

SUPREME COURT OF NOVA SCOTIA

Citation: *CIBC v. Ernst*, 2023 NSSC 303

Date: 20230920

Registry: Halifax

Docket: No. 516516

Between:

Canadian Imperial Bank of Commerce

Applicant

and

Sandra May Ernst, George Lester Ernst and
Kenneth Todd Ingram

Respondents

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: September 5 and 6, 2023, in Halifax, Nova Scotia

Counsel: Morgan Hicks, for the Applicant
Sandra Ernst, self-represented Respondent
George Ernst, not present
Sandra Ernst, for the Respondent (Kenneth Todd Ingram)

By the Court:

[1] In 2019 CIBC started a simple foreclosure action against Sandra May Ernst and her brother George Lester Ernst, the owners of a property located at 44 Jackson Drive in North Sydney. The Order for Foreclosure was issued on August 13, 2020, and on September 9, 2020 a Confirmatory Order was issued confirming that CIBC had taken title to the property.

[2] In October 2020 CIBC was made aware that Ms. Ernst and her partner Mr. Ingram were still living in what CIBC understood to be part of the property that had been the subject of the foreclosure. And that is where things started to get complicated. (Mr. Ingram was not a party to the mortgage and was not on title as an owner of the land in question. He lives on the property with Ms. Ernst.)

[3] Ms. Ernst and Mr. Ingram say that they are living, not at 44 Jackson Drive, but at 46 Jackson Drive, which became 46 Jackson Drive only after the foreclosure. That living space, which is about 20 feet by 20 feet, is located for the most part on an adjoining lot, which Ms. Ernst owns with her brother and which was not part of the foreclosure. They consider that space to be a separate structure built after the original house was constructed and located on a separate lot, not secured by the mortgage, and having nothing whatsoever to do with the foreclosure. They want to stay there. And they want CIBC to pay them damages for stress and disruption that they have suffered as a result of the process.

[4] CIBC disagrees. The bank wants them out of the house. It says that a mortgage was obtained over the property at 44 Jackson Drive on which one house was located. And that house included the portion which now encroaches on the neighbouring land owned by Sandra Ernst and her brother, George Ernst. When the foreclosure proceeded with respect to 44 Jackson Drive it included a single parcel of land as set out in the legal description. It also included, CIBC says, the single undetached home located on that lot, which unbeknownst to CIBC at the time, was encroaching on the adjoining lot. It is important to note, once again, that the property on which the house encroaches was owned by Sandra Ernst and George Ernst and not by some third party. The lot on which the building encroaches was not included in the mortgage and was therefore not part of the foreclosure.

[5] CIBC filed a Notice of Application in Court seeking an order granting conveyance of the part of the land still owned by the respondents Sandra Ernst and George Ernst that is encroached upon by the house at 44 Jackson Drive which is now owned by CIBC.

[6] George Ernst received notice of this matter but did not participate. Ms. Ernst made representations on behalf of herself and Mr. Ingram. She identified 93 areas of concern with the position taken by the bank and 27 arguments that she made to support the position taken by herself and Mr. Ingram. It is neither necessary nor particularly helpful to set out each of those arguments and positions and address them separately.

[7] Ms. Ernst argued that the foreclosure was granted based on false and misleading information filed by CIBC. She said that in any event CIBC should have no right to the separate residential property that was never part of the mortgage. She said that the respondents should be entitled to damages from CIBC and from unnamed third party “data providers”, which might include the solicitors for CIBC and employees of the bank who provided misleading or incorrect information about the matter to the bank.

Issues

[8] A more concise statement of the issues reflects an attempt to consolidate those arguments in some kind of coherent way. The first issue is whether the mortgage over 44 Jackson Drive covers the entire structure in which Ms. Ernst and Mr. Ingram are now residing, including that part of the structure located on the neighbouring lands. If it does, the issue is whether CIBC is entitled to an order requiring the respondents to formally convey to CIBC the adjoining lands under which the encroaching structure is located.

The Mortgage

[9] The property that is the subject of the dispute is on Jackson Drive which overlooks the Northwest Arm of Sydney Harbour. There are two parcels of land, and both were owned by Lester and Amy Ernst, who were the parents of George and Sandra Ernst. Lester Ernst and Amy Ernst built a home on one of those lots sometime around 1961. It had the civic number 44 Jackson Drive assigned to it.

[10] On August 5, 1976, Amy Ernst and Lester Ernst signed an agreement with a family member, Amy Maclean who had returned from the United States to live at home in Cape Breton. That agreement is brief and can be quoted in its entirety.

This is to certify that Amy J. Maclean will have in her possession the West addition (20 x 22 Ft.) to the home of Lester and Amy Ernst (44 Jackson Dr. North Sydney) as long as she requires it.

[11] The agreement was signed by Lester and Amy Ernst, by Amy J. Maclean and by two witnesses. It permitted Amy Maclean to live in the west addition to the Ernst home at 44 Jackson Drive for as long as she needed it. It was not intended as permanent arrangement. When Amy Maclean not longer needed to have possession of the west addition it would revert to the possession of the Ernsts, as part of 44 Jackson Drive.

[12] It appears as though the structure referred to as being an addition to the home at 44 Jackson Drive was build some time around 1976, though the appraisal provided to CIBC suggested it might have been 1978. Because the Ernsts owned both 44 Jackson Drive and the adjoining lot which at that time had not been assigned a separate civic number, it would be reasonable to assume that little thought was given to whether the “West addition” was entirely located on one lot or the other. But in fact, the addition was built for the most part, though not entirely on the adjoining lot and not the lot on which the original home stood. The structure encroached on the adjoining lot by about 15 feet in the front and 19 feet in the rear.

[13] Amy Maclean, who was Sandra Ernst’s great aunt, died. Sandra Ernst moved into the area that Ms. Maclean had once occupied. She has lived there continuously since. When Sandra and George Ernst’s mother Amy Ernst died in 2000, Lester Ernst was then the owner of the two lots. In 2011 Lester Ernst signed a Power of Attorney in favour of Sandra Ernst and her brother George Ernst. Sandra Ernst and George Ernst were added as joint tenants to both lots.

[14] On February 18, 2015, Sandra Ernst, George Ernst and their father Lester Ernst entered into a Consumer General Collateral Mortgage for \$43,000 with CIBC with 44 Jackson Drive as security.

[15] An appraisal was completed as part of the mortgage application process. That was done by Brian Aucoin of McCharles Aucoin Appraisals in Sydney River. It is dated December 19, 2014. When the appraiser visited the property Sandra Ernst was present and spoke with him. There would appear to have been no indication at that time that the “addition” was not part of 44 Jackson Drive.

[16] The appraisal report notes that the building was a “detached” one storey home. The house is described as a four-bedroom one storey house built around 1961 “with a side addition in 1978”. The pictures taken by the appraiser show what appear to be a detached one storey home. The roof appears to have a single roof line with nothing to suggest that there are two structures. There is no space

between them. There is absolutely nothing contained in the appraisal report that would suggest that what was appraised did not include the entire structure or that the structure appraised had another structure attached to it but not part of it.

[17] Sandra Ernst was party to the mortgage. She gave her address as being 44 Jackson Drive and then, as now, she was residing in the space later identified as 46 Jackson Drive. She explained that 44 Jackson Drive was her mailing address, but not where she lived. In each of the documents signed as part of the mortgage application process Ms. Ernst noted that her address given in response to the request for a street name and number was 44 Jackson Drive. That was the same address given for Ms. Ernst's father, Lester Ernst, who was then living in the original house.

[18] As part of the mortgage application Ms. Ernst was required to provide a list of her debts and assets. She listed 44 Jackson Drive as an asset but did not list a separate property at what later became 46 Jackson Drive and listed no property that could in any way be construed as being either real property or a structure other than 44 Jackson Drive.

The 2015 Sketch

[19] When the mortgage was signed in 2015 the property at 44 Jackson Drive had that civic number assigned to it. The adjoining property had no civic number.

[20] Ms. Ernst noted that there were concerns about some clear cutting that was taking place near the boundary of the property. She retained Thompson Conn Limited to provide a survey sketch. That document is dated December 14, 2015. It shows civic number 44 Jackson Drive with what is referred to as a "newer section" attached to it. The newer section is shown as encroaching over the boundary line 15 feet more or less in the front and 19 feet more or less in the rear. That means that the newer section encroaches onto the second lot, which now has the civic number 46.

[21] The sketch shows that as of December 2015 at the latest, there was a deck placed on the back of the house. The deck is a single continuous structure, servicing the entire house and partially on one lot and partially on the other.

[22] Civic number 46 was not assigned until October 2020, after the foreclosure order had already been issued on August 13, 2020, and after the confirming order was issued on September 9, 2020. Because CIBC used the simple foreclosure

process, CIBC acquired title in fee simple to the lands set out in the legal description attached to the mortgage. It was only then that Ms. Ernst made arrangements to have a civic number assigned to the “West addition” located on the remaining lands.

Foreclosure

[23] Lester Ernst died on February 13, 2017. Title to the property passed to the surviving joint tenants, Sandra Ernst and George Ernst.

[24] As indicated, the simple foreclosure proceedings were effectively complete on September 9, 2020, when a Confirmatory Order was issued.

[25] There was no appeal from any part of that process. In this application Ms. Ernst suggested that there may have been inaccuracies in the “data” used in obtaining the foreclosure and argued that the court should in some way “look into” these matters. She asserted that there were “scandalous” allegations made about her in the process.

[26] An application of this kind cannot act as a form of appeal from a foreclosure order. The orders that relate to the foreclosure stand. The issue is whether that foreclosure included the structure that Ms. Ernst and Mr. Ingram now occupy.

The “West Addition”

[27] The mortgage in this case included a metes and bounds legal description. That description covered the lot that is now referred to as civic number 44 Jackson Drive. It did not contain a legal description for what in October 2020 became known as civic number 46 Jackson Drive and CIBC makes no claim over that property as a whole. It could be argued that CIBC should only be able to take as security what was set out in the legal description attached to the mortgage. That however would leave CIBC with a portion of a house, while the other portion sits on a piece of land owned by the people who applied for and signed the mortgage. The building was not and is not now a duplex.

[28] That part is significant. When the mortgage was signed in 2015 there was no suggestion whatsoever that the subject property at 44 Jackson Drive was a duplex, so that the mortgage should apply only to one portion of it. It was one structure. When it was constructed in 1976 and given to Amy Maclean as a place to live it was described as “the West addition (20 x 22 Ft.) to the home of Lester and Amy

Ernst (44 Jackson Dr. North Sydney)”. It was not built only on the adjoining lot but was firmly physically attached to 44 Jackson Drive. It was placed on a poured foundation directly against 44 Jackson Drive and the roofline was finished so that the property looks from the outside like one structure. It was built as an addition to an existing family dwelling and treated like one.

[29] There may have been separate wiring and heating, much like one would expect in what is sometimes referred to as an “in-law suite”. But that does not make it any less one structure.

[30] When the mortgage application was made the property that was subject to the mortgage was civic number 44 Jackson Drive. The parties clearly intended to include the single, entire residence that was then attached to only one civic number, 44 Jackson Drive. There is nothing in the evidence to suggest that either the mortgagors were only offering security, or the mortgagee was only accepting security over just a portion of the structure identified as 44 Jackson Drive. When a mortgage is funded by a financial institution that institution, in this case CIBC, is concerned that it have security for the money loaned. And that security must be something that can be realized. It would be difficult to infer that CIBC, or any institutional lender, would authorize a mortgage where the security is a house or portion of a house that is attached to another structure that is built partially on one lot and partially on another. No reasonable person would expect that the bank would accept that form of security.

[31] In 2015 anyone looking at 44 Jackson Drive would objectively and reasonably assume that 44 Jackson Drive included the entire structure with the “West addition” from 1976. The appraisal was clear in stating that this was a detached home. That means that it was not a semidetached home or a duplex. Ms. Ernst argued that the value given to the home by the appraiser was so low that it must not have included the 1976 addition. There is no evidence about property values in 2015 to support that argument. And in any event, it is abundantly clear from the appraisal that what was appraised was the detached home with a later constructed addition.

[32] Ms. Ernst gave her address as being 44 Jackson Drive. She says that was where she got her mail even though she lived in the property now designated with civic number 46. She was one of the mortgagors. She was getting a mortgage over 44 Jackson Drive and said that her address was 44 Jackson Drive. She claims that she was actually living in adjoining and attached property that then had no civic

number but was not 44 Jackson Drive, which she gave as her address. She said nothing to CIBC to clarify a situation that would be very different from how it appeared. Had she done so and told them that the mortgaged property was intended to be only the older part of what was designated as 44 Jackson Drive and that the security did not include the attached addition, the only reasonable inference is that the bank would not have accepted the mortgage application.

[33] When the mortgage was entered into in 2015 it was for 44 Jackson Drive, which included all the building and not only part of it.

Encroachment

[34] As a result of the foreclosure CIBC now has title to the land set out in the legal description attached to the mortgage. The building located on that land, at 44 Jackson Drive, encroaches on the adjoining property. CIBC did not build the home. The bank bears no legal responsibility for the fact that the home known as 44 Jackson Drive was built partially on the lot owned by Sandra Ernst and George Ernst. The building was put there by Lester and Amy Ernst.

[35] Doing nothing is not an option. CIBC could not realistically hope to sell the property with an attached portion occupied by Ms. Ernst and Mr. Ingram. That portion it should be noted, also encroached on the lands now owned by CIBC. Removing the encroaching part of the addition would involve substantial expense.

[36] This is not a situation in which a *Quieting Titles* application would be a practical solution. The property lines and ownership are not in dispute. There is an encroachment. The house known as 44 Jackson Drive, now owned by CIBC, encroaches between 15 and 19 feet onto the parcel of land still owned by George Ernst and Sandra Ernst. The encroachment rests on a poured foundation and is structurally connected to the rest of the house. It is part of the house and part of the security for the mortgage.

[37] The parcel of land that is set out in the legal description attached to the mortgage has been migrated into the Land Registration System. Section 76(3) of the *Land Registration Act*, 2001, c. 6, deals with the situation where it is found that a building encroaches on adjoining land. CIBC in its pleadings in this matter indicated that it sought, as a remedy, title to the land underlying the encroachment. The legislation was not specifically pleaded, as it should have been, but the brief filed by CIBC made very clear that it was relying on the *Land Registration Act* and the respondents were in no way taken by surprise.

[38] The court may, on the application of either the owner of the land on which the building is located or the registered owner of the land on the which the building encroaches, do one of three things. It may require the owner to remove or abandon the encroaching building. It may require the owner to acquire an easement. Or it may require the owner of the building to acquire the land from the person to whom it belongs, in the amount and on such terms as the court thinks just. It is the third option that CIBC proposed here.

[39] The legislation in British Columbia is similar. The *Property Law Act*, RSBC 1996, c. 377, at Section 36(2), provides that where a building encroaches on adjoining land the court can require an easement to be granted, vest title to the land on the owner of the encroaching property with proper compensation being paid or may order the owner to remove the encroachment. That section has been described as giving the court broad discretion to resolve boundary and encroachment disputes. Relief is entirely discretionary based on the facts and equities of the case. *Glahn v. Stipec*, 2022 BCSC 2351, para. 6.

[40] In British Columbia the principles applied in determining the equities of the case are referred to as the “Vineberg principles” from *Vineberg v. Rerick*, 1995 CanLII 3363 (BCSC). The first issue is referred to as the “comprehension of the property lines”. The question is whether the parties were aware of the boundary line before the encroachment became an issue. The party seeking relief should have had an honest belief to be awarded the remedy. The second principle is the nature of the encroachment. It matters whether the encroachment was a lasting improvement and the effort and cost involved in moving it is an issue. The more fixed the improvement and the more costly and cumbersome to remove it, the more these considerations should be weighed in favour of the party asking for the relief. The third principle addresses the size of the encroachment. How the encroachment effects the properties in terms of their present and future value and use matters.

[41] Those principles provide guidance when applied to this case.

[42] When CIBC issued the mortgage, it was not aware of the encroachment and received no notice that the house at 44 Jackson Drive might encroach on the other lot owned by George Ernst and Sandra Ernst. Obtaining a plot or location certificate might well have disclosed that problem. But no plan was required when the mortgage was placed on 44 Jackson Drive. The addition was built by Lester and Amy Ernst. There is no evidence about whether they knew that the “west addition” was built straddling the line between their two lots. Presumably it would

not have mattered much to them at the time. But part of the west addition is on the lot with the original house to the extent of about 3 feet, while between 15 and 19 feet encroach on the other lot owned by Sandra Ernst and George Ernst.

[43] When CIBC granted the mortgage, the assumption was that the house was entirely on the lot that was being mortgaged. There was no suggestion that there were two separate structures or that the single structure was not a detached home but a duplex.

[44] This is not a situation in which an encroachment is upon a stranger's land and CIBC is seeking to acquire it. The encroachment is on land owned by the people who entered into a mortgage in respect of which the only reasonable understanding at the time was that it included as security the building at civic number 44, and not merely some part of it.

[45] The nature of the encroachment is such that it would be expensive and disruptive to move. It would also be unfair to allow it to be moved. It was intended to be part of the security for the mortgage and removing it would potentially do damage to the existing structure as well. The injunction requiring Ms. Ernst and Mr. Ingram to vacate the property is for the purpose of giving effect to the mortgage by allowing CIBC to sell house and property that was taken as security.

[46] The size of the encroachment is not insubstantial as a portion of the house. As a portion of the vacant lot owned by Sandra Ernst and George Ernst it does not represent a portion that would be likely to render the lot worthless. It would remain an asset.

[47] When a mortgage is concerned the balancing of equities between the parties can present challenges. They are not evenly matched. CIBC is a chartered bank. The loss of this property would not make a dent in bank's profits. Sandra Ernst is an individual. She has lost her property through the simple foreclosure process. She will get nothing from it.

[48] But the balancing of equities does not allow for a consideration of empathy. Ms. Ernst's situation is sad. The family home is lost. But she entered into a mortgage with CIBC with 44 Jackson Drive as security. That meant the land that was described in the mortgage and the structures on that land. The house on that land was one structure and was included in the mortgage. After the foreclosure she had a civic number assigned to the west addition but when the mortgage was signed it was undoubtedly part of a single structure.

[49] The balancing of equities involves the consideration of whether it is fair and reasonable to give legal effect to the reality that the entire house was intended as part of security. Refusing to do that would mean that 44 Jackson Drive would be unmarketable. Removing the addition would be expensive and moreover would deprive the bank of the security that was intended as part of the mortgage.

Conclusion

[50] The transfer of that portion of the lot to CIBC requires a subdivision and consolidation. A portion of the residential structure owned by CIBC at 44 Jackson Drive encroaches on the property of Sandra Ernst and George Ernst at 46 Jackson Drive, as shown on the plan of survey produced by John D. Conn, N.S.L.S. on April 21, 2021 and title Plan of Survey Lot 2021-1. The land owned by Sandra Ernst and George Ernst which underlies the encroachment shall be conveyed to CIBC. CIBC will be required to retain a certified Nova Scotia Land Surveyor to complete a Plan of Subdivision and Consolidation transferring the underlying lands of the encroachment. The Plan of Survey and Consolidation shall be submitted to Cape Breton Regional Municipality for approval and once approved by the municipality, the Plan of Subdivision and Consolidation shall be recorded at the registry of Deeds and Sandra Ernst and George Ernst shall execute a deed and other documents as may be required to transfer the land underlying the encroachment and such other portion of the property as required to satisfy municipal sideline bylaw requirements.

Claim for Damages

[51] Ms. Ernst and Mr. Ingram claimed damages which Ms. Ernst described in court as both “real and perceived damages.” The damages apparently arise from various misrepresentations made about them, including claims under provisions of the *Criminal Code*. They claimed general and special damages and aggravated damages for “the 24/7 anxiety” and lost personal time amounting to \$37,000. They claimed that their financial losses included lost equity in the property, loss of potential rental income, business equipment damage due to loss of storage facility and reduced professional income due to loss of design studio space.

[52] The respondents went on to say that they are seeking the “courts authority” (sic) in determining a fair ruling “with considerations to” the “false, misleading, and omission (sic) of fact by the applicant that they have relied upon in bringing this matter before the Court, when determining judgement.”

[53] The respondents were not successful in this matter. The foreclosure was completed, and title was vested in CIBC. There has been no appeal from that, and this matter was not the appropriate forum to either relitigate or appeal the foreclosure. Framing the relitigation of the foreclosure as a claim for damages arising from defamation or misrepresentation as part of the foreclosure process is an attempt to do indirectly what cannot properly be done directly. In any event there was no evidence in the application of any misrepresentation on the part of CIBC, its agents, or employees.

[54] Damages claimed in terms of stress or inconvenience by Ms. Ernst and Mr. Ingram do not arise from any illegal or improper actions proven to have been taken by CIBC. Ms. Ernst and Mr. Ingram attempted to stall or derail the process by claiming a portion of the single detached house as not being subject to the mortgage, when clearly it was intended to be. They have delayed realization on the security for three years, caused CIBC to incur substantial costs and caused their own stress. They would have been well advised to have cut their losses when they could. Intelligent people can often impair their own judgement. As clever people they can develop arguments that convince them that they are incontrovertibly right and that the other side is not only an irrational bully but a deceitful rogue as well. A sad and difficult situation is made worse.

[55] CIBC has been successful in the application and have requested costs. At the request of the parties, I will hear them on the issue of costs. That hearing should include written submissions followed by an appearance which may be done virtually. I will note in advance that any amount of costs requested should consider that while CIBC has been prevented from realizing on its security, and the land was represented as having built on it a detached family home, the issue could have been avoided with a surveyor's certificate, plot plan or sketch similar to the one prepared in 2015. CIBC must accept some of the risk that arose from the decision to fund the mortgage on the assumption that the structure was on the lot set out in the legal description.

[56] Counsel for CIBC should prepare a draft order to be reviewed by the respondents and consented to as to form and contact the court to set up time for the filing of briefs and a hearing on costs.

Campbell, J.