CV 05688

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGE CORPORATION

Plaintiff

- and -

PAUL QUASSA, ELISAPEE QUASSA and GERRASIMUS LOGOTHETIS

Defendants

Application to determine priorities as between an equitable mortgagee and a subsequent purchaser of leasehold property.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on February 16, 1996

Reasons filed: February 21, 1996

Counsel for the Applicant (Plaintiff): Edward W. Gullberg

Counsel for the Respondent (Logothetis): Hugh R. Latimer

No one appeared for the Defendants Quassa.

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REASONS FOR JUDGMENT

1 This is an application to determine priorities as between a mortgagee and a subsequent purchaser who claims to be a bona fide purchaser for value without notice of the mortgagee's interest.

2 The defendants, Paul Quassa and Elisapee Quassa, have been noted in default and did not appear on this application. They are the lessees of a certain property described as "Lot 39 in the Town of Iqaluit, in the Northwest Territories, according to a plan of survey filed in the land Titles Office for the Northwest Territories under number 674". The lessor is the Commissioner of the Northwest Territories. The property is unpatented Crown land administered by the territorial government under the *Commissioner's Land Act*, R.S.N.W.T. 1988, c. C-11. No certificate of title has been issued so the property is not "registered" in any manner under the Land Titles registry system established by the *Land Titles Act*, R.S.N.W.T. 1988, c.8 (Supp.).

3 The Quassas' leasehold interest was noted, however, in an ad hoc registry system maintained by the territorial Department of Municipal and Community Affairs. A number was assigned to the lease and anyone could attend at the department's office in Yellowknife to review the file. This ad hoc registry system is not based on any statutory provisions but is one that has been used by the government and others, such as solicitors undertaking conveyance work for clients respecting leases of Commissioner's lands, for many years. A similar practice is in place for unpatented Crown lands held by the Government of Canada. The informal registry procedure for such lands administered by the federal government received judicial recognition in Pitts v. Steen et al, [1981] 3 W.W.R. 289 (N.W.T.S.C.).

4 On July 22, 1993, the Quassas executed a mortgage of their leasehold interest in favour of the CIBC Mortgage Corporation (the "applicant" herein). The amount was $256,250.00. This mortgage was consented to by the Commissioner as lessor and a copy of the mortgage was deposited at the department office in Yellowknife. It was marked as registered on July 28, 1993, as instrument number 1680. The original lease document in the file was marked with a notation that the lease was subject to a mortgage. Hence anyone attending at the office to do a search of the lease file would have seen the notation and the filed copy of the mortgage itself.

5 On July 21, 1994, the Quassas made an agreement to sell their interest in the property to the defendant Gerrasimus Logothetis (the "respondent" herein). The agreement was a hand-written document reciting a total purchase price of $230,000.00 payable by a down payment of $35,000.00 and monthly instalments of $4,000.00. The

respondent made the down payment and took possession of the property. The mortgage was already in default by the date of the agreement. In March of 1995 the applicant commenced foreclosure proceedings. The mortgage debt is now in excess of $268,000.00.

6 The lease is still in the name of the Quassas. No steps were taken by them to transfer the lease to the respondent. It is also acknowledged that the respondent took no steps to ascertain the state of the Quassas' interest. He made no independent inquiries as to the state of the title but instead relied on assurances from the vendors. The respondent gave the following recitation of events in his affidavit filed on this application:

> 3. On or about July 21, 1994, I entered into a written agreement (the "agreement") for the purchase of the leasehold interest in the land of Paul Quassa and Elisapee Quassa (called "the Quassas"). Some time before I signed the agreement, Paul Quassa told me, in response to my inquiry, that the leasehold interest of the Quassas in the land was not subject to any encumbrances. He told me that there had been a mortgage against the Quassas' leasehold interest in the lands but that it had been paid out...
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> 4. When I persisted in making inquiries, Paul Quassa told me that as far as he knew the Quassas' leasehold interest in the land was not encumbered in any way, but that as it was possible his wife, Elisapee Quassa might have encumbered their interest, he would double-check and let me know. He also said that if there was any encumbrance against the Quassas' interest in the land, it would be for a minimal amount of money, and that in any case, the Quassas would pay the amount owing on any such encumbrance and have it discharged before assigning the leasehold interest to me in accordance with the agreement. Paul Quassa did not, at any time thereafter or before I entered into possession, advise me that there were any encumbrances against the leasehold interest in the land. I therefore believed that there were no such encumbrances...
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> 7. It was agreed between the parties that the Quassas' leasehold interest in the lands would be assigned to me, free and clear of all encumbrances, upon the payment by myself of $35,000.00 to the Quassas. Paul Quassa told me, at the time that I paid the balance of the $35,000.00, that that the assignment of lease was in the hands of his lawyers, and that it would be registered within a short period of time.

7 The parties are agreed that, in the absence of statutory registration provisions as in this situation, the common law applies. The respondent also concedes that the applicant holds an equitable mortgage. He claims, however, that he is a bona fide purchaser for value without notice of the mortgage and therefore is not bound by the applicant's prior charge on the leasehold.

8 It is settled law that the defence of purchase for value without notice is a defence which must be pleaded and proved affirmatively. It is a defence in respect of which the onus in the strict sense is on the party claiming the benefit of it. The respondent must affirmatively establish absence of notice: Union Bank of Halifax v. Indian & General Investment Trust, [1908] 40 S.C.R. 510. In my opinion, there are a number of reasons why the defence fails in this case.

9 The respondent has paid approximately $40,000.00 to date pursuant to his agreement with the Quassas. That agreement, while stipulating that ownership will transfer on payment of the initial downpayment, also reserves the right to the Quassas to cancel the agreement should the respondent miss any of the monthly instalments. In this situation the most that can be said is that the respondent also has only an equitable interest in the leasehold as purchaser. And, since the equitable mortgage was created a year before the respondent's equitable interest arose, then at common law the earlier interest has priority. This rule is known as "first in time is first in right": see J. E. Roach, The Canadian Law of Mortgages of Land (1993), pages 356 - 357.

10 The respondent, while acknowledging the rule, submits that the rule should be displaced due to negligence on the part of the applicant and/or its solicitors in not "adequately" securing the mortgage loan. Cases have refused to recognize a priority under this rule where there is evidence of fraud or negligence on the part of the mortgagee claiming a prior interest. The emphasis, however, is always on doing what is fair in the overall circumstances of the particular case. As stated by Anglin J. in McDougall v. MacKay, [1922] 64 S.C.R. 1 (at page 12):

> I fully recognize that a court of equity will not prefer one equity to another on the mere ground of priority of time until it has found by examination of their relative merits that there is no other sufficient ground of preference between them; that such examination must cover the conduct of the parties and all the circumstances; and that the test of preference is the broad principle of right and justice which courts of equity apply universally.

11 The respondent argues that, having regard to the relatively large amount of the mortgage loan, the applicant should have taken steps to better secure its position by having title raised pursuant to the *Land Titles Act* so that registration could be effected under that statute. The irony in this argument of course is that in this case the respondent admits that he made no search of title whatsoever but if there had been registration under the *Land Titles Act* he would have nevertheless been deemed by the statute to have notice of the mortgage.

12 I reject this argument for three reasons. First, as already noted, the respondent admits that he made no search of title, not at the government office where the lease was filed and not at the Land Titles Office. So any submission as to what may have happened if registration had taken place in the Land Titles Office is purely speculative. Second, also as previously noted, the ad hoc registry system maintained by the territorial government

is one that has been in place for many years and familiar to solicitors in this jurisdiction. In the circumstances of this case I cannot say that it is negligence to not take steps to raise title. Finally, there is no evidence that title could be raised. It is a mere possibility contingent on factors that are wholly unrelated to the mortgage loan. For these reasons I do not find any act on the part of the applicant to displace the "first in time" rule. But there are other grounds favouring the applicant's position beside simply this rule of equity.

13 Applicant's counsel submits that the respondent does not meet the test of being a purchaser for value. He has not paid the full purchase price. He now has notice of the mortgage. The law is that a purchaser must pay the full amount of the purchase before receiving notice of the prior charge to claim priority as a purchaser for value: see Megarry & Wade, Law of Real Property (5th ed., 1984), page 143.

14 Applicant's counsel also submits that at a minimum the respondent had, if not actual notice of the mortgage, then constructive notice of it. Constructive notice is found where the purchaser has, either deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made. Did the purchaser have some knowledge which ought to have put him on inquiry? Would he have acquired the necessary information but for his own gross negligence? The standard was explained by Roach, supra, at page 358:

> Gross negligence is more than mere carelessness; it is aggravated carelessness by someone who, on the one hand, disregards the standards of care of the reasonable person and, on the other hand, indicates a lack of concern for consequences of one's conduct, though the risks are obvious.

15 In this case, the respondent acknowledges that he made inquiries of the vendors as to the state of title and he received assurances that there were no encumbrances but, if there were, they were minor and would be cleared off. He admits that he made no independent inquiries or searches. The respondent did not retain a solicitor. He was content to rely on the vendors. To my mind, especially having regard to the amount of money at stake, these actions, or lack of action, on the part of the respondent reveal a lack of prudence and care. It amounts to gross negligence in the handling of his affairs. The respondent had a complete disregard for the care that a prudent purchaser would take in such a transaction. It is not as if the respondent was totally oblivious to the risks. After all, he says he asked the vendors about any encumbrances. In these circumstances it was unreasonable for him to rely on the vendors' assurances. This is in no way diminished by the fact that he only paid a small portion of the purchase price up front.

16 There are well-established authorities for the proposition that the purchaser bears the obligation to make reasonable inquiries into the state of title. And, in this regard, the purchaser cannot, in answer to a competing claim, simply rely on the vendor's representations or assurances: Patman v. Harland, [1881] 17 Ch. 353 (M.R.); Oliver v. Hinton, [1899] 2 Ch. 264 (C.A.). In my opinion, in this day and age, it is unreasonable to think that a person would enter into a transaction such as this without at least making some independent inquiries if not, as in most cases, retaining the services of a solicitor to make sure that one got what one paid for. I therefore find that the respondent had constructive notice of the mortgage.

17 For these reasons, the respondent's claim to be a bona fide purchaser for value without notice fails. A declaration will issue that the applicant's mortgage is valid and has priority over the respondent's interest as purchaser.

18 Respondent's counsel suggested that the respondent should at least retain priority as to the approximate sum of $40,000.00 paid by him to the Quassas. While there may be some superficial appeal to this argument out of sympathy for the respondent, I find no evidence to support such a disposition. The respondent has apparently commenced separate proceedings against the Quassas so he will have to pursue that claim to recover what he has paid them.

19 Costs may be spoken to if necessary.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 21st day of February, 1996

Counsel for the Applicant (Plaintiff): Edward W. Gullberg

Counsel for the Respondent (Logothetis): Hugh R. Latimer

No one appeared for the Defendants Quassa.

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Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

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