COURT OF APPEAL FOR ONTARIO

CITATION: Stanbarr Services Limited v. Metropolis Properties Inc., 2018 ONCA 244
DATE: 20180314
DOCKET: C61872, C61878 and C61894

Doherty, Pepall and Hourigan JJ.A.

DOCKET: C61872 and C61894

BETWEEN

Stanbarr Services Limited, Janodee Investments Ltd., Meadowshire Investments Ltd., Regard Investments Ltd., 1563503 Ontario Limited, Beaver Pond Investments Ltd., The Canada Trust Company, Rita Rosenberg and 527540 Ontario Limited

Applicants (Respondents)

and

Metropolis Properties Inc., Ginkgo Mortgage Investment Corporation, Canada Investment Corporation, 2413913 Ontario Limited, 2421955 Ontario Inc. and Sai Mohammed

Respondents (Appellants)

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Respondents (Respondents)

Ronald G. Slaght and Danielle Glatt, for the appellant/respondent, 2413913 Ontario Limited

Brian Belmont, for the appellants, 2421955 Ontario Inc. and Sai Mohammed

Stephen Schwartz, for the respondents/appellants, Stanbarr Services Limited et al

Philip Polster, for the respondent, Ginkgo Mortgage Investment Corporation

Heard: January 24 and January 25, 2018

On appeal from the judgment of Justice Wendy Matheson of the Superior Court of Justice, dated August 21, 2015, with reasons reported at 2015 ONSC 5249 and with further reasons dated February 22, 2016, reported at 2016 ONSC 1258.

Hourigan J.A.:

[1] These appeals arise from the exercise of a power of sale by a first mortgagee on a commercial/residential property. At issue is whether the purchaser of the property had actual notice of a defect in the power of sale process and, if not, whether the purchaser can rely on the registration of its transfer. Also at issue is the impact of the defect on the rights of the post-sale mortgagees of the property.

[2] For the reasons I detail below, I have concluded that the trial judge erred in law in finding that the purchaser had actual notice of the defect. Contrary to the trial judge's finding, the purchaser is a *bona fide* purchaser for value without notice of the defect and holds good title to the property. I am also of the view that the trial judge's analysis of the post-sale mortgagees' rights was flawed because it relied on her erroneous finding of notice and proceeded based on jurisprudence that was inapplicable.

Facts

[3] Canada Investment Corporation ("CIC") was the first mortgagee on property owned by Metropolis Properties Inc. ("Metropolis") municipally described as 91-93 Scollard Street, Toronto, Ontario (the "Property"). The mortgage was in default and CIC sought to sell the Property under its power of sale rights in its mortgage. At the time, there were eleven subsequent mortgages registered against the Property. Those subsequent mortgages were held by the nine applicants in the proceeding below, either as sole mortgagees or along with other applicants (the "pre-sale mortgagees").[1]

[4] The appellant 2413913 Ontario Inc. ("241 Ontario") purchased the Property pursuant to CIC's power of sale. The appellant Sai Mohammed is a director of 241 Ontario. The sale closed on June 6, 2014. The pre-sale mortgagees argued that they had never received a notice of sale, as required by the *Mortgages Act*, R.S.O. 1990, c. M.40, and that the sale was therefore invalid. In the proceedings below, the trial judge accepted that 241 Ontario was a *bona fide* purchaser for value of the Property. The issue was whether 241 Ontario was without notice that the sale was defective.

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[1] A thirteenth mortgage (or twelfth subsequent mortgage) was held by 2329916 Ontario Ltd. for a period of time, but it did not have a charge at the time of the sale and was not a party to the hybrid trial below.

[5] There was no dispute that CIC's lawyer in the power of sale proceedings, Rasik Mehta, prepared a notice of sale dated November 28, 2013. The notice of sale stated that the amount due under the CIC mortgage totaled $3,271,947.36 – quadruple the amount secured under the mortgage when CIC acquired it by assignment approximately five months prior. In the proceedings below, CIC attempted to justify the amount in the notice of sale through expenditures for property management and maintenance stretching back to 2009, years before the mortgage assignment. Those pre-assignment expenditures and the interest that accrued on them resulted in the bulk of the substantial increase in the amount said to be owing under the mortgage.

[6] Jonathan Ricci acted as counsel to Mr. Mohammed and 241 Ontario in the sale. Mr. Ricci was originally retained by Metropolis, the owner of the Property before the impugned sale. On May 2, 2014, Mr. Ricci sent an email to Metropolis' litigation counsel indicating that he was acting for Metropolis in connection with a pending sale of the Property. Mr. Ricci's email was forwarded to other counsel in a receivership proceeding regarding the Property. Within five days of sending that email, Mr. Ricci had terminated his retainer with Metropolis and accepted Mr. Mohammed's retainer for the sale. On May 16, 2014, Doug Bourassa, one of the counsel to the pre-sale mortgagees, sent an email to Mr. Ricci. This email was key to the trial judge's conclusion that 241 Ontario had notice of a defect in the power of sale process. Mr. Bourassa wrote:

> You provided an email to [Metropolis' litigation counsel] dated May 2, 2014…in which you advised that you are acting for Metropolis Properties, and that you were 'in the process of receiving mortgage statements from mortgagees and preparation of documentation for closing.'
>
> …
>
> Please note that my clients have never received any notice of sale from the 1st ranking mortgagee [CIC]…Any attempt by the 1st mortgagee to sell under power of sale will be invalid. [Emphasis added.]

[7] Mr. Ricci conveyed this information to Mr. Mohammed. Mr. Ricci also contacted Mr. Mehta to confirm that the notice of sale was properly sent to the pre-sale mortgagees. In response, Mr. Mehta provided Mr. Ricci with a copy of the notice of sale and registered mail documentation. Additionally, prior to closing, Mr. Ricci obtained a statutory declaration from Mr. Mehta confirming proper service of the notice of sale. 241 Ontario closed the transaction. Mr. Ricci testified that he did not reply to Mr. Bourassa's email because it was not clear to him who Mr. Bourassa represented, and because he was no longer retained by Metropolis.

[8] As part of the impugned sale, Ginkgo Mortgage Investment Corporation ("Ginkgo") provided financing to 241 Ontario and took a first mortgage on the Property. Mr. Mohammed was also involved as a mortgagee, personally or in his role as director of 2421955 Ontario Inc. ("242 Ontario"), in several subsequent post-sale mortgages. Mr. Mohammed and 242 Ontario (the "post-sale subsequent mortgagees") also appeal.

Decision Below

[9] The case proceeded before the trial judge as a hybrid trial. In reasons dated August 21, 2015, she answered the four legal questions at issue as follows:

1. *Was CIC's Notice of Sale Valid?*

   No. Despite the preparation of the notice of sale, the trial judge found that the pre-sale mortgagees were not served with it. She found that it was more probable than not that, while Mr. Mehta intended to serve the notice of sale, he inadvertently mailed the wrong documents to the pre-sale mortgagees. Therefore, CIC failed to comply with the statutory conditions regarding notice in the *Mortgages Act*. Further, the pre-assignment expenditures were improperly included in the amount due under CIC's mortgage, so the notice of sale was also invalid for that reason.

2. *Was 241 Ontario a bona fide purchaser for value without notice of the invalidity of sale?*

   No. 241 Ontario cannot rely on the relief from strict compliance with the requirements of a power of sale proceeding contained in ss. 35 and 36 of the *Mortgages Act*. It had actual notice of the invalidity of the sale. Further, it cannot restore itself to "without notice" status by making reasonable inquiries into the validity of the sale. Even if it could, 241 Ontario did not make reasonable inquiries.

3. *If the answer to Question 2 is no, are the mortgages registered subsequent to the purchase valid?*

   The post-sale subsequent mortgagees (not including Ginkgo) are deemed to have the same notice received by 241 Ontario and therefore do not have valid charges as against the pre-sale mortgagees. The validity of Ginkgo's mortgage was to be determined in subsequent reasons, pending further submissions.

4. *If the answer to Question 3 is no, do Ginkgo and the post-sale subsequent mortgagees have an equitable subrogated interest if they advanced funds?*

> The pre-sale mortgagees agreed that since CIC received the benefit of the new mortgage advances, Ginkgo and the other post-sale subsequent mortgagees are entitled to an equitable subrogated interest in the Property. The pre-sale mortgagees argued that any charges in priority to their mortgages should not exceed the amount properly secured by the CIC mortgage at closing. Since that amount was in dispute, as were other related issues, this issue was left to be determined pending further submissions.

[10] Following further submissions, in reasons dated February 22, 2016, the trial judge determined the following issue:

> 5. *Is Ginkgo's first mortgage on the Property valid?*
>
> Yes, relying on *Lawrence v. Maple Trust Company,* 2007 ONCA 74, 84 O.R. (3d) 94, the trial judge found that 241 Ontario was an intermediate owner and Ginkgo was a deferred owner. Thus Ginkgo was a *bona fide* encumbrancer for value without notice.

[11] In this court, 241 Ontario appeals the order that it is a *bona fide* purchaser for value with actual notice of the defect in the exercise of the power of sale and therefore did not obtain valid title to the Property. The post-sale subsequent mortgagees appeal the order that their mortgages are invalid. Finally, the pre-sale mortgagees appeal the order that Ginkgo has a valid mortgage.

Issues

[12] The following issues are relevant for the determination of these appeals:

> 1. Did the trial judge err in applying the wrong test for actual notice sufficient to defeat a registered interest under the *Land Titles Act,* R.S.O. 1990, c. L.5?

2. If the answer to issue 1 is yes, can 241 Ontario rely on its registration of the transfer?

3. Did the trial judge err in her analysis of the validity of the mortgages registered by the post-sale subsequent mortgagees?

4. Did the trial judge err in her analysis of the validity of the mortgage registered by Ginkgo?

Analysis

[13] Before turning to the issues in this appeal, it is helpful to consider the principles that underlie the *Land Titles Act* and review how the legislation has been interpreted in the jurisprudence. Epstein J. (as she then was) described those principles in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (S.C.), at para. 42, referencing Marcia Neave's article, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173:

> The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and [are] the essence of the land titles system…

[14] There is no question that fraud has always been recognized as an exception to the mirror principle: *Waimiha Sawmilling Company Limited v. Waione Timber Company Limited*, [1926] A.C. 101 (P.C.). It was less clear whether notice of a

defect in title not involving fraud could serve to defeat the interest of a registered owner or encumbrancer. That question was answered in the seminal case of *United Trust v. Dominion Stores*, [1977] 2 S.C.R. 915. There the respondent owner was seeking to take title to a property free from an unregistered lease. The majority of the Supreme Court rejected the respondent's submission that, "under the Ontario *Land Titles Act,* apart from fraud, actual notice of a non-registered instrument is ineffective to put the burden of the encumbrance resulting therefrom upon a purchaser for value" (at p. 948). In other words, the majority held that actual notice of an unregistered instrument could defeat the interest of a registered owner or encumbrancer even in the absence of fraud.

[15] Spence J., writing for the majority, reasoned that the doctrine of actual notice has been well established in our law since the beginning of equity and that, "such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms" (at p. 952). Spence J. adopted the analysis of Arnup J.A. in the Court of Appeal's decision in that case and found, "the law of real property should not be found to have been altered by the Legislature except where such alteration had been made by clear or appropriate words" (at p. 957).

[16] The next case of interest is *Household Realty Corp. Ltd. v. Liu* (2005), 205 O.A.C. 141 (C.A.). There, the appellant's wife forged a power of attorney and used it to obtain three mortgages registered against their joint residence, unbeknownst

to the appellant. The appellant's submission that the mortgages were void was rejected on the motion below. This court dismissed the appeal, affirming the motion judge's finding that the mortgagees were *bona fide* encumbrancers for value without notice of the fraud. In those circumstances, the court reasoned that while the mortgages were void at common law, they became valid upon registration.

[17] The result was that as between the innocent parties, being the appellant and the mortgagees, the appellant's rights were inferior. This finding was consistent with the immediate indefeasibility theory. Central to this theory is that the *Land Titles Act* creates a system of title by registration, not a system of registration of title. Thus, once registered an instrument is effective. There was no exception to this rule because the mortgagees had no knowledge of the fraud.

[18] This court revisited its decision in *Household Realty* in *Maple Trust.* In that case, an imposter posing as the appellant homeowner entered into an agreement of purchase and sale for the appellant's home with a confederate. The purchaser then obtained mortgage financing from the respondent and the sale closed. When the appellant discovered what had happened, she brought an application to set aside the fraudulent transfer and the registration of the respondent's mortgage. The application judge set aside the transfer but refused to set aside the mortgage on the basis that he was bound by *Household Realty*. The issue for this court was as between the innocent homeowner and the innocent mortgagee, whose rights should be paramount.

[19] The court in *Maple Trust* found that *Household Realty* was incorrectly decided and that the theory of deferred indefeasibility rather than immediate indefeasibility was more consistent with the *Land Titles Act*:

> [67] The theory of deferred indefeasibility accords with the Act and must be taken into consideration in an analysis of s.155 and its relationship with other provisions in the Act. Under this theory, the party acquiring an interest in land from the party responsible for the fraud (the "intermediate owner") is vulnerable to a claim from the true owner because the intermediate owner had an opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such opportunity. Therefore, in accord with s. 78(4) and the theory of deferred indefeasibility, the deferred owner acquires an interest in the property that is good as against all the world.

[20] The result was that Maple Trust's interest as an intermediate encumbrancer did not defeat the interest of the true owner.

[21] Following the release of this court's decision in *Household Realty*, the legislature amended the *Land Titles Act* with the express purpose of protecting innocent homeowners from losing their homes as a consequence of fraud. Those amendments will be set out below in the analysis of Issue 4. For present purposes, it is sufficient to note that as a result of the amendments, fraudulent instruments are an exception to the rule, embodied in s. 78(4) of the *Land Titles Act*, that a registered instrument is effective according to its nature and intent, to create, transfer, charge or discharge an interest in land. Importantly, the court in *Maple Trust* made no reference to these amendments as they were not effective for

registrations made prior to October 19, 2006, and the registration in that case took place in 2005.

[22] A question arises from the foregoing. Does actual notice of a non-fraudulent defect continue to operate to defeat the interest of a *bona fide* purchaser or encumbrancer for value who has notice of such defect?

[23] On the one hand, it could be credibly argued that such notice is no longer operative to defeat registered interests. This argument would be premised on the notion that the legislature has effectively occupied the field with its post-*Household Realty* amendments. One view of the amendments' impact is that only in cases of fraud will the registered owner's or encumbrancer's interest be vulnerable and then only in accordance with the statutory scheme provided therein.

[24] On the other hand, applying the reasoning of the majority in *United Dominion*, it could be argued that notice of non-fraudulent defects is a well-established doctrine in property law and it should not be deemed to have been abrogated absent the manifestation of a specific intention to do so by the legislature through clear wording in an amendment to the *Land Titles Act*.

[25] As will be discussed below, it is unnecessary for me to resolve this issue because I am satisfied that the trial judge erred in finding that 241 Ontario had actual notice of the defect in title. For the purposes of the analysis below, I will assume that notice of a non-fraudulent defect continues to operate to defeat the

interest of a *bona fide* purchaser or encumbrancer for value who has notice of such defect.

(1) Notice of Defect

[26] Because notice has been considered to be one of a limited number of exceptions to the mirror principle, it has been strictly construed. Our courts insist on actual notice of a defect. Actual knowledge means just that; the party must actually know about the defect. It is not sufficient that it has become aware of facts that may suggest it should make inquiries: *Rose v. Peterkin* (1885), 13 S.C.R. 677, at pp. 694-695. Constructive knowledge is insufficient. Thus, the factual analysis in considering a notice argument is limited to a consideration of what the party knew, not what it could have known had it made inquiries.[2]

[27] The issue that the trial judge had to determine was whether 241 Ontario had actual knowledge of non-compliance with s. 33 of the *Mortgages Act*, which mandates the manner of notice of the exercise of a power of sale. The trial judge erred in two respects in her knowledge analysis. First, she conflated actual knowledge with constructive knowledge, when she stated:

> [111] Actual notice is knowledge, not presumed knowledge. The test is whether the registered instrument holder was in receipt of such information as would cause a reasonable person to make inquiries: *Durrani* at para. 61, citing *Canadian Imperial Bank of Commerce v.*

[2] As no party took the position that 241 was wilfully blind, I do not propose to comment on that issue.

> *Rockway Holdings Ltd.* (1996), 1996 CanLII 8007 (ON SC), 29 O.R. (3d) 350 (Gen. Div.).
>
> [112] Here, 2413913 had actual notice. Its counsel received an email that stated flatly that no notice of sale had been received from CIC and any attempt by CIC to sell would be invalid. This was sufficient information to put 2413913 on inquiry.

[28] With respect, these passages demonstrate an impermissible blurring of the concepts of actual and constructive knowledge. In determining whether a party has actual knowledge of a defect, it is unnecessary and unhelpful to consider whether they received sufficient information to put them on inquiry. That is because receipt of such information does not amount to actual knowledge: *Rose*, at pp. 694-695. Therefore, whether the party received such information and what steps it took to investigate the situation is wholly irrelevant to the actual knowledge analysis.

[29] I also observe that the trial judge's reliance on the two cases cited in paragraph 111 of her reasons is misplaced. In *Rockway Holdings*, the issue was whether a bank took a registered mortgage subject to a pre-existing licence agreement. There was no issue that the bank was aware of the agreement. The question was whether the bank, having actual knowledge of the agreement, was obliged to make inquiries regarding its precise terms. Similarly, *Durrani* does not support the proposition cited by the trial judge. That was a case where the court found that the purchaser's agent had actual knowledge of a fraud. Neither case attenuates the test for actual knowledge.

[30] The second error in the trial judge's knowledge analysis was her failure to properly identify the alleged defect in the power of sale process. She found that 241 Ontario had actual notice, noting that "[i]ts counsel received an email [from Mr. Bourassa] that stated flatly that no notice of sale had been received from CIC and any attempt by CIC to sell would be invalid" (para. 112).

[31] Section 33 of the *Mortgages Act* provides for service of a notice of sale by personal service or by registered mail to the party's usual or last known address, or, where the last known address is shown on the registered instrument under which the party acquired an interest, to that address. Pursuant to s. 34, a notice delivered by mail is deemed to have been given on the day on which it is mailed.

[32] It is not a defect in a power of sale process that a notice is not received by the intended recipient; it is only a defect if the notice was not sent in the prescribed manner: *Wood v. Bank of Nova Scotia* (1980), 29 O.R. (2d) 35 (C.A.), at pp. 36-37. The trial judge erred in finding that 241 Ontario had actual notice of the defect because of Mr. Bourassa's email, which said that no notice had been received. 241 Ontario had no actual knowledge of a defect, i.e. that the notice was not sent in the prescribed manner. In my view, therefore, the trial judge erred in finding that 241 Ontario had actual knowledge of a defect.

(2) Validity of 241 Ontario's Title

[33] Because 241 Ontario did not have actual notice, it submits that it is entitled to rely upon the protections in the *Land Titles Act* as a *bona fide* purchaser for value without knowledge of a defect. Subsection 78(4) of Act provides:

> 78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[34] More specific to power of sale proceedings are ss. 99(1) and 99(1.1) of the *Land Titles Act*, which provide as follows:

> 99(1) Subject to the *Mortgages Act* the registered owner of a registered charge that contains a power of sale, upon registering the evidence specified by the Director of Titles, may sell and transfer the interest in the land or any part thereof that is the subject of the charge in accordance with the terms of the power in the same manner as if the registered owner of the registered charge were the registered owner of the land to the extent of such interest therein.
>
> …
>
> 99(1.1) The evidence specified by the Director of Titles under subsection (1) is conclusive evidence of compliance with Part III of the *Mortgages Act* and, where applicable, with Part II of that Act and, upon registration of a transfer under that subsection, is sufficient to give a good title to the purchaser.

[35] In the present case, CIC registered a "Transfer: Power of Sale" that fully complied with the requirements of s. 99(1.1), as specified by the Director of Titles. Accordingly, 241 Ontario submits that it can rely upon the registration to give it good title.

[36] The pre-sale mortgagees submit that the provisions of the *Mortgages Act* operate to prevent 241 Ontario from obtaining good title. They argue that s. 99(1) of the *Land Titles Act* provides that it is subject to the *Mortgages Act* and there has not been compliance with the strict requirements for a power of sale proceeding under that Act. They also submit that 241 Ontario cannot rely on ss. 35 and 36 of the *Mortgages Act*, which provide relief from non-compliance.

[37] Sections 35 and 36 fall under Part III of the *Mortgages Act*, which is entitled "Notice of Exercising Power of Sale". Part III includes the notice requirements for exercising powers of sale. Section 35 deems compliance with Part III where certain statutory declarations are made, whereas s. 36 deals with situations where there has been "professed compliance" with Part III:

> 35 Subject to the *Land Titles Act* and except where an order is made under section 39, a document that contains all of the following is conclusive evidence of compliance with this Part and, where applicable, with Part II, and is sufficient to give a good title to the purchaser:
>
> 1. A statutory declaration by the mortgagee or the mortgagee's solicitor or agent as to default.
>
> 2. A statutory declaration proving service, including production of the original or a notarial copy of the post office receipt of registration, if any.
>
> 3. A statutory declaration by the mortgagee or the mortgagee's solicitor that the sale complies with this Part and, where applicable, with Part II.
>
> 36 Where a notice has been given in professed compliance with this Part and, where applicable, with Part II, the title of the purchaser is

> not liable to be impeached on the ground that the provisions of this Part or, where applicable, Part II respecting default and the provisions of this Part respecting notice, have not been complied with, but any person damnified thereby has a remedy against the person exercising the power of sale.

[38] The pre-sale mortgagees adopt the trial judge's analysis regarding the unavailability of ss. 35 and 36. They argue that s. 35 is unavailable to 241 Ontario because the statutory declaration that Mr. Ricci obtained did not include all of the required elements. It also cannot rely on s. 36 of the *Mortgages Act*, because no notice was given to them and 241 Ontario had actual knowledge of the defect in the power of sale proceedings. Therefore, they submit that because there has been non-compliance with the *Mortgages Act*, 241 Ontario cannot rely on s. 99(1) of the *Land Titles Act*.

[39] I would not give effect to this submission. Accepting for the moment that the trial judge was correct in her analysis of ss. 35 and 36 of the *Mortgages Act*, that only means that those two sections are unavailable. 241 Ontario is prohibited from relying on Mr. Mehta's statutory declaration and it cannot rely on s. 36 because notice was not actually given. However, none of the cases the trial judge relied upon in her analysis dealt with the *Land Titles Act*, nor the interplay between the *Land Titles Act* and the *Mortgages Act*: see *Re Botiuk and Collison* (1979), 26 O.R. 2d) 580 (C.A.); *Cranberry Cove Tower Inc. v. Monarch Trust Co.* (2003), 125 A.C.W.S. (3d) 1074 (Ont. S.C.), aff'd (2005), 136 A.C.W.S. (3d) 949 (Ont. C.A.); *Re Hyde and Besserer* (1971), 1 O.R. 434 (Co. Ct.).

[40] On my reading, ss. 35 and 36 of the *Mortgages Act* do not purport to limit 241 Ontario's other rights, including the right to rely on the registration of evidence referred to in ss. 99(1) and 99(1.1) of the *Land Titles Act*.

[41] Under s. 99 of the *Land Titles Act*, a registered owner of a registered charge that contains a power of sale may sell and transfer the interest in land in accordance with the terms of the power of sale. The owner may do so "[s]ubject to the *Mortgages Act*" and "upon registering the evidence specified by the Director of Titles". According to subsection (1.1), such evidence is conclusive evidence of compliance with Part III of the *Mortgages Act*. Thus, while the registered owner must comply with the *Mortgages Act*, subsection (1.1) deems compliance with Part III of the *Act.*

[42] Section 35 of the *Mortgages Act* also deems there to be compliance with Part III if certain conditions are satisfied: except where an order is made under s. 39, a document containing the requisite declarations is "conclusive evidence of compliance" with Part III. However, s. 35 is "[s]ubject to the *Land Titles Act*" and so, to the extent of any conflict between s. 35 and s. 99, the latter would prevail.

[43] Section 36 of the *Mortgages Act* operates as a saving provision where a notice has been given in "professed compliance" with Part III. I see no conflict between s. 36 of the *Mortgages Act* and s. 99 of the *Land Titles Act.* Reading the

provisions harmoniously, where there has been technical non-compliance with Part III of the *Mortgages Act*, both s. 36 and s. 99(1.1) may be available.

[44] Accordingly, as I read ss. 35 and 36 of the *Mortgages Act*, they do not purport to limit 241 Ontario's right to rely on the registration of evidence referred to in ss. 99(1) and 99(1.1) of the *Land Titles Act*.

[45] In contrast to my interpretation, the pre-sale mortgagees' argument regarding the interplay between the *Mortgages Act* and the *Land Titles Act* would lead to conflict between the two statutes. According to their argument, if a purchaser could not rely on ss. 35 and 36 of the *Mortgages Act*, it would automatically be prohibited from relying on ss. 99(1) and 99(1.1) of the *Land Titles Act.* The latter sections would be rendered inoperative. Such an interpretation is inconsistent with the statutory interpretation principle that statutes are to be read harmoniously, in a manner that avoids conflict: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 27.

[46] Further, the pre-sale mortgagees' submission makes little sense from a policy standpoint. There is no policy imperative that would suggest that the failure to produce a statutory declaration that complies with s. 35 of the *Mortgages Act* renders the registration of the evidence provided for under the *Land Titles Act* a nullity. Section 35 of the *Mortgages Act* is not mandatory. A mortgagee may choose to prepare a statutory declaration or elect not to do so as it sees fit. A

purchaser may similarly rely on the statutory declaration or choose not to do so. There is also no reason why notice under s. 36 of the *Mortgages Act* must be relied upon given the availability of s. 99(1) of the *Land Titles Act.*

[47] The better interpretation of the interaction of ss. 35 and 36 of the *Mortgages Act* and s. 99(1) of the *Land Titles Act* is that the provisions provide complementary methods of protecting *bona fide* purchasers for value without notice of a defect in a power of sale proceeding. This interpretation is also consistent with the curtain principle underlying the *Land Titles Act*, which holds that a purchaser need not investigate the history of past dealings with the land or search behind the title as depicted on the register.

[48] I therefore find that that 241 Ontario is *a bona fide* purchaser for value without notice of the defect in the power of sale proceedings and holds good title to the Property.

(3) Post-Sale Subsequent Mortgagees

[49] With respect to the post-sale subsequent mortgagees, the trial judge found that they were all deemed to have the same knowledge that Mr. Mohammed obtained by reason of his position as a director of 241 Ontario and his involvement with the post-sale subsequent mortgagees. For the reasons set forth above, the trial judge’s knowledge analysis was flawed. Therefore, I would set aside her

finding with respect to the validity of these mortgages and find the post-sale subsequent mortgagees have valid encumbrances.

(4) Ginkgo Mortgage

[50] In her second set of reasons, the trial judge reached the correct conclusion with respect to the validity of the Ginkgo mortgage but her legal analysis was flawed. Her conclusion relied on the doctrine of deferred indefeasibility as described in *Maple Trust*. Before her, the pre-sale mortgagees argued that under that doctrine, Ginkgo was an intermediate owner and was thus limited to an equitable charge subordinate to their mortgages. Ginkgo submitted that it was a deferred owner under the doctrine, and that its mortgage was also valid under the *Land Titles Act.*

[51] Relying on *Maple Trust*, the trial judge noted that fraud had been alleged against CIC but had not been proved since that issue was not part of the hybrid trial. However, CIC was responsible for the defective power of sale proceedings. 241 Ontario dealt with CIC and thus 241 Ontario was the intermediate owner. Ginkgo was a deferred owner and a *bona fide* encumbrancer for value without notice. Accordingly, Ginkgo has a valid first charge against the Property.

[52] The trial judge went on to find that the extent to which the pre-sale mortgagees are affected by Ginkgo having a legal charge, rather than only an

equitable charge, depends on the amount due and owing under the CIC mortgage. That amount was left to be determined in the next stage of the proceedings.

[53] This analysis is consistent with *Maple Trust*. However, as there was no fraud yet proven in this case, *Maple Trust,* a fraud case*,* did not provide the proper framework. The proper analysis concerned only whether Ginkgo had actual notice of a non-fraudulent defect. As noted above, whether notice of such a defect creates an exception to the mirror principle is an open question that need not be determined on this appeal, as 241 Ontario and consequently the other post-sale mortgagees, including Ginkgo, did not have actual notice.

[54] In any event, a proper fraud analysis required the trial judge to consider the amendments to the *Land Titles Act* enacted after this court's decision in *Household Realty*. Those amendments introduced the provisions pursuant to which a court is to analyze whether there has been fraud such that the mirror principle is defeated. The relevant sections of the Act are as follows:

> 1. In this Act, …
>
> "fraudulent instrument" means an instrument,
>
> (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
>
> (b) that is given under the purported authority of a power of attorney that is forged,
>
> (c) that is a transfer of a charge where the charge is given by a fraudulent person, or

> (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; (“acte frauduleux”)
>
> “fraudulent person” means a person who executes or purports to execute an instrument if,
>
> (a) the person forged the instrument,
>
> (b) the person is a fictitious person, or
>
> (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument; (“fraudeur”)
>
> * * *
>
> 78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.
>
> 78(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.
>
> 78(4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument.

[55] Given that the trial judge proceeded on the basis that fraud had not been proved, she should have restricted her analysis to whether Ginkgo had actual notice of a non-fraudulent defect. If this were a case where she was considering a fraud argument, a proper analysis had to take into account the post-*Household Realty* amendments to the *Land Titles Act* and focus on whether the Ginkgo

mortgage was a fraudulent instrument that fell within the exception found in s. 78(4.1).

[56] On appeal, counsel for the pre-sale mortgagees argues that the Ginkgo mortgage is invalid because 241 Ontario is a fraudulent person under subsection (c) of the definition of that term. Therefore, he submits that 241 Ontario's purported transfer of an interest in the Property was caught by subsection (a) of the definition of the term fraudulent instrument. However, counsel concedes that his argument can only succeed if 241 Ontario had actual knowledge of the defect. I have found that it did not have such knowledge. Accordingly, this argument fails against Ginkgo and, to the extent it is made against the post-sale subsequent mortgagees, against them as well.

Disposition

[57] I would dispose of the appeals as follows:

(i) I would allow the appeal of 241 Ontario in appeal C61872 and grant judgment that 241 Ontario is *a bona fide* purchaser for value without notice of the defect in the power of sale proceedings and therefore holds good title to the Property;

(ii) I would allow the appeal of the post-sale subsequent mortgagees in appeal C61894, and grant judgment that they are *bona fide* mortgagees for value without notice of the defect in the power of sale proceedings; and

(iii) I would dismiss the appeal of the pre-sale mortgagees in appeal C61878.

[58] The parties have agreed on the costs of the appeals and the proceedings below. In accordance with their agreement, I would order that Stanbarr Services Limited on behalf of the pre-sale mortgagees pay:

(i) $25,000 to 241 Ontario in respect of its all-inclusive appeal costs;

(ii) $7,500 inclusive to 242 Ontario and Mr. Mohammed in respect of their all-inclusive appeal costs;

(iii) $40,000 inclusive to 241 Ontario, 242 Ontario, and Mr. Mohammed in respect of their all-inclusive trial costs; and

(iv) $13,500 to Ginkgo inclusive in respect of its all-inclusive responding appeal costs.

[59] In respect of Ginkgo, the trial costs as ordered by the trial judge stand.

Released: “D.D.” March 14, 2018

“C.W. Hourigan J.A.”
“I agree. Doherty J.A.”
“I agree. S.E. Pepall J.A.”