Action No.: 1001-02216

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITOR ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF DARIAN RESOURCES LTD.

AND IN THE MATTER OF BOWVIEW PETROLEUM INC.

BRIEF OF LAW AND ARGUMENT OF

SJ CAPITAL CORP., S.P.L.H. INVESTMENTS LTD., JULMAR HOLDINGS LTD. and SHAWANA ESTATES LTD.

(Redeeming ATB Security)

February 18, 2010

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I. INTRODUCTION

1. This brief is provided in support of a motion by SJ Capital Corp., S.P.L.H. Investments Ltd., Julmar Holdings Ltd. And Shawana Estates Ltd. (collectively, "SFG") for an order directing the Alberta Treasury Branches ("ATB") to assign their debt and security to SFG.

II. FACTS

2. On September 28, 2009, SFG entered into a lending arrangement with Darian Resources Ltd. ("Darian"), whereby SFG provided two credit facilities to Darian in the form of (i) a $15,000,000 operating line of credit, and (ii) four convertible debentures, in an aggregate total of $25,000,000 (the "SFG Agreement").

Affidavit of Gary W. Goetsch, filed February 17, 2010 at paras. 2-3.

3. Concurrent with the completion of the SFG Agreement, Darian entered into lending arrangements with ATB and KYAL Energy Inc. ("KYAL"). The ATB lending arrangement provided Darian with an operating loan facility in the amount of $12,500,000.00 (the "ATB Agreement") which amount (the "ATB Indebtedness") was secured by various forms of security granted by Darian to ATB giving ATB a security interest in Darian's real and personal property (the "ATB Security").

Affidavit of Gary W. Goetsch, filed February 17, 2010 at para. 5.

4. The priorities in respect of the total Darian indebtedness to, and security interests of, SFG, ATB and KYAL (collectively the "Lenders") are governed by an Interlender Agreement dated September 29, 2008 (the "Interlender Agreement"). The Interlender Agreement provides the Lenders, among other things, with the right to pay out the obligations of Darian owing to another Lender and thereby take an assignment of that Lender's indebtedness and security.

Affidavit of Gary W. Goetsch, filed February 17, 2010 at para. 6.

5. On or about February 10, 2010, SFG informed ATB that it intended to redeem the total indebtedness owing by Darian to ATB and take an assignment of the ATB Indebtedness

and ATB Security. ATB informed SFG that it was considering this internally, and would respond accordingly. SFG did not receive any further information from ATB.

Affidavit of Gary W. Goetsch, filed February 17, 2010 at para. 7.

6. On or about February 12, 2010, ATB, through its counsel, served a demand for repayment in respect of the ATB Indebtedness and issued a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (Canada).

Affidavit of Gary W. Goetsch, filed February 17, 2010 at para. 8.

7. On or about February 16, 2010, SFG, through its counsel, advised ATB and re-affirmed its position that SGF has elected to exercise its rights and acquire the ATB Indebtedness and ATB Security pursuant to the Interlender Agreement.

Affidavit of Gary W. Goetsch, filed February 17, 2010 at para. 9.

8. ATB has refused, neglected and failed and continues to refuse neglect and fail to perform their obligations pursuant to the Interlender Agreement, in particular, to allow SFG to payout the ATB Indebtedness and take an assignment of the ATB Indebtedness and ATB Security.

III. ISSUE

9. Can SFG redeem the ATB Indebtedness and obtain an assignment of the ATB Indebtedness and ATB Security pursuant to the Interlender Agreement?

10. Is an assignment of the ATB Indebtedness and ATB Security pursuant to the Interlender Agreement stayed under the Initial Order granted in the within proceedings?

IV. LAW AND ARGUMENT

A. SFG has the right, both in law and equity, to redeem the ATB Indebtedness and obtain an assignment of the ATB Indebtedness and ATB Security

11. SFG has a legal and equitable right to redeem the ATB Indebtedness and there is a corresponding obligation on the part of ATB to assign the ATB Indebtedness and ATB Security to SFG. ATB has no defence.

1. SFG has a legal right to an assignment of the ATB Indebtedness and ATB Security

12. Legal redemption exists as a right contained within the contractual arrangements of the parties. As demonstrated below, SFG has the contractual right to pay off the ATB Indebtedness thereby affording SFG with the right of legal redemption.

Walter M. Traub, *Falconbridge on Mortgages*, loose-leaf (Ontario: Canada Law Book, 2003-) at 29-1 [Falconbridge]. [TAB 1]

13. Section 5.3 of the Interlender Agreement gives the right to any of the Lenders, at any time during the currency of the Interlender Agreement, to payout the obligations of Darian owing to another Lender and thereby take an assignment of that Lender's indebtedness and security granted to them by Darian (the "Payout Right"). Section 5.3 provides that:

> 5.3 **Assignment to Secured Party.** Subject to the respective provisions of the ATB Credit Agreement, the SFG Credit Agreement and the KYAL Credit Agreement, a Secured Party may at any time during the currency of this Agreement pay out the Borrower's Obligations to another Secured Party, and take an assignment of the other Secured Party's security, on the basis that no representations and warranties are given except that such other Secured Party has not assigned or encumbered its indebtedness and security to any other person. (Emphasis added.)

Exhibit "J" to the Affidavit of Gary W. Goetsch, filed February 17, 2010.

14. SFG has elected to exercise the Payout Right under the Interlender Agreement to redeem the ATB Indebtedness. The Payout Right is not subject to any form of notice to or consent on the part of any of the Lenders or Darian. Therefore, upon ATB's receipt of payment of the obligations owed by Darian to ATB, ATB is obligated under the Interlender Agreement to assign the ATB Indebtedness and ATB Security to SFG.

2. SFG has an equitable right to redeem the ATB Indebtedness and take an assignment of the ATB Indebtedness and ATB Security

15. Historically, redemption was created to allow a mortgagor to obtain possession and enjoyment of real property when the mortgagor had lost possession, usually to a mortgagee through a default under a mortgage. The evolution of this remedy expanded

the right to redeem and made it available on an equitable basis to any person who has a subsequent interest in the equity of the real property.

Falconbridge at 29-1. [TAB 1]

16. Equitable redemption is founded in the equitable right to "relief against forfeiture". Equitable redemption is an inherent term to every mortgage, and the mortgagor cannot waive this right as it exists in equity.

Falconbridge at 29-1 – 29-2. [TAB 1]

17. The general rule is that a mortgagor is not entitled to redeem before the day fixed in the mortgage contract for payment of the principal, except when the mortgagee chooses to enforce its security; then the right to redeem will be triggered. In *Bank of Montreal v. Sam Richman Investments (London) Ltd.*, the Ontario Supreme Court outlined that where the mortgagee has taken steps to recover payment, he is bound to accept a pay out of its mortgage.

> Secondly, there is the equitable right of redemption which relieves the mortgagor from the rigours of the mortgage terms. In considering this doctrine, I start from this undisputed proposition: "As a general rule a mortgagor is not entitled to redeem before the day fixed in the mortgage contract unless the mortgagee has demanded payment of his mortgage debt, or has taken steps to compel payment of it by taking possession or otherwise" (see 21 Hals., 1st ed., p. 147, para. 283, citing *Bovill v. Endle*, [1896] 1 Ch. 648, and repeated with approval by the learned author of Falconbridge, *Law of Mortgages of Land*, 3rd ed. (1942), p. 509). The result of this is that a mortgagee who has taken steps to recover payment by taking possession or otherwise is bound to accept in satisfaction of his security his principal costs with interest up to the time of payment though made within the closed period; to this he is bound by reason of his having commenced proceedings to enforce payment. (*Emphasis added*)

***Bank of Montreal v. Sam Richman Investments (London) Ltd.* (1973), 45 D.L.R. (3d) 24 (Ont. S.C.J.) at para. 16. [TAB 2]**

18. Though these general rules are applicable to mortgages, in *Re Shire International Real Estate Investments Ltd.*, a recent Alberta CCAA proceeding, this Court allowed a pre-existing secured creditor to redeem a DIP facility and acquire the accompanying Court-ordered DIP charge.

Transcript of Proceedings dated January 11, 2010, Re *Shire International Real Estate Investments Ltd.*, Action No.: 0901-11866. [TAB 3]

19. ATB has demanded repayment of the ATB Indebtedness and has served a Notice of Intention to Enforce Security on Darian. SFG respectfully submits that this triggers the equitable right to redeem. As outlined in *Bank of Montreal v. Sam Richman Investments (London) Ltd*, ATB is now bound to accept payment of the outstanding amount owed and interest up to the time paid as a result of ATB's demand.

20. Further, SFG is given the same rights by s. 73(2) of the *Law of Property Act* (Alberta) which states:

> When a person
>
> (a) becomes entitled or obligated to pay off the balance owing on a mortgage, and
>
> (b) pays to the mortgagee the balance owing on the mortgage,
>
> the mortgagee on receiving the payment, instead of giving a discharge, is bound on the request of the person who made the payment to transfer the mortgage as the person who made the payment directs.

***Law of Property Act*, R.S.A. 2000, c. L-7, s. 73(2). [TAB 4]**

21. Section 73(2) of the *Law of Property Act* (Alberta) codifies the right for an entitled party to redeem (as set out above) and have the mortgage transferred to the redeeming party.

Francis C.R. Price and Marguerite Trussler, *Mortgage Actions in Alberta* (Calgary: Carswell Legal Publications Western Division, 1985) at 186 and 392. [TAB 5]

***565075 Alberta Ltd. v. Community Development Corp.*, 1994 CarswellAlta 886. [TAB 6]**

B. The Stay of Proceedings is inapplicable to the pay out and assignment

22. SFG respectfully submits that the stay of proceedings as set out in the Initial Order does not affect this application, and no order lifting the stay is required as:

(a) SFG is not seeking to execute any right or take any proceeding against Darian or its property;

(b) the proposed assignment is as a consequence of rights afforded to SFG against ATB pursuant to the Interlender Agreement, at law and equity;

(c) Darian has no right or ability pursuant to the Interlender Agreement to prevent an assignment; and

(d) the assignment will not alter any of the rights of Darian under the current ATB Agreement, the ATB Security or the Interlender Agreement.

23. In the alternative, if the stay of proceedings prevents this application, SFG respectfully submits the stay of proceedings should be lifted for the reasons set out above.

V. CONCLUSION

24. It is respectfully submitted that SFG has the right to require ATB to accept the payout of ATB Indebtedness from SFG, and the right to compel the assignment of the ATB Indebtedness and ATB Security pursuant to the Interlender Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FRASER MILNER CASGRAIN LLP, Solicitors for the SJ Capital Corp., S.P.L.H. Investments Ltd., Julmar Holdings Ltd. and Shawana Estates Ltd.

Per: ________________________
David LeGeyt

LIST OF AUTHORITIES

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1	Walter M. Traub, *Falconbridge on Mortgages*, loose-leaf (Ontario: Canada Law Book, 2003-) at 29-1 [Falconbridge].
2	*Bank of Montreal v. Sam Richman Investments (London) Ltd.* (1973), 45 D.L.R. (3d) 24 (Ont. S.C.J.) at para. 16.
3	Transcript of Proceedings dated January 11, 2010, Re *Shire International Real Estate Investments Ltd.*, Action No.: 0901-11866.
4	*Law of Property Act*, R.S.A. 2000, c. L-7, s. 73(2).
5	Francis C.R. Price and Marguerite Trussler, *Mortgage Actions in Alberta* (Calgary: Carswell Legal Publications Western Division, 1985) at 186 and 392.
6	*565075 Alberta Ltd. v. Community Development Corp.*, 1994 CarswellAlta 886.

TAB 1

Falconbridge on Mortgages

Fifth Edition

Walter M. Traub, B.A., LL.B., LL.M.
Editor-in-Chief

Canada Law Book
A Division of The Cartwright Group
240 Edward Street, Aurora, Ontario, L4G 3S9
www.canadalawbook.ca

May 2009

Chapter 29

ACTION FOR REDEMPTION*

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§29:10 The Right to Redeem and the Effect

The right to redeem is available to all persons who have a legal interest in the equity of a real property, which has been secured to a mortgagee. Redemption is the right of parties entitled to such interest to obtain possession and enjoyment of real property and is a remedy which is available to a mortgagor, or other person, only when that person is out of possession. This means redemption is available only when the mortgagee is in actual or constructive possession of the real property.

When, by default in payment, according to the terms of a mortgage, the mortgagor has forfeited the legal or contractual right to redeem, the mortgagor still has in equity an equitable right to redeem his or her interest in the real property upon payment of the mortgage debt, which right is commonly known as the "equity of redemption". This equitable right to redeem is an inherent term of every mortgage, which the mortgagor cannot waive or relinquish by any agreement made at the time of, and as part of, the mortgage transaction.[1] This right may, however, be forfeited or terminated in various ways subsequent to the granting of the mortgage.[2]

There is *obiter dicta* to the effect that an equity of redemption constitutes an equitable "estate" in the mortgaged land which constitutes, in equity, an absolute right to redeem subject only to a bar arising on equitable grounds, or by virtue of the passage of the limitation period. This right is one over which the courts have no discretionary power. It is, however, only in an equitable sense that the equity of

* This chapter has been prepared with the assistance of Alison R. Manzer whose contribution is hereby gratefully acknowledged. We also acknowledge with thanks the assistance of William McCullough in revising and updating the within chapter.

[1] See §3:20.

[2] See §3.9 of the earlier edition of this text, W.B. Rayner and R.H. McLaren, eds., *Falconbridge on Mortgages*, 4th ed. (Agincourt: Canada Law Book, 1977).

redemption constitutes an estate in real property. This estate is different from a legal estate in the real property, and as a result there are some differences in its enforcement.[3]

The equitable right to redeem can be only exercised on equitable terms,[4] and therefore might not be enforced if the granting of it would be inequitable. The courts, in applying the maxim "he who seeks equity must do equity", may impose conditions precedent to the enforcement of a claim for equitable relief[5] or, in applying the maxim "he who comes into equity must come with clean hands", may consider all the circumstances in order to decide whether it is equitable to grant the relief at all.[6] By contrast, if a person asserts a legal right, rather than an equitable right, a court cannot refuse to give effect to the legal right, and cannot impose terms on the granting of the legal relief.[7]

The basis on which the equity of redemption is founded is the equitable right to "relief against forfeiture". However, the equity may not be allowed where the mortgagee has not been guilty of misconduct and, where based on the dealings of the parties, the redemption would work injustice against the mortgagee.[8]

Redemption can be barred by a statute of limitations, and also may be refused on the ground of laches or staleness of demand, even if the claim is not barred by any statute of limitation.[9] The statutes of limitation, in all Canadian common law provinces, recognize the continued application of equitable principles, including laches, in all circumstances.

In *Re Leslie*[10] a mortgagor neglected for 21 years to prosecute a decree for redemption against a mortgagee in possession. Owing to the commencement and continuation of an action for redemption, the right to redeem was not barred by any statute of limitation. A purchaser from the mortgagee was held entitled to an absolute certificate of title under the *Quieting Titles Act* eliminating the right to redeem, as a consequence of the court barring the right to redeem based on laches.

The statute of limitations allows an action for redemption to be brought only within the statutorily specified periods of time. The limitation period for redemption will generally commence from the time of the act which results in possession by the mortgagee. The statutory period of limitation for commencing an action for recovery of possession of land applies if no other time period is specified under the terms of the mortgage, or dictated by statute directly applicable to redemption. A

[3] *Ibid.*, §3.8.

[4] See, *e.g.*, the doctrine of consolidation of mortgages in Chapter 9.

[5] *Camp-Wee-Gee-Wa for Boys Ltd. v. Clark* (1971), 23 D.L.R. (3d) 158 (Ont. H.C.J.).

[6] *Yorkshire Railway Wagon Co. v. Maclure* (1881), 19 Ch. D. 478, at p. 484; *Re Maddever; Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523 (C.A.); *Blake v. Gale* (1886), 32 Ch. D. 571 (C.A.).

[7] If tender of the mortgage debt, with interest and costs, is made by the mortgagor to the mortgagee on the day fixed for repayment, and the tender is refused, and in consequence the mortgagor sues for redemption, the redemption asked for is not equitable but legal relief. The giving of the relief in that case will not be subject to equitable principles: J.A. Strahan, *Law of Mortgages*, 2nd ed., pp. 137-8.

[8] *Skae v. Chapman* (1874), 21 Gr. 534. As to laches and acquiescence, see also Chapter 30.

[9] *Martin v. Miles* (1883), 5 O.R. 404 (Ch. Div.), at p. 416. The broad proposition stated in this case was not necessary to the decision, which was simply that a tenant under a lease made by the mortgagor after he had mortgaged the lands was a necessary party to a foreclosure action as being a person interested in the equity of redemption. Without reference to this case, the Supreme Court of Canada, in a peculiar set of facts where an agreement, in the form of an agreement for sale of land, was treated as a mortgage, appears to have affirmed the proposition set out in the text: see *Fleming v. Watts*, [1944] 4 D.L.R. 353 (S.C.C.).

[10] (1893), 23 O.R. 143 (Ch. D.); *cf.*, *Eaton v. Dorland* (1893), 15 P.R. 138.

TAB 2

C
1973 CarswellOnt 381

Bank of Montreal v. Sam Richman Investments (London) Ltd.

Re Bank of Montreal and Sam Richman Investments (London) Ltd.

Ontario Supreme Court

Pennell, J.

Judgment: August 31, 1973
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Counsel: *A.B. Cameron*, for applicant.

J.S.M. Mitchell, for respondent.

Subject: Corporate and Commercial

Mortgages --- Interest.

Closed mortgage — Redemption — Whether mortgagee allowed interest to date of maturity.

The mortgagee had started foreclosure proceedings on a closed mortgage. The issue was whether the mortgagor had to pay the interest to the date of tender which fell within the closed period or pay interest to the date of maturity of the mortgage. Held, the mortgagee should accept the principal, costs to date, and interest to the date of tender. He was not entitled to demand the interest after the date of payment until the end of the closed period as set out in the mortgage.

***Pennell, J.*:**

1 This motion is brought pursuant to the provisions of Rules 611 and 612 and, therefore, upon the basis that there are no material facts or inferences from such facts in dispute. This aspect of the matter is subject to an observation which I shall find necessary to set out hereafter.

2 It is needful at the outset to state in outline the facts, as I understand them, in order that the legal problem before me may be illustrated.

3 Sybil Mortin Lyon West (hereinafter referred to as the mortgagor) was the owner of a parcel of residential property municipally known as 1376 Erindale Crescent in the City of London. At all material times prior to December 8, 1970, the property was subject to the following mortgages:

1. A first mortgage to the Bank of Nova Scotia on which the balance owing as of December 8, 1970, was $13,184.61;

2. a second mortgage to Sam Richman Investments (London) Limited (hereinafter called Richman) which by its terms was closed to November 25, 1971, and

3. a third mortgage to the Bank of Montreal (hereinafter called the bank) on which the balance owing as of December 8, 1970, was $11,544.68.

4 Prior to November 6, 1970, the mortgagor defaulted on payments under the first mortgage to the Bank of Nova Scotia and these arrears were paid by Richman.

5 On or about October 29, 1970, Richman advised the first mortgagee, the mortgagor and the bank that it would commence foreclosure proceedings based on the default under the first mortgage.

6 On November 6, 1970, Richman issued a writ of foreclosure against the mortgagor in which Richman claimed the sum of $5,701.39 for principal as of November 6, 1970, and the sum of $596 for arrears under the first mortgage paid by Richman.

7 Three days later, on November 9, 1970, the mortgagor accepted an offer of purchase and sale on the property from one Jeffrey, a condition of the offer being that the mortgagor would "discharge the existing second mortgage at his expense".

8 Two days later, on November 11, 1970, the writ of foreclosure was served on the mortgagor. Subsequently, the solicitor for the mortgagor contacted the solicitor for Richman requesting a statement with regard to the amount payable to discharge the second mortgage. In consequence of that request, Richman received payment in the amount of $7,501.94 which included interest on the mortgage up to November 25, 1971, being the date to which the mortgage was closed by virtue of a clause in the mortgage and to which further reference will be necessary.

9 On December 8, 1970, the sale of Jeffrey was completed. On closing, the first mortgage was assumed. There were sufficient proceeds of the sale to redeem the Richman mortgage for principal, interest and costs, but the remaining balance was not sufficient to fully redeem the bank's third mortgage.

10 A dispute arose between Richman and the bank as to the distribution of the proceeds of the sale, and, as no agreement could be arrived at, this motion was brought under Rules 611 and 612.

11 At the root of the problem is the contractual provision relied upon by Richman in the mortgage referred to in the writ of foreclosure. That provision reads as follows:

> Provided the mortgagor, when not in default, shall have the privilege, after November 25th, 1971, of paying any additional amount on account of principal at any time, without notice or bonus, and provided that if the whole balance is paid, interest is payable only to the date of such payment.

12 All that is in issue in this proceeding, the ultimate fact to be determined, is whether the amount necessary to redeem the Richman mortgage as of December 8, 1970, includes an allowance for interest from the date of the redemption to the end of the closed period, namely, from December 8, 1970, to November 25, 1971. Interest for this period amounts to $946.06 and is held in trust by agreement pending the disposition of the motion.

13 The controversy is the old one between freedom of contract and the application of equitable rules. Equity follows the law but not always because it is the office of equity to minister the dispensing power of the spirit of the law to relieve against the letter.

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14 I endeavour now to express my diffident understanding of equitable rules affecting interest payable on redemption of mortgage securities.

15 Redemption is inherent in the very nature of a mortgage. So much sanctity is attached to the right of redemption that the right is preserved in two fundamentally different situations. First, there is the contractual right of redemption in the mortgage itself. Subject to a case of foreclosure which still requires consideration it has always been the rule that the mortgagor, as a condition of obtaining redemption, must discharge all the principal and all the interest payable in accordance with the terms of the mortgage.

16 Secondly, there is the equitable right of redemption which relieves the mortgagor from the rigours of the mortgage terms. In considering this doctrine, I start from this undisputed proposition: "As a general rule a mortgagor is not entitled to redeem before the day fixed in the mortgage contract unless the mortgagee has demanded payment of his mortgage debt, or has taken steps to compel payment of it by taking possession or otherwise" (see 21 Hals., 1st ed., p. 147, para. 283, citing *Bovill v. Endle*, [1896] 1 Ch. 648, and repeated with approval by the learned author of Falconbridge, *Law of Mortgages of Land*, 3rd ed. (1942), p. 509). The result of this is that a mortgagee who has taken steps to recover payment by taking possession or otherwise is bound to accept in satisfaction of his security his principal costs with interest up to the time of payment though made within the closed period; to this he is bound by reason of his having commenced proceedings to enforce payment.

17 The argument is pressed that, assuming Richman had not issued the writ of forclosure, it (Richman) could not have been compelled to provide the mortgagor with a discharge of the second mortgage in order that the mortgagor could sell the property in accordance with the terms of the offer of purchase and sale entered into and concluded on December 8, 1970. But it is not unimportant to look at the facts and the facts of this situation, as I understand them, are that Richman did commence proceedings to recover payment, and that Richman was not a party to the offer of purchase and sale. I think that the offer of purchase and sale did not do away with the effect of Richman having taken proceedings which amounted to a demand for payment, and it is bound to accept in satisfaction of its security principal and costs with interest up to the time of payment; to this it is bound by its having commenced proceedings to enforce payment. In these circumstances, equity exacts an acceptance of tender; the tender was made, and interest ceased to run upon the mortgage debt from the time at which a tender of the whole amount was made, namely, on December 8, 1970.

18 For these reasons I would order that the amount required to redeem the Richman mortgage is $6,555.88, divided as follows:

For principal and interest to December 8, 1970	$5,798.45
For payments to first mortgage	596.00
For costs	161.43
	$6,555.88

19 It remains to make an observation on the facts of the case. As I have already stated, the motion was entertained on the basis that there are no material facts in dispute. On that, counsel, who approved at the bar on behalf of the applicant and respondent respectively, were agreed. The opinion of the Court, of course, is founded on what it understands to be the agreed facts. I mean no disrespect to counsel but I am bound to notice in the respective briefs submissions that appear to some slight extent to be qualified by a view of the facts not quite in harmony.

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20 For illustrative purposes, I refer to the rival contentions that are centred around the amount claimed in the writ of foreclosure. The applicant argues that the respondent should not be allowed to receive a sum greater than that requested in the writ. On the other side, the respondent says that an amendment would have been sought had the matter proceeded to foreclosure. I express no view, one way or the other, as to whether the respondent would have been entitled to an amendment. For my part, I think that a determination can be made without consideration of the matter of the amount set out in the writ and accordingly, I excluded it from my mind.

21 I am anxious that the range of my decision will not be misapprehended. I found myself on the facts manifest in the reasons for judgment and which I assume to have been agreed upon.

22 If counsel do not take the same view of the facts I suspect that the matter will be spoken to. My order is limited accordingly.

END OF DOCUMENT

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TAB 3

Action No.: 0901-11866
E-File No.: CVQ10SHIRE1
Appeal No.: ____________________

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c C-36, AS AMENDED

AND IN THE MATTER OF SHIRE INTERNATIONAL
REAL ESTATE INVESTMENTS LTD.,
SHIRE CAPITAL LTD., HALAMA GARDENS LLC,
SHIRE ASSET MANAGEMENT LTD.,
WINN RIVER RESORT LTD., FORT MCMONEY
PROPERTIES II LTD., HALAMA GARDENS LTD.,
MAPLES AND WHITE SANDS INVESTMENT LTD.,
FORT MCMONEY PROPERTIES LTD.,
CHEMAINUS PROPERTIES LTD., SKAHA LAKE
DEVELOPMENT LTD., TSEHUM HARBOUR LTD.,
BEARSPAW AT 144TH AVENUE LTD.,
BEARSPAW AT 114TH EQUITIES LTD.,
BEARSPAW AT 144TH BONDS INC.,
TSEHUM HARBOUR EQUITIES LTD.,
TSEHUM HARBOUR BONDS LTD.,
ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD.,
0675816 B.C. LTD., and BOSUN'S HOLDINGS LTD.

P R O C E E D I N G
(Reasons for Judgment)
EXCERPT

Calgary, Alberta
January 11, 2010

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta
2

3 January 11, 2010	Morning Session
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5 The Honourable Madam Justice Kent	Court of Queen's Bench of Alberta
6	
7 H. L. Williams (by telephone)	For Olympia Trust Company
8 J. I. McLean (by telephone)	For Investit Financial Inc.
9 D. McLellan (by telephone)	For D. Lofgren and other Investors
10 P. R. Leveque (by telephone)	For 1533021 Ontario Ltd.
11 T. A. Batty (by telephone)	For 1206354 Alberta Ltd.
12 S. F. Collins (by telephone)	For the Receiver/Monitor Ernst & Young
13 D. Mann (by telephone)	For Echo Merchant Fund
14 A. A. Frydenlund (by telephone)	For Romspen Mortgage Corporation
15 B. Richard (by telephone)	For Cody Stokes
16 R. Camplin	Court Clerk

17
18
19 **Reasons for Judgment**
20
21 THE COURT: We are in a courtroom, it is being recorded. I
22 have Mr. Leveque, Mr. Batty, Mr. Williams, Mr. McLellan, Mr. Mann and others,
23 Mr. Frydenlund, Mr. McLean, and Mr. Collins. Just stay silent if you -- if your response
24 would be no. Does anybody know if anyone else was planning to check in to this call?
25
26 All right. Then we can proceed. So the purpose of this is for me to give you my
27 judgment on the various applications that were heard last week and I will do that now.
28
29 Shire's CCAA status ended when I declined to extend the stay. DIP financing had been
30 ordered and had a first priority. The applications before me were, first, an application by
31 one of the secured creditors, Romspen, to substitute itself . . .
32
33 Hello? Who just checked in?
34
35 MR. RICHARD: Good morning, My Lady. It's Bern Richard
36 (phonetic) representing Cody Stokes. I'm calling from Ontario.
37
38 THE COURT: Okay. And Cody Stokes, don't recog -- can
39 you remind me? I don't recognize that name.
40
41 MR. RICHARD: I'm -- I represent the mortgagee on the

1 Winnipeg River property --
2
3 THE COURT: Ah.
4
5 MR. RICHARD: -- in northwestern Ontario.
6
7 THE COURT: Okay. Thank you. Okay. Mr. Richard, I just
8 started reading my judgment. I hadn't said more than one introductory sentence so I
9 won't repeat it.
10
11 MR. RICHARD: Thank you.
12
13 THE COURT: The applications that were before me were:
14
15 1. An application by one of the secured creditors, Romspen, to substitute itself for the
16 DIP lender, Echo, and further for an order permitting it to supervise the sale of certain
17 Shire assets which would then be used to pay out the DIP loan.
18
19 2. An application by the DIP lender to appoint a receiver with the goal of paying out
20 the DIP loan. That application had first been filed in late 2009. And, third, an
21 application by Investit discharging the receiver that is currently in place with the
22 possibility or alternate relief subordinating the receiver's charge to the existing secured
23 creditors -- or secured charges.
24
25 All of the secured creditors were in favour of the application to assign the DIP loan to
26 Romspen. The rationale for the assignment was to avoid continuing receivership costs
27 which would prime the secured lenders and also put into place a method to sell Shire
28 land to pay out the DIP loan without jeopardizing the security of the secured lenders.
29
30 Echo opposed the application citing several reasons. First, if there is no receiver to
31 oversee the disposition of Shire assets, the secureds, or at least Romspen, is in charge of
32 the process, including timing. The DIP loan has an attractive interest rate so that it
33 would be in Romspen's interest to move slowly in the sale of the Shire lands. Echo also
34 argued that if a secured could move into the position of a DIP lender, distress lenders
35 would see DIP financing as less desirable with the potential that the market for distress
36 loans would dry up.
37
38 Finally, Echo argued that the equities favoured it over Romspen. Counsel for some of
39 the bondholders supported Echo's position. He acknowledged that the receiver would
40 add a layer of costs which would ultimately be borne by decreasing the assets which
41 may be available to his clients. However, that consideration was overshadowed by a

1 concern that there would be no supervision of Romspen in the disposition of the lands in
2 a way that would ensure his client's interests were best served.
3
4 In my view, it is appropriate to grant Romspen's application but with some safeguards
5 in place to ensure that the bondholders and any other unsecured creditors' interests are
6 monitored. The reason for my decision is that with the safeguards in place there is no
7 need for there to be a receiver that primes the secured lenders. The process proposed by
8 Romspen will be less costly, which is a benefit to all of the creditors, secured and
9 unsecured.
10
11 Secondly, Echo received everything it was entitled to receive under the DIP loan. There
12 is no reason to favour Echo over a secured lender who has a real interest in minimizing
13 the costs of the process going forward.
14
15 The safeguards which I propose are two:
16
17 1. I understand that the current receiver is prepared to accept the appointment as
18 receiver but with his fees subordinate to the secureds. It seems to me that that has to be
19 done in any event and that him being there will provide a monitor to Romspen's
20 activities in selling the property.
21
22 2. I can and will order that Romspen report to the Court on a periodic basis with
23 respect to its efforts to obtain the best sale of the assets it wants to list to sale -- to sell.
24 The burden then is on Romspen, not the receiver, to provide the information with the
25 receiver acting as watchdog.
26
27 So, essentially, those are my reasons. So I'm granting, Mr. Frydenlund, your application
28 but with those provisos. I'm not sure your order has to be amended with respect to the
29 receivership issue but it does have to be amended with respect to a comeback date, at
30 which time I want you to report with respect to the efforts to sell.
31
32 MR. FRYDENLUND: Would that be a report, My Lady, in person or
33 by way of just simply filing a report with the Court and circulating it to the receiver and
34 the other parties?
35
36 THE COURT: Well, I sort of thought about both and decided
37 that I would leave it to this morning to hear from counsel. I guess my initial reaction is
38 just send me a report and -- but my concern with that is that obviously if someone,
39 particularly Mr. McLellan I guess, or the receiver, has issues with that, then we get into
40 some kind of paper battle about -- back and forth about that. So --
41

1 MR. FRYDENLUND: My Lady, if we furnish a periodic report and
2 it's incumbent upon us to apply to court to approve a sale in any event, if any of the
3 parties took issue with the steps that Romspen was taking, they could either
4 communicate that to us in writing or, alternatively, bring an interim application to the
5 Court. If Romspen did not take into account or do what was appropriate, then that
6 would obviously be something that would be brought up at the time to approve the sale.
7
8 THE COURT: All right. Well, I'll open that up to the floor
9 then. And if you could just identify yourself before you speak.
10
11 No -- nothing? Mr. Collins, do you have any problem with that process?
12
13 MR. COLLINS: No, that should be fine. I mean the form of
14 order that we have worked on with Investit last week contemplates essentially the
15 structure and it includes a discharge of the receiver from its current mandate with
16 approval of the receiver's activities up-to-date discharging that administration charge or
17 the receiver's charge as it existed in the current form of order. And then on a go
18 forward basis the receiver would be the receiver but not in occupation, possession,
19 management, or control of any of the property, receiving (INDISCERNIBLE)
20 represented (INDISCERNIBLE) applications for sale so presumably there will be an
21 action commenced on various securities and the receiver will respond to those as it's
22 deemed appropriate, would leave the receiver to take further advice and direction.
23
24 THE COURT: Okay. So, if Mr. Frydenlund submits a written
25 report of his activities within 'X' month, then we have to talk about that as well. Then
26 you'd get a copy of the report, as would counsel for other investors and Mr. McLellan,
27 and then I guess what would make most sense is a contact to my assistant to say, I want
28 a hearing about this because -- well, you don't even have to give your reasons to
29 Hillary, just, I want a hearing about this, if someone is concerned about what's going
30 on, because I do -- did take I think it was Mr. Mann's point that it's now in Romspen's
31 hands and I do think there has to be some measure of supervision, so requirement of
32 reports plus the fact that there's a receiver there I think will do that. So --
33
34 MR. COLLINS: I guess -- I'm sorry, My Lady. If -- I guess I
35 just thought -- maybe I'm not totally clear in terms of -- so just in terms of perhaps
36 Romspen (INDISCERNIBLE) but in terms of the way things would occur, if an offer
37 comes in on property 'X', you know, what happens?
38
39 THE COURT: Well, if an offer comes in on property 'X',
40 Mr. -- the -- it has to come back to the Court for approval and you would have to be
41 given notice of that application.

1
2 MR. COLLINS: In the role -- in a role of Ernst & Young as
3 receiver with (INDISCERNIBLE) in charge, is --
4
5 THE COURT: Sorry, I didn't -- I -- you --
6
7 MR. COLLINS: Sorry. The role of Ernst & Young is in . . .
8
9 THE COURT: What would -- what would Ernst & Young's
10 role be in that? Tell me, Mr. Collins, if you see it differently, but in coming to this
11 decision it would be that Ernst & Young would be an independent - I don't want to
12 use -- well, I'll use the word monitor, but I'm not -- monitor, small 'M' monitor -
13 independent role monitoring the process so that, if Mr. Frydenlund comes with an offer
14 to sell, he or indeed any counsel, and probably you'd be the one most likely to do it, I
15 guess, because you're at the bottom, say, Well, don't like that price, don't like those
16 terms, order him to get an appraisal, any one of those things.
17
18 MR. COLLINS: But Ernst & Young isn't filing a report of any
19 kind stating that, you know, that the price is 'X', it should have been, you know, could
20 be 'Y'. I don't want to get too much into it, you know, in terms of that.
21
22 THE COURT: Yeah. You --
23
24 MR. COLLINS: Of course I recognize it's your decision. I'm
25 just trying to make sure I understand.
26
27 THE COURT: Yeah. No, no, I understand. You cut out a bit
28 but I think your question was do I expect Ernst & Young to file a report that the price
29 should be different than the price that is being offered; correct? Is that your --
30
31 MR. COLLINS: Right. Yes.
32
33 THE COURT: Right. Well, I mean I contemplated that that --
34 whether they . . . The mechanism, in terms of whether they provide a report, I guess,
35 makes sense. I saw Ernst & Young as being, as I say, a small 'M' monitor over what
36 Romspen is doing. So do they file a report? I would -- I would ask Mr. Collins.
37
38 MR. COLLINS: Well, My Lady, I think -- I think Ernst &
39 Young can be a capital 'R' receiver, but a receiver in the sense of they're the party in
40 its representative capacity who deals with responding to offers.
41

1 THE COURT: Right.
2
3 MR. COLLINS: They're the party that receives any additional
4 proceeds above and beyond a valid secured charge, for -- for the time being, because
5 what will happen is that at a point in time the indebtedness under the DIP loan will be
6 retired and -- and then the various secured parties can continue to do that, which they're
7 entitled to do --
8
9 THE COURT: Right.
10
11 MR. COLLINS: -- but at that point, Ernst & Young will have
12 to continue to deal with the assets undertaking (INDISCERNIBLE)
13
14 THE COURT: Oh, I didn't hear -- I didn't hear that last part.
15
16 MR. COLLINS: It will continue to be a receiver of the
17 assets --
18
19 THE COURT: Right.
20
21 MR. COLLINS: -- and undertaking of the various entities.
22
23 THE COURT: And so if -- when Mr. Frydenlund comes to
24 court with an offer to sale -- for selling a piece of property, presumably the receiver
25 may have some comments on that; right?
26
27 MR. COLLINS: Correct. The receiver will analyze the -- the
28 sale materials and provide his position, as best he can, given -- given the scarcity of
29 work --
30
31 THE COURT: Right.
32
33 MR. COLLINS: -- but the receiver will -- will do that.
34
35 MR. FRYDENLUND: My Lady, it's -- it's Frydenlund. What I
36 would contemplate, perhaps, is that what Romspen would do would be to furnish the
37 receiver the listing information. Romspen would rely on what appraisal evidence might
38 be there, obtain some listing proposals from various realtors and then settle on a price
39 and give the receiver notice of what the properties are being marketed at. And if the
40 receiver or anyone else thought, no, that that's too low, then they could raise it at that
41 time. Then subsequently, as there's offers and counteroffers, that -- they would be

1 negotiated by Romspen, assuming no issue with the list price, then a contract would be
2 entered into. And in support -- evidence in support of approval of a sale would be the
3 listing history of the property, what offers and counteroffers had been received to date,
4 those terms of the offers and counteroffers, any other particular evidence, and that would
5 all be filed in an affidavit for court approval. Anyone could then step up at that time and
6 say, Well, we think it should have been exposed to the market longer, or, for example, if
7 they take issue with the listing price, they could take that issue from the get-go and say,
8 No, you're starting off too low, in which case then maybe the price should be a little bit
9 higher and start -- aim a little bit higher and then work your way down.
10
11 THE COURT: I think that makes sense. I mean that process
12 where the people who have an interest, and that would be the people represented on this
13 call, would be kept informed right from the beginning of listing and could challenge the
14 processes as Romspen -- as it goes forward.
15
16 MR. FRYDENLUND: Yes, My Lady. And that's true for all of the
17 secured creditors because, in the event that there is not sufficient equity in the
18 unencumbered lands and, of course, obviously --
19
20 THE COURT: Then they all have an interest. I agree.
21
22 MR. FRYDENLUND: All have an interest. So my suggestion is that
23 we are obliged to furnish particulars of the proposed list price of the properties and, if
24 anybody takes issue with it, then they can take issue with it, we can talk about it. If
25 necessary to come back to court for -- for directions, we could do that as well. But in
26 the meantime, it -- through that process. And the same process, I mean, the secured
27 creditor's going to be basically doing the same thing in any event.
28
29 THE COURT: Yes. And the only other thing,
30 Mr. Frydenlund, since -- I don't want this to just sort of -- I mean, people get busy and
31 this file isn't maybe top of mind, I don't want it to go on without a time when you
32 supply me with a report which then -- about marketing efforts, whatever. And I don't
33 know, quite frankly, what would be an appropriate amount of time. Is that three months?
34
35 MR. FRYDENLUND: Well, certainly within three months, but -- but
36 I would think a bit earlier, but certainly we should have something furnished within
37 three months would be --
38
39 THE COURT: All right. Does anybody else have any
40 thoughts on that time period? Is three months not enough -- not soon enough?
41

1 Three months would make it April the -- well, we'll call it the 12th, which is a Monday.
2 And that's subject -- and this should be in the order, Mr. Frydenlund, that that's -- that's
3 the formal report. I don't need to see the listing agreements and all the -- that you'll be
4 supplying to the -- to the counsel for all the creditors. But it should be in the order that
5 Romspen will supply that information on an ongoing basis of the listing and so on and
6 that in any event there'll be a report filed with me by the 12th of April.
7
8 MR. FRYDENLUND: Very well.
9
10 THE COURT: Now, so, Mr. Collins, so you're going to have
11 to redo that order that you --
12
13 MR. COLLINS: I think we need to marry -- oh, I'm sorry, My
14 Lady.
15
16 THE COURT: Yeah. Go ahead.
17
18 MR. COLLINS: (INDISCERNIBLE) forms of orders. There's
19 three forms of order that are presently out there for circulation. There's the Romspen
20 order, there is the Investit order with respect to the formula, and then there's
21 receivership access and I think counsel needs to work together to put those three
22 together in a form of order (INDISCERNIBLE)
23
24 THE COURT: All right. Well, then that makes sense. So if
25 you -- counsel work on that, assuming everybody approves it, fine. If not, we're going
26 to have to have a process where we get the order finalized.
27
28 MR. FRYDENLUND: My Lady, there's a couple of other issues that
29 relate to this. You'll recall on Friday Mr. Mann was to furnish a payout statement of the
30 DIP financing and he circulated that to everyone and I don't know if Your Ladyship's
31 seen it.
32
33 THE COURT: I haven't seen it.
34
35 MR. FRYDENLUND: It's -- the total amount is shown at
36 $1,829,290.43 as at I believe January 10th, yesterday, with a per diem of $1,141.64.
37 And in -- and as I pointed out on Friday, we'd like to see that blessed by the Court but I
38 point out that that includes legal fees estimated at $75,696.27. And again, the issue isn't
39 so much that Romspen takes with it, it's a question of, if that amount's paid, we don't
40 want somebody else to challenge it later or put some mechanism in place where we
41 can -- we don't overpay Echo.

1
2 THE COURT: All right. Well, now, did you warn your
3 friends that you're going to raise this issue about -- today, because --
4
5 MR. FRYDENLUND: Well, the way that I drafted the motion, My
6 Lady, was that we -- they would give us a payout amount, we'd circulate it. If nobody
7 objected to it, then we'd pay that amount. If somebody objected to it, then we'd pay into
8 the court the difference. But --
9
10 THE COURT: Okay.
11
12 MR. FRYDENLUND: -- I think everybody's seen it. If everybody
13 nods their head and says, That's fine, then we simply pay it. There was a question of
14 having the costs assessed or tax, then -- then --
15
16 THE COURT: Yeah.
17
18 MR. FRYDENLUND: -- that can be dealt with as well. It's just that
19 it's cleaner if we can just write the cheque for a number that everybody that's on the
20 call is satisfied with.
21
22 THE COURT: All right. Well, again, don't speak if you are
23 satisfied with those numbers. Does anyone have an issue with respect to the numbers?
24
25 MR. WILLIAMS: My Lady, it's Lance Williams for the
26 Olympia Trust Company. I don't necessarily take an issue but I don't think I've seen it.
27
28 THE COURT: Oh. So that's a problem. If you haven't seen
29 it, you can't tell.
30
31 MR. WILLIAMS: And I can't tell you one way or the other.
32
33 THE COURT: All right. Well, then, Mr. Frydenlund, that
34 number is going to have to be circulated to everybody and I guess this all should be
35 done reasonably quickly because you want to pay out that loan, right, pay it out --
36
37 MR. FRYDENLUND: Right. And what we contemplated in the order
38 is that, if there's no objection, then we'll pay the amount. If no injunction within 48
39 hours, we'll pay the amount.
40
41 THE COURT: Okay.

1
2 MR. FRYDENLUND: And if there is an objection, then we'll have
3 somebody hold in trust the difference or pay it into court.
4
5 THE COURT: Okay. Well, what about doing this. Can you
6 ensure that today everybody gets a copy of that and that they have 48 hours from today,
7 from --
8
9 MR. MANN: Sorry, My Lady, it's David Mann. We
10 thought we'd circulated to everybody on the list. Our apologies for missing somebody.
11 We're rectifying that electronically right now.
12
13 THE COURT: Okay.
14
15 MR. MANN: And they'll all have that information
16 immediately, I think.
17
18 MR. FRYDENLUND: Well, then let's leave it at then, perhaps, My
19 Lady, that if they do not object within 48 hours to my attention or Mr. Mann's
20 attention --
21
22 THE COURT: Yes.
23
24 MR. FRYDENLUND: -- then we (INDISCERNIBLE) amount.
25
26 THE COURT: Okay. So --
27
28 MR. WILLIAMS: My Lady, it's Lance Williams. I'd be fine
29 with that.
30
31 THE COURT: Okay. So noon on Wednesday will be 48
32 hours.
33
34 MR. FRYDENLUND: The other -- the other issue that was raised,
35 and it was in our motion, I just want to point out that we asked for an interest cutoff as
36 at December 31st simply because we didn't get a payout statement. I assume that that
37 will pay interest right until --
38
39 THE COURT: You pay --
40
41 MR. FRYDENLUND: -- whenever the money's paid, presumably

1 Wednesday.
2
3 THE COURT: Yeah.
4
5 MR. FRYDENLUND: But we also did ask for costs as against Echo
6 because -- and we -- we -- I don't know if Your Ladyship has addressed that.
7
8 THE COURT: I saw that in your motion and I didn't address
9 it. What do you have to say about costs, Mr. Frydenlund?
10
11 **Submissions by Mr. Frydenlund (Costs)**
12
13 MR. FRYDENLUND: Well, we -- we asked repeatedly for a payout.
14 We didn't get the payout. Obviously we attended on Friday, occasioned by the
15 requirement to bring the motion. We would not have attended in Calgary and it's our
16 view that we ought to get the costs of the day. We could have simply done this by -- by
17 telephone conference or agreement to pay them out. They're the ones that are resisting
18 it. We were successful.
19
20 THE COURT: Mr. Mann?
21
22 **Submissions by Mr. Mann (Costs)**
23
24 MR. MANN: Well, My Lady, Echo held its indebtedness by
25 virtue of a court order. It wasn't at liberty to put it anywhere else until there was a court
26 order, which is what you've decreed today, so I don't think that we have done
27 anything -- I mean a court order was going to be necessary regardless of the outcome so
28 I would -- my submission would be that everyone's costs would simply fall under their
29 security.
30
31 **Ruling (Costs)**
32
33 THE COURT: Yeah. The reason I didn't address the issue of
34 costs in my judgment is because I am inclined to think that under the circumstances, this
35 has been -- this matter has been unusual in many respects, and this application was too.
36 I think everyone will bear their own costs on this. Okay.
37
38 MR. BATTY: My Lady --
39
40 THE COURT: So --
41

1 MR. BATTY: -- it's Trevor Batty. Just while we're on the
2 subject of costs and --
3
4 THE COURT: Yes.
5
6 MR. BATTY: -- it's fairly obvious, but I would just like
7 some direction as well and I'm assuming that Romspen is planning on claiming costs
8 relating to the sale in relation to the DIP loan, but I would just like some assurance that
9 those costs will be claimed in relation to the DIP loan and not in relation to the
10 mortgage that they hold over Bearspaw.
11
12 THE COURT: Mr. Frydenlund?
13
14 MR. FRYDENLUND: Well, yeah. The Romspen -- I mean
15 Mr. McLean brought the application to discharge the receiver on behalf of Investit. I
16 would think that Romspen would be claiming under the DIP loan.
17
18 THE COURT: Sorry, I --
19
20 MR. FRYDENLUND: I hadn't -- I had -- I hadn't really given it --
21 given it thought as to which would be appropriate, but --
22
23 THE COURT: Mr. Batty just --
24
25 MR. BATTY: I just (INDISCERNIBLE) I think the question
26 is the cost of selling unencumbered lands to pay the DIP loan, those will be added to the
27 DIP loan and not to the Bearspaw property.
28
29 THE COURT: Right.
30
31 MR. FRYDENLUND: That's right. Yeah, that would be -- that's
32 right, because -- because it seems to me that -- that Romspen's in the shoes of Echo and
33 that's what Echo (INDISCERNIBLE)
34
35 THE COURT: Right. Does that satisfy you, Mr. Batty?
36
37 MR. BATTY: It does. Thank you.
38
39 THE COURT: All right. Thank you.
40
41 MR. WILLIAMS: My Lady, one other quick thing. Lance

1 Williams. Just in relation to my submissions on Friday regarding Romspen having
2 conduct of sale over one property they called the unencumbered land, actually is
3 encumbered by the Olympia Trust Company mortgage.
4
5 THE COURT: Yes.
6
7 MR. WILLIAMS: And just confirming that the conduct of sale is
8 just a conduct of sale. Doesn't affect our priority, validity. All that will be determined
9 when the property's sold, but they're just getting conduct of sale.
10
11 THE COURT: Yes.
12
13 MR. WILLIAMS: Okay. I just wanted to confirm.
14
15 THE COURT: Yeah.
16
17 MR. FRYDENLUND: I mean of course we would be at liberty to
18 apply to determine that before the sale.
19
20 THE COURT: Apply --
21
22 MR. WILLIAMS: Right. Right. But -- but we're not determining
23 anything today. Basically just confirming that.
24
25 THE COURT: Right.
26
27 MR. FRYDENLUND: Romspen's (INDISCERNIBLE)
28
29 THE COURT: Sorry, the last person who spoke, I didn't hear
30 what you said.
31
32 MR. FRYDENLUND: Oh, it's Frydenlund. Just saying that
33 Romspen's position is consistent with that.
34
35 THE COURT: Okay. Thank you. Anything else?
36
37 Okay. So you'll draft an order and you'll have to send it up to me for signature because
38 it incorporates parts of things that weren't discussed today. If there's problems with
39 respect to the wording of the order, you'll have to organize a time to see me, through
40 my assistant. And if -- otherwise, I guess there'll be a first report. Next I will see is
41 sometime around April the 12th. Okay.

1
2 MR. FRYDENLUND: Thank you, My Lady.
3
4 THE COURT: All right.
5
6 MR. COLLINS: Thank you, My Lady.
7
8 THE COURT: Thank you.
9
10 MR. WILLIAMS: Thank you.
11
12 THE COURT CLERK: Order in court.
13
14 ---
15 PROCEEDINGS ADJOURNED UNTIL APRIL 12, 2010
16 ---
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1 **Certificate of Record**
2
3 I, Rhonda Camplin, certify that this recording is a record of the oral evidence of
4 proceedings in the Court of Queen's Bench court, held in courtroom 1103, at Calgary,
5 Alberta, 11th day of January, 2010, and I was the court official in charge of the
6 sound-recording machine.
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I, Lori Rosdal, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a true and faithful transcript of the contents of the record, and

(b) the certificate of record for these proceedings was included orally on the record and is transcribed in this transcript.

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Title Page Characters:	523
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TAB 4

Alberta Statutes
Law of Property Act
Part 8 — Miscellaneous
s 73. Transfer of mortgage

Alberta Current to Gazette Vol. 106:2 (January 30, 2010)

73. Transfer of mortgage

73(1) When a mortgagor becomes entitled to pay off the balance owing on the mortgage, the mortgagor may require the mortgagee on receiving payment, instead of giving a discharge, to transfer the mortgage to a third party and the mortgagee is bound to transfer the mortgage as the mortgagor directs.

73(2) When a person
(a) becomes entitled or obligated to pay off the balance owing on a mortgage, and
(b) pays to the mortgagee the balance owing on the mortgage,

the mortgagee on receiving the payment, instead of giving a discharge, is bound on the request of the person who made the payment to transfer the mortgage as the person who made the payment directs.

73(3) Any waiver or release of the rights, benefits or protection given by this section is against public policy and void.

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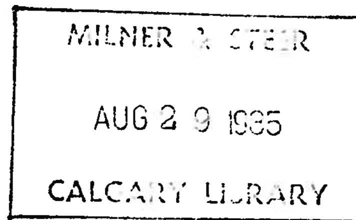
TAB 5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Mortgage Actions in Alberta

The Law and Practice in Actions
upon Mortgages and
Collateral Security and
Agreements for Sale of Land

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1985
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WESTERN DIVISION
CALGARY, ALBERTA

guarantee depends on the wording of the guarantee. Most guarantees by their wording take away any such rights and the surety cannot dictate to the creditor which remedy the creditor is to pursue. The mortgagee may proceed against the land, choosing to disregard the guarantor until after proceedings against the land have been completed. The only exception is where the mortgagee refuses to pursue any remedy and is in danger of losing his other remedies. In those instances, a surety can pay and is entitled to an assignment of the mortgage.[26]

Where a guarantor has made payments on the mortgage, he obtains thereby a charge on the mortgagor's interest in the land,[27] and obtains both a right of redemption[28] and the right to obtain an assignment of the mortgage.[29]

In terms of priority as to the right to redeem,the surety usually ranks next to the mortgagor, although the priority can be altered by the wording in the guarantee.[30]

3. INDIVIDUAL MORTGAGOR

Section 42 of the Law of Property Act reads:

42(1) The time to be fixed for redemption by the order nisi in an action for foreclosure of a mortgage and the time to be fixed for redemption by the order for specific performance in an action on an agreement for sale shall

(*a*) in the case of farm land be one year from the date of the granting of the order, and

(*b*) in the case of land other than farm land be 6 months from the date of the granting of the order.

(2) In an action coming under subsection (1), the Court on application may decrease or extend the period of redemption having regard to the following circumstances:

(*a*) when the action is in respect of a security on farm land,

(i) the ability of the debtor to pay,
(ii) the value of the land including the improvements made thereon,
(ii.1) whether the land has been abandoned,

26 *Royal Trust Co. Mtge. Corp. v. Nudnyk Hldg. Ltd., supra*, note 25, at 173.

27 *Gedye v. Matson, supra*, note 25, at 656; *Badger v. Megson, supra*, note 25, at 58. See further c. 24, *infra*.

28 *Green v. Wynn* (1869), L.R. 4 Ch. App. 204 (L.C.); *Forbes v. Jackson* (1882), 19 Ch. D. 615 (V.C.); *Standard Realty Co. v. Nicholson* (1911), 24 O.L.R. 46 (H.C.).

29 Law of Property Act, R.S.A. 1980, c. L-8, s. 64(2) [en. 1983, c. 97, s. 2]; *Standard Realty Co. v. Nicholson, supra*, note 28; *Merchants Bank v. McKay* (1888), 15 S.C.R. 672; *Rigney v. Vanzandt* (1856), 5 Gr. 494 (Ch.); *Traders Fin. Corp. Ltd. v. Ross*, [1943] 1 D.L.R. 49 (Ont. H.C.); *Douglas v. Young* (1912), 3 W.W.R. 523 (Sask. Q.B.); *Trust & Loan Co. v. Wurtele* (1905), 35 S.C.R. 663 at 677.

30 *Royal Trust Co. Mtge. Corp. v. Nudnyk Hldg. Ltd., supra*, note 25.

(d) Release of the Guarantor

(i) Payment of the Guaranteed Debt

Upon payment in full of the mortgage that has been guaranteed, the guarantor will be entitled to a discharge of his guarantee, and also a discharge or transfer of the mortgage as he may direct the mortgagee.[38] At law, unless he has expressly waived it, the guarantor has always had a right to the benefit of all securities held by the mortgagee upon payment of the debt guaranteed.[39]

Partial payment by the guarantor, for example, under a limited guarantee, presents an interesting problem. If the contract of guarantee clearly states that the guarantor has no rights to any of the security, unless and until the full debt owed by the mortgagor to the mortgagee is paid, then the problem does not arise. Equally, the proper construction of the guarantee may be that the guarantor is liable, to a limited amount, for the ultimate balance remaining after all money obtainable from other sources has been applied in reduction of the full mortgage debt.[40] By definition, there will be nothing left to share if, in fact, the guarantor is called upon to pay. However, the guarantee may make no provision, or may give the guarantor rights over the other security held by the mortgagee, upon payment of his limited, guaranteed amount. In these circumstances, upon payment of the full amount for which he is liable under the guarantee, the guarantor is entitled to a proportionate share in the security held by the mortgagee for the whole debt.[41] The guarantor will not obtain these rights until he has paid everything for which he is liable. Part payment is not sufficient.[42]

Where the guarantor has paid off the mortgage, or the portion of the debt guaranteed, the mortgagee becomes a trustee for the guarantor and must realize the assets on behalf of the guarantor as to his proportional share.[43]

---

38 Law of Property Act, R.S.A. 1980, c. L-8, s. 64(2)[en. 1983, c. 97, s. 2].

39 *Merchants Bank v. McKay* (1888), 15 S.C.R. 672; *Rigney v. Vanzandt* (1856), 5 Gr. 494 (Ch.); *Traders Fin. Corp. v. Ross*, [1943] 1 D.L.R. 49 (Ont. H.C.); *Douglas v. Young* (1912), 3 W.W.R. 523 (Sask. K.B.); *Trust & Loan Co. of Can. v. Wurtele* (1905), 35 S.C.R. 663 at 677. Moreover the right appears to be codified in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict.), c. 97, s. 5, which has been held to be good law in Alberta: *Griffith v. Wade* (1966), 60 D.L.R. (2d) 62 at 68 (Alta. A.D.).

40 *Hobson v. Bass* (1871), 6 Ch. App. 792 at 794 (L.C.).

41 *Merchants Bank of Can. v. McKay*, *supra*, note 39, at 680; *Snell's Principles of Equity* (1982), 28th ed., p. 468; *Goodwin v. Gray* (1874), 22 W.R. 312 (Rolls Ct.); *Thornton v. M'Kewan* (1862), 71 E.R. 230 (Ch.).

42 *C.I.B.C. v. Graham* (1982), 44 C.B.R. (N.S.) 145 (Ont. H.C.); *Gedye v. Matson* (1858), 53 E.R. 655 (Rolls Ct.); *Williams v. Owen* (1843), 60 E.R. 232 (Ch.); *Goddard v. Whyte* (1860), 2 Giff. 449 at 452 (V.C.); *Re Howe; Ex parte Brett* (1871), 6 Ch. App. 838 at 841 (C.A.).

43 *Rigney v. Vanzandt*, *supra*, note 39.

TAB 6

1994 CarswellAlta 886

565075 Alberta Ltd. v. Community Development Corp.

565075 Alberta Ltd., Plaintiff and Community Development Corporation, Whitemud Estates Corporation and Carrington Properties Ltd., Defendants

Alberta Master

Funduk Master

Judgment: June 22, 1994
Docket: Edmonton 9303-24984

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Counsel: *R.J. Cotter, Q.C.*, for Plaintiff.

R.W. Steen, for Carrington.

Subject: Corporate and Commercial; Property

Corporations --- Nature of corporation — Distinct existence — From related corporations.

Mortgages --- Redemption — When redemption available — General.

***M. Funduk, Master* in Chambers:**

1 This is an application by the Plaintiff for summary judgment in a foreclosure action.

2 At all relevant times Whitemud has been the registered owner of the land, being two lots. At all relevant times Whitemud has held the land in trust for Community.

3 In December 1986 Community and Whitemud gave a mortgage against a number of lots, including the two subject to this foreclosure action, to Alberta Treasury Branches to secure a loan of $3,500,000 and interest. The debt is due on demand.

4 In August 1989 an agreement was entered into between Whitemud and Carrington whereby Carrington was to purchase the two lots. The lots were of course at that time subject to the Treasury Branches mortgage. The agreement deals with that.

5 Carrington filed a caveat against the lots claiming an interest as purchaser under the agreement.

6 Carrington started a specific performance action against. Whitemud on August 10, 1990: Q.B. 9003 15298.

That action is defended and counterclaimed. Counsel for Carrington says that there have been partial discoveries in that action. In the meantime Carrington has the lots tied up with its caveats and certificate of lis pendens.

7 The Plaintiff was incorporated in May 1993. It has three beneficial shareholders. The three shareholders of the Plaintiff are also the shareholders of Community and Whitemud.

8 The Plaintiff paid the debt owing to the Treasury Branches and got the mortgage assigned to it on Whitemud's instructions to Treasury Branches: s. 64(1) Law of Property Act.

9 The Plaintiff then commenced this action which is the usual in rem/in personam foreclosure action. Although the pleading asks for a money judgment against all Defendants it is conceded that the Plaintiff does not have an in personam claim against Carrington.

10 Carrington is properly a party because it claims an interest in the lots which, if it exists, arose after the mortgage was granted. As this interest would be adversely affected by the foreclosure Carrington should be and is a party.

11 Community and Whitemud delivered a demand of notice. Carrington delivered a defence. Carrington admits many of the allegations in the Plaintiff's pleading. It then goes on to make limited denials as follows:

> 2. The Defendant Carrington Properties Ltd. denies that The Province of Alberta Treasury Branches transferred the said memorandum due to the Plaintiff and puts the Plaintiff to the strict proof thereof.
>
> 3. The Defendant Carrington Properties Ltd. denies that the Defendant Whitemud Estates Corporation is indebted to the Plaintiff in the sum of $1,162,430.00 as alleged in the within Statement of Claim and puts the Plaintiff to the strict proof thereof.
>
> 4. The Defendant Carrington Properties Ltd. denies that the Plaintiff is entitled to Judgment against it as claimed.

12 Based on the pleadings there is a very limited joinder of issues between the Plaintiff and Carrington.

13 As it turns out, there are no issues on the pleaded issues.

14 The uncontradicted evidence shows that the Treasury Branches was paid what was still owing to it, and that it transferred the mortgage to the Plaintiff. The uncontradicted evidence proves the amount that is still owing on the debt. So the issues raised in paras. 2 and 3 are without merit.

15 As to para. 4, it is conceded, as it must be, that the Plaintiff cannot have a cause of action against Carrington so there is no issue.

16 Very simply, there are no triable issues based on the pleadings.

17 Carrington's approach is to somehow hold off this action until and unless its action is first concluded.

18 Mr. Steen says that the transfer of the mortgage is a sham. I do not agree.

19 A sham is something that is a fiction. The debt that was owing to the Treasury Branches is not a fiction. The mortgage granted to it is not a fiction. The payment of the debt by the Plaintiff is not a fiction.

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20 I think that it can fairly be said that there is some jockeying going on.

21 The bottom line is that Carrington proposes that corporate boundaries should be ignored and that the Plaintiff, Community and Whitemud should be melted together because each has the same shareholders.

22 But that ignores the basic law that a shareholder and a company are separate persons in law: *National Bank of Canada v. Houle*, [1990] 3 S.C.R. 122; *Allarco Group v. Suncor Inc.*, 53 Alta. L.R. (2d) 107 (C.A.).

23 There have been fact situations where the corporate veil has been ignored. They are usually cases where the object of the exercise is to get at a shareholder hiding behind a corporate shield.

24 That is not the case before me. Carrington does not advance or even suggest that it has some kind of claim against the shareholders. Its claim in its action is against Whitemud only.

25 No authority is cited for a proposition that two or more corporations should be considered as one just because they have common shareholders.

26 Counsel for Carrington suggests that this is really a case where Whitemud is foreclosing on itself. But that argument is predicated on the Plaintiff and Whitemud being treated as one merely because they have the same shareholders. I am not prepared to so treat them.

27 What the Plaintiff has done and is doing is neither illegal or immoral. It paid the debt owing to Treasury Branches and got the mortgage transferred to itself. That is neither illegal or immoral. It may well be jockeying by the shareholders but jockeying to get legal advantages is not of itself reprehensible. Carrington is not somebody's sweet old white haired aunt ready to be taken advantage of.

28 *First National Mortgage Co. v. L.J.V. Holdings*, 66 Alta. L.R. (2d) 363 (C.A.) suggests that a mortgagor can require that the mortgage be transferred to himself instead of being discharged when he pays the debt. I need not address that obiter because that is not the fact before me. See also the discussion in *Farm Credit Corp. v. Nelson* , 102 D.L.R. (4th) 743 (Sask. Q.B.).

29 The bottom line is that Carrington wants to be in a better position because of what has happened than it would otherwise be in.

30 If Treasury Branches had not been paid and it was now foreclosing Carrington could not hold off this action until its action is concluded. It now seeks a better position because somebody else now owns the debt (chose in action) and the security for it.

31 *Farm Credit Corp.* points out that in a case like this the subsequent encumbrancer or subsequent interest holder still has all the rights it otherwise had, pp. 756-57:

> Once a right to redeem arises, s. 136 applies. It gives the person who "redeems" or pays out the mortgage, the election to request either a discharge or a transfer of it. Depending on the circumstances (such as whether an action can be brought on the personal covenant, whether one mortgagor is a guarantor, whether prior mortgages secure property in addition to that secured by subsequent mortgages, whether there are other types of encumbrances on the title, etc.) different consequences will follow from the election that is made.
>
> What is significant, however, is that the exercise of the election by the mortgagor cannot of itself prejudice

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or impair the security of others entitled as well to the right of redemption. A mortgagor may, in certain circumstances and by means of a transfer instead of a discharge, preclude subsequent encumbrancers from acquiring a benefit from the pay-out of the prior mortgage by the mortgagor. But this is a benefit that the subsequent encumbrancers would not otherwise acquire if they proceeded themselves to pay out the mortgage and take a discharge or transfer of it.

An example will illustrate this principle. If a mortgagor pays out and discharges the first mortgage, the priority of the second mortgage will be enhanced to that of a first mortgage. If the second mortgagee (who has now become the first mortgagee) then forecloses on the land, he will in effect have acquired a benefit from the enhancement that he would not have received had he instead paid out the first mortgage.

If on the other hand the mortgagor, through a nominee, takes a transfer of the first mortgage, he will preserve the first mortgage and secure to himself through his nominee the funds used to pay out that mortgage. No benefit will pass to the second mortgagee in that the status of his mortgage is not elevated to that of a first mortgage. This option is attractive to a mortgagor if there is little equity in the land, or if he is a guarantor of a co-mortgagor.

The nominee of a mortgagor who takes a transfer of the first mortgage acquires, under s. 145, the rights to continue on with the foreclosure action. If he discontinues the action, that is the end of the matter. But if he proceeds with the foreclosure of the mortgage he has acquired, surely the court would provide any subsequent mortgagees and encumbrancers, who had attempted to redeem previously, with a further opportunity to redeem. This would enable them to protect their security by redeeming the prior mortgage. If a subsequent mortgagee did redeem, it is unlikely that the court would entertain another application by the mortgagor to again redeem the first mortgage. He previously had been given his remedy and then subsequently chose, through his nominee, to carry on with the action to foreclose off the subsequent encumbrances. If he was again permitted to redeem, a perpetual series of redemptions could ensue. As stated in *Juby v. Birch* (1963), 38 D.L.R. (2d) 328 at p. 332 (Man. Q.B.), the court should not be used to aid fruitless circuity.

32 S. 136 is comparable to s. 64 Law of Property Act.

33 A subsequent encumbrancer or a subsequent interest holder has a right, if a foreclosure action is started, to pay the mortgagee and get the mortgage transferred to him. That was so in equity and that is now a statutory right: s. 64(2).

34 Mr. Cotter concedes that Carrington can redeem.

35 The problem here is that Carrington wants to hold off its decision on whether to redeem until after its lawsuit is concluded. That is not appropriate.

36 The probable jockeying by the shareholders undoubtedly forces Carrington to now decide whether its claim to the lots is sufficiently strong to put up its money now. I see nothing improper about that. Carrington would still have to make that decision now if it was Treasury Branches that was foreclosing.

37 The other lawsuit is going nowhere fast, to use a vernacular expression. It is almost four years old and Carrington's ardour for prosecuting it appears rather cool. It has tied up the lots with its caveats and certificate of lis pendens. It is not innocent of jockeying.

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38 There will be summary judgment, being an order nisi with directions for sale. The redemption period will be seven days from service of the formal order.

39 The land will be listed, if necessary, with a real estate agent for three months at its market value. The listing will be the standard listing issued by the Court.

40 The useless requirements of Rule 694 are dispensed with.

41 The Plaintiff will have costs on a solicitor and client basis.

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Action No. 1001-02216

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITOR ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF DARIAN RESOURCES LTD.

AND IN THE MATTER OF BOWVIEW PETROLEUM INC.

BRIEF OF LAW AND ARGUMENT OF SJ CAPITAL CORP., S.P.L.H. INVESTMENTS LTD., JULMAR HOLDINGS LTD. and SHAWANA ESTATES LTD.

(Redeeming ATB Security)

February 18, 2010

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