues the request properly, the referee (or Chambers judge in Nova Scotia) “shall” amend the initial judgment. According to Form 64F, the encumbrancer need only prove that they have an outstanding claim over the mortgaged property, and set out any particulars to support the claim.

[94] Whether or not to order a sale after an order for simple foreclosure was the subject of the decision in *Montreal Trust Co of Canada*, which provided for the court’s general preference for foreclosure by way of sale:

16 Craig Perkins in Holmstead and Watson - The Rules of Civil Procedure (Toronto: Carswell, 1994-Rel 3) at 64-24-25 suggests that any party may move for sale, and the court will favour the motion:

> **A sale always takes priority over a foreclosure**, in that the filing of a single request for sale by any defendant entitled to do so results in a judgment for sale no matter how many requests to redeem are filed. **Because foreclosure is so drastic a remedy -- the absolute barring of all claims subsequent to the plaintiff's, without any compensation -- the Rules contain a built in bias toward sale.**

17 G. William Dunn and Wayne Scarisbrick Grey in Marriot and Dunn, Mortgage Remedies 5th ed. (Toronto: Carswell, 1996 - Rel2) go even further, suggesting that as long as the plaintiff is protected, even the original mortgagor can demand sale. The authors suggest that this demand can be made even where it is unlikely that the demanding party's interest will be satisfied. They state, at 21-8.2:

> **Where there is equity for a second mortgagee after the first mortgagee's account is satisfied the first mortgagee should be precluded from converting the sale to foreclosure even if there is insufficient equity to satisfy the claim of the mortgagor or a further subsequent encumbrancer filing the request for sale.** Although there is no express authority for this proposition, the principle in Petranik v. Dale (1977), 69 D.L.R. (3d) 411 (S.C.C.) appears to apply: see Beber v. Davis (1987), 22 C.P.C. (2d) 25 (Master), where the Master expressed the view that the mortgagor had the right to shelter under a request for sale filed by a subsequent encumbrancer.

Dunn and Grey also note at 21-5:

> **In converting the foreclosure action to a sale action on motion by a defendant to the action, the court in exercising its discretion, will require compelling evidence that by so doing**, it will be for the general benefit of all persons with an interest in the mortgaged property. **Evidence that the value of the mortgaged property exceeds the plaintiff mortgagee's account is compellable evidence.** There is a paucity of reported case law in Ontario on the point.

18 Therefore, **it appears that the key consideration as to whether the proceedings should be by way of sale rather than foreclosure is whether a sale will likely generate an excess beyond the plaintiff's claim** and if that is established, the question of who is requesting the sale is not all that crucial.

19 It would appear that even where it is not the next direct subsequent encumbrancer who is raising the objection, **the court will pragmatically focus on the issue of**

windfall. In Dufferin Finch Investments Ltd. v. J.D.S. Investments Ltd.,[1994] O.J. No. 2648 (Gen.Div.) the personal defendant, an officer of the corporate defendant, intervened to request a sale rather than a foreclosure. The corporate defendant's interest in the property in question was held by the plaintiff as security for any deficiencies in a guaranteed rate of monthly returns. There were, however, other debts owing, due to the improper use of funds. These debts, while not related to the security interest, were ones for which the personal defendant could be held liable. There was a significant excess in the property and if the property was sold, it would enable the corporate defendant to reduce its other debts to the plaintiff, in turn leading to a reduction in the personal defendant's liability. Justice Spence found that a sale was clearly preferable in the circumstances, stating at para 20:

> ... not to order foreclosure could put Dufferin-Finch in a position to enjoy a windfall to the potential disadvantage to Mr. Edwards.

20 In Coronation Credit (Ont.) Ltd. v. Franklin Motel (North Bay) Ltd. et al., [1966] 2 O.R. 300 (H.C.J.), where a conversion to sale was refused, the Court was clearly concerned with the evidence before the court as to any excess value, finding it to be insufficient. In that case, the judgment for foreclosure had been granted, and the time for redemption had expired. The applicants for conversion to sale were third in priority, but were supported by the Bank of Nova Scotia, who was second in priority. The applicants alleged that the property was worth more than enough to generate a surplus. In the end result, Lacourciere Co. Ct. J.(as he then was) found that a sale at this point would result in further delay and that the applicant had failed to explain why it did not move for a sale before the settlement of the Master's report. He did note however, at p. 302:

> **I would be inclined to make the order requested if the applicant's material disclosed a reasonable possibility of a profitable sale.**

21 **Accordingly, the driving consideration as to whether there should be foreclosure or sale is whether there is excess value in the property to satisfy the claim of the plaintiff, the party with the first priority. If there is the likelihood of surplus upon a sale, as there is in the instant case, the possibility of a windfall to the plaintiff is of concern to the Court. The fact that the party requesting the sale is too far down the line of subsequent encumbrancers to ever receive any of the surplus is irrelevant to the question.**

[emphasis added]

[95] In that case, the court ordered that the foreclosure be converted to a sale (para 24).

[96] Although not dealing with an application to convert a simple foreclosure to a sale, Justice Campbell in *Dima* provided that this court must consider the rights of the subsequent encumbrancers when dealing with foreclosures:

> 32 The court, as the inheritor of the equitable jurisdiction of Chancery Court in dealing with foreclosure, must consider the implications of any procedure for the rights of borrowers.
>
> It seems that a borrower was such a favourite with courts of equity.
>
> 33 A simple or absolute foreclosure remains under the supervision of the court. The rights of the borrower are protected, as they are in other provinces.
>
> 34 The rights of subsequent encumbrancers are not sacrificed to expediency. They are notified and have the opportunity to present, defend or contest the proceeding when the confirmatory order is sought.
>
> [footnote removed]

[97] There are some questions that the court should ask itself before such a request is granted:

- Is the sale likely to generate surplus? (*Montreal Trust Co of Canada*, para 15)
- Do other interested parties oppose conversion? (*Elle Mortgage Corp v My Father's House – Apostolic Ministries Inc*, [2016] OJ No 196 (ONSCJ), para 50)

[98] As no other encumbrancers have filed submissions in this matter, we may assume they do not oppose the Encumbrancer's motion. Unfortunately, it is difficult to answer whether a court-ordered auction will generate surplus with any certainty in this case. For example, if this court had been provided with a valuation of the

Property, then it would be easier to determine whether a sale would be likely to generate surplus. A summary of the evidence we do have on this point is as follows:

- tax assessed value of the Property (PID 45401965) is $2,687,400
- tax assessed value of PID 45382736 is $38,700
- tax assessed value of PID 45407459 is $113,700
- PFL has default judgment, and an order for foreclosure, against Terra Firma for $3,602,491.71
- Martin Schmidt says he paid $541,500 for the unit
- Martin Schmidt has a *lis pendens* filed on the Property for $284,800
- Malcolm Storey/Blubrix Ltd says they paid $466,413.35
- Malcolm Storey/Bluebrix Ltd does not appear to have a filed *lis pendens* on the Property
- Peter and Barbara Strobl says they paid $515,200
- Peter and Barbara Strobl have a *lis pendens* filed on the Property for $438,025
- Stephen Jurgen/STAN says they paid $340,500
- Stephen Jurgen/STAN has a *lis pendens* filed on the Property for $340,499
- Dr. Paul Solvi/SG Invest SARL says they paid $470,025
- Dr. Paul Solvi/SG Invest SARL has a *lis pendens* filed on the Property for $470,025

[99] First, it is clear that if one accepts the tax assessed values as the true values of the parcels, there will be no surplus left over upon sale. On its face, by simple foreclosure, PFL would be agreeing to forego almost $800,000 of debt. It is not obvious, based on the evidence, that any surplus would be available and it is possible that there would be a significant deficit. Furthermore, PFL could not seek any deficit from Terra Firma as their claim would be completely satisfied by the

foreclosure. PFL's argument that this removes a substantial creditor from the pool upon bankruptcy is salient.

[100] However, without a clear valuation of the Property or Terra Firma's assets, it is impossible to say whether the Encumbrancers' claims would ever be satisfied, whether by simple foreclosure or by foreclosure, sale and possession. Their claims fall somewhere down the line with a long list of creditors and other interested parties. I am not certain that an auction would generate sufficient surplus to satisfy all the creditors. There does not appear to be sufficient evidence on file to show that there would be surplus upon judicial sale. On the other hand, according to the case law in Ontario, the bar for requesting a simple foreclosure be converted to a sale is not particularly high. It is open to the court to find that this is a case where such an order should be granted.

CONCLUSION

[101] When PFL's Refinancing Mortgage was executed in August 2019, none of the Encumbrancers had recorded their respective equitable interests, in the form of purchaser's liens or otherwise, on the Property's parcel registry. Whereas the Property is registered under the *LRA*, the Act provides that recorded interests take priority to unrecorded interests. And because the Refinancing Mortgage is not void

under the *Assignments and Preferences Act*, its first-ranking interest is the first that must be satisfied upon foreclosure.

[102] It is not clear what effect the Encumbrancers' certificates of *lis pendens* have regarding their claims, as these were not stressed in their submissions. If the *lis pendens* reflect recorded purchaser's liens supported by the agreements of purchase and sale, then these were not recorded until at least December 30, 2019, long after the PFL Mortgage was recorded in August. The interests did not attach or affect title until then, and do not rank in priority to the Mortgage.

[103] It remains open to the court to vary the February 18 order for simple foreclosure over the Property. Foreclosure, sale and possession is the typical procedure in Nova Scotia and it is generally considered to be the less harsh remedy.

[104] As was previously indicated, the trustee is not objecting to simple foreclosure by PFL. And, without attorning to the jurisdiction of the court on this motion asks for an order that no determinations are being made that are binding on the trustee with respect to:

(a) The quantum of PFL's claim against Terra Firma and any such determination will be made pursuant to s.135 of the BIA; or

(b) Whether the PFL is valid in the sense that it is not subject to attack by the trustee pursuant to s.96 of the Act.

[105] If the trustee chooses to later attack the validity of the mortgage or to establish the quantum of PFL's claim under the provisions of the BIA, it is for the trustee to pursue. But, for purposes of the motion that is now before me the validity and quantum owed pursuant to the mortgage between PFL and Terra Firma has already been determined and is reflected in Justice Bodurtha's Order for Foreclosure. I have no desire to revisit either of these determinations. Nor am I persuaded to order that the Confirming Order vesting the other two properties that were subject to the mortgage be set aside. Justice Moir granted that order on March 20, 2020 with the result that both properties are now vested in the name of PFL. This all took place approximately five months before Terra Firma was officially declared bankrupt. This, however, comes with a caveat as will become clear when I make the following order.

[106] I believe this is a case where fairness and equity require that the mortgaged property be sold at public auction instead of simply vested in the name of the mortgagee – PFL.

[107] By ordering a public sale at auction, the Encumbrancers and the trustee will have the opportunity to fully participate in an open, arms length bidding process

that will explore and hopefully identify any interested purchasers for the property given current market conditions. If PFL is the successful bidder at the court-ordered sale and if there remains a deficit owing, the company is at liberty to advance a further motion, after confirmation of all sale procedures, to seek quantification of the amount still owing. PFL would, as part of that process, be required to account to the court for the proceeds of sale of the other two properties (assuming they or one of them has been sold at fair market value in an arms length transaction). If neither property has been sold then PFL would have to satisfy the court their market value by way of an appraisal by a qualified real estate appraiser licensed and certified to perform such work within the Province of Nova Scotia.

[108] My decision should not preclude the trustee from seeking a similar remedy under the BIA should PFL seek to quantify any claim it might wish to make against Terra Firma pursuant to the provisions of the Act.

[109] I further order that the Order for Foreclosure, Sale, and Possession be varied from the usual order set out in the Civil Procedure Rules and Practice Memorandum #1. Given the rather unique nature and extent of the property, the first notice advertising the date of public auction should be be placed simultaneously in a newspaper with circulation throughout the Province of Nova Scotia and another having national circulation at least 90 days prior to the date set

for the sale. A second set of notices should be placed in the newspaper selected at least 45 days before the public sale and a third notice no more than 15 days prior to the sale.

[110] I would request that counsel for PFL make these changes to the standard form order for foreclosure, sale, and possession and submit it along with the name and qualifications of the person designated to conduct the public sale with any other notifications that might be necessary.

J.