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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., ABELLA and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	
	)	
THE CITADEL GENERAL ASSURANCE COMPANY	)	William J. Burden, for the appellant
	)	
Plaintiff (Appellant)	)	
	)	
- and -	)	
	)	
	)	John Lo Faso
MARIO IABONI, LUISA IABONI, ANTONIO DEL DUCA, MARIA DEL DUCA, and C.C. BRAMPTON ENTERPRISES INC.	)	for the respondent
	)	
	)	Heard: April 20, 2004
Defendants (Respondents)	)	

On appeal from the judgment of Justice Wailan Low of the Superior Court of Justice, reasons for judgment dated October 29, 2003, reported at [2003] O.J. No. 4496.

ROSENBERG J.A.:

[1] In this appeal, the court must consider the apparent conflict between the decision of the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 and the subsequent decision of this court in *National Trust Co. v. Hodgson* (2000), 38 R.P.R. (3d) 6. Low J. considered that she was bound to apply *Manulife* and she dismissed the claim of the appellant mortgagee because it had not given notice to the

respondents, the original mortgagors, of a renewal of the mortgage. I agree with that result and would dismiss the appeal.

THE FACTS

[2] The respondents, the Iabonis and the Del Ducas, granted a mortgage in favour of the appellant Citadel General Assurance Company. A numbered company was a guarantor. The mortgage, dated October 14, 1986, was a five-year mortgage. On September 8, 1987, the respondents sold the property to the respondent C.C. Brampton Enterprises Inc. The appellant approved the purchase and entered into an assumption agreement whereby C.C. Brampton assumed the mortgage. By its terms, the mortgage expired on October 15, 1991. On October 29, 1991, the appellant wrote to the principal of C.C. Brampton and offered a "renewal" of the mortgage and referred to the drawing up of a "new agreement". The appellant and C.C. Brampton agreed to "extend" the mortgage for a further five years on the same terms, except to reduce the interest rate and the monthly payments. The respondents were not notified of the agreement. The agreement is dated March 27, 1992 and was registered on title on May 6, 1992.

[3] The mortgage went into default in September 1996 and the appellant sold the property under power of sale in August 1997. The deficiency in the amount owing on the mortgage, including interest, is approximately $275,000. The appellant brought an action against the respondents for this deficiency. It relies upon a number of terms in the mortgage, which it says render the respondents liable to pay the deficiency notwithstanding they sold the property and were not parties to the subsequent extension agreement with C.C. Brampton.

[4] In his affidavit filed on the motions, Mr. Iaboni states that he had no notice of the 1991 renewal. If he had been given notice in 1991 that he was still liable on the mortgage, he would have asked that the property be sold.

THE MORTGAGE TERMS

[5] It would appear that the relevant terms of the mortgage are the following. They are reproduced with the headings as they appear in the mortgage.

> TITLE COVENANTS
>
> THE said Mortgagor covenants with the said Mortgagee that the Mortgagor will pay the Mortgage money and interest and observe the above proviso, and will pay as they fall due all

taxes, rates and assessments, municipal, local, parliamentary and otherwise which now are or may hereafter be imposed, charged or levied upon the said lands and premises.

…

DEFAULT

…

PROVIDED further that no sale or other dealing by the Mortgagor with the equity of redemption in the said lands or any part thereof shall in any way change the liability of the Mortgagor or in any way alter the rights of the Mortgagee as against the Mortgagor or any other person liable for payment of the moneys hereby secured.

…

RENEWAL OR EXTENSION OF TIME:
ATTENTION SUBSEQUENT INTERESTS

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or any one claiming under him, or any other dealing by the Mortgagee with the owner or owners of the equity of redemption of said lands or of any part thereof, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the money hereby secured, and that this Mortgage may be renewed by an agreement in writing at maturity for any term with or without an increased rate of interest notwithstanding that there may be subsequent encumbrancers. And it shall not be necessary to register any such agreement in order to retain priority for this Mortgage so altered over any instrument registered subsequently to this Mortgage. PROVIDED that nothing contained in this paragraph shall confer any right of renewal upon the Mortgagor.

…

SALE, CHANGE OF CONTROL OR ENCUMBERING

Provided that:

> a) (1) in the event of the Mortgagor selling … the lands hereby mortgaged to a purchaser … not approved in writing by the Mortgagee . . .
>
> at the option of the Mortgagee, all monies hereby secured, with accrued interest thereon and unearned interest thereon until maturity, shall forthwith become due and payable.
>
> …
>
> It is further understood and agreed that any approval given pursuant to subparagraphs (a) (1) or (b) of the herein paragraph shall in no way change the liability of the Mortgagor or in any way alter the rights of the Mortgagee as against the Mortgagor or any other person liable for payment of the moneys hereby secured.
>
> …
>
> HEADINGS
>
> The headings with respect to the various paragraphs of this mortgage are intended to be for identification of the various provisions of this mortgage only, and the wording of such headings is not intended to have any legal effect.

LEGISLATION

[6] Section 20 of the *Mortgages Act*, R.S.O. 1990, c. M-40 may also be relevant to resolution of the issues in this case:

> (1) In this section, "original mortgagor" means any person who by virtue of privity of contract with the mortgagee is personally liable to the mortgagee to pay the whole or any part of the money secured by the mortgage.
>
> (2) Despite any stipulation to the contrary in a mortgage, where a mortgagor has conveyed and transferred the equity of redemption to a grantee under such circumstances that the grantee is by express covenant or otherwise obligated to indemnify the mortgagor with respect to the mortgage, the mortgagee has the right to recover from the grantee the

> amount of the mortgage debt in respect of which the grantee is obligated to indemnify the mortgagor; provided that the right of the mortgagee to recover the amount of the mortgage debt under this section from the grantee of the equity of redemption shall as against such grantee terminate on the registration of a grant or transfer of the equity of redemption by such grantee to another person unless prior to such registration an action has been commenced to enforce the right of the mortgagee.
>
> (3) *Where a mortgagee has the right to recover the whole or any part of money secured by a mortgage from an original mortgagor and also has a right by virtue of this section to recover from a grantee of the equity of redemption from a mortgagor, if the mortgagee recovers judgment for the amount of the mortgage debt against the original mortgagor, the mortgagee thereupon forever ceases to have a right to recover under this section from a grantee*, and if the mortgagee recovers judgment under this section against a grantee the mortgagee thereupon forever ceases to have a right to recover from the original mortgagor; provided that where there is more than one original mortgagor this section does not affect the right of a mortgagee after the recovery of judgment against one original mortgagor to recover judgment against the other original mortgagor or mortgagors. [Emphasis added.]

REASONS OF THE MOTIONS JUDGE

[7] The appellant moved for summary judgment on its claim for the deficiency. The respondents then moved for summary dismissal of the appellant's claim. The motions judge held that the first issue to be determined was whether the 1992 agreement between the appellant and C.C. Brampton was an extension or a renewal. If the agreement was merely an extension, the appellant was entitled to judgment. After interpreting the various provisions of the mortgage in light of the decision in *Manulife*, the motions judge found that that the agreement was a renewal. On this appeal, the appellant does not contest that finding.

[8] The motions judge next addressed the question of the legal effect of the renewal. In her view, resolution of that question depended on application of the majority judgment

in *Manulife.* She also relied upon the reasons of C. Campbell J. in *Laurentian Bank v. Weingarten* (1999), 23 R.P.R. (3d) 318 (Ont. S.C.J.).

[9] The motions judge set out those parts of the reasons of Cory J. in *Manulife* in which he held that the mortgagor as a principal debtor must be given notice of the renewal agreement. She noted that the mortgage in *Manulife* contained a "no prejudice clause" that was "virtually identical" to the Renewal or Extension of Time clause in this mortgage. She concluded that the clause was not sufficient to bind the respondents to an agreement of which they had no notice and to which they had not agreed.

[10] The motions judge also dealt with this court's decision in *Hodgson*. She noted that there was the same no prejudice clause in the mortgage in that case as in this, and that the majority of the court had held that the plaintiff was bound to repay the mortgage amounts. This conclusion was reached in *Hodgson* notwithstanding there had been a subsequent sale. She concluded that the reasons of Abella J.A. dissenting were more consonant with the reasoning in *Manulife*. In any event, the motions judge felt bound to apply the principles in *Manulife* and to dismiss the appellant's action.

THE CASE LAW

Manulife Bank of Canada v. Conlin

[11] *Manulife* concerned the rights of a guarantor where the creditor and the principal debtor agree to a material alteration of the terms of a mortgage loan. The mortgagor Dina Conlin granted a mortgage to the predecessor of Manulife. Dina Conlin's husband was a guarantor of the loan. Dina Conlin and her husband separated in 1989. In 1990, shortly before the mortgage was to mature, Ms. Conlin and Manulife executed an agreement to renew the mortgage for a further three-year term at an increased interest rate. The renewal forms provided spaces for the signature of the registered owner and the guarantor. Only Ms. Conlin signed the agreement. Mr. Conlin had no notice or knowledge of the renewal. When the mortgage went into default, Manulife initiated proceedings for summary judgment against Dina Conlin and the guarantors. The motions judge granted summary judgment to Manulife. Mr. Conlin successfully appealed to this court. Cory J., writing for the majority of the Supreme Court of Canada, dismissed Manulife's appeal.

[12] As indicated, the *Manulife* appeal concerned the rights of a guarantor with regard to Ms. Conlin's mortgage. The reasons of Cory J. are founded on the fundamental principle that "a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of

the terms of the contract of debt without the consent of the guarantor" (p. 421). As he explained at p. 422, the basis for the rule is that a "material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk".

[13] The issues in the case were whether there had been a material alteration and, if so, whether there was anything in the mortgage that detracted from the requirement of the guarantor's consent, or, put another way, whether the guarantor had contracted out of the protection provided by the common law or equity. Cory J. found that in that case, the agreement between Manulife and Ms. Conlin was a renewal, not merely an extension of the original agreement. He further found that this renewal agreement "materially altered the provisions of the original loan agreement" (p. 437). The basis for this finding would appear to be that the renewal agreement "provides for an agreement as to the term of a new mortgage and the new rate of interest" (p. 433).[1]

[14] In light of these findings, Cory J. then had to consider whether the guarantor had contracted out of the protection afforded by law. Manulife relied on the guarantee clause in the mortgage, referred to in the reasons as "clause 34". In it, the guarantors were described as "principal debtors and not as sureties". Further, the guarantors agreed in clause 34 to all the covenants made binding upon the mortgagor "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". Cory J. concluded at p. 431 that the principal debtor obligation in clause 34 could not assist Manulife because "the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal". As he went on to say: "It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them." Nevertheless, "a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights" (p. 431). Such a waiver would have to be clear. There was nothing in clause 34 to indicate that the guarantor as a principal debtor had given up any of his rights as principal debtor, such as notice regarding the renewal and the opportunity to negotiate and consent to the terms of the renewal.

[15] I would point out that there is an important difference between Mr. Conlin's situation as guarantor in the *Manulife* case and the respondents' situation in this case. While there is a guarantor clause in this mortgage that is similar to clause 34 in *Manulife*,

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[1] See also the dissenting reasons of Iacobucci J. at p. 450 holding that "[a]n increase in the rate of interest and an extension of the time for payment are both materials changes to the loan agreement".

it does not apply to these respondents. If the respondents have any continued responsibility for the debt, it is based on the Covenant clause in the mortgage.

[16] To return to *Manulife,* Cory J. next considered the terms of the renewal agreement. He noted that the standard form renewal agreement called for the signature of the guarantor. At p. 433 Cory J. explained that this element of the form supported the guarantor's position that he was not, "by the terms of the original loan agreement, deprived of the equitable and common law protection ordinarily extended to guarantors. Rather he was expected to sign the renewal agreement." Further, the form appeared to indicate that the renewal agreement was a new mortgage agreement. In terms that could also apply in this case, at pp. 433-34, Cory J. explained the policy basis for insisting on the guarantor's agreement to the renewal:

> The standard form indicates that many variations in the original mortgage are to be agreed upon. For example, the mortgagor can select the length of the term of the loan; the rate of interest is to be agreed upon between the mortgagor and the lending institution. If the renewal agreement is no more than the extension of the original mortgage, the mischief that that position creates becomes obvious. *What if the renewal provided for an extension of the term to 25 years at a substantially increased rate of interest? What if the situation with regard to the security had changed remarkably as a result of new zoning regulations or a new building code or there had been a marked change of use in the surrounding lands? To say that despite the changed circumstances the guarantor is, beyond the strict terms of the agreement, bound without any notice to an indefinite guarantee of a mortgage containing substantial changes in the term of the loan and the interest rate is worrisome indeed.* [Emphasis added.]

[17] Finally, Cory J. turned to what is referred to in the reasons as "clause 7". Like the Renewal and Extension clause in this mortgage, clause 7 referred to both extension and renewal, thus implying that these words described two different situations. At p. 435-36, Cory J. found that the fact that the guarantor clause, clause 34, did not refer to a renewal "strongly suggests that it [i.e. clause 34] has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term which is well known in the commercial world of mortgages." Cory J. concluded his analysis as follows:

> It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation. (p. 437)

[18] As I read Cory J.'s reasons, whether or not the guarantor was discharged depended upon clause 34. While he referred to clause 7, he did so solely as a means of interpreting clause 34. The fact that clause 7 referred to both extensions and renewals, whereas clause 34 referred only to "giving of time for payment" (i.e. an extension), suggested that clause 34 was not intended to cover renewals. Since the liability of the respondents in this case does not depend on the equivalent of clause 34, much of the discussion in *Manulife* is not applicable to this case. What is applicable is the more general discussion by Cory J. of the rights of the "principal debtor". The respondents say that they are principal debtors and therefore had a right to notice and, perhaps, had to consent to any renewal to remain bound by their covenant in the original mortgage to repay the debt. Since Cory J.'s explanation of the rights of principal debtor, found at p. 432, are fundamental to resolution of this appeal I set out that explanation here:

> *The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement.* The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. *If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor.* That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor must have notice of and agree to the renewal before he is bound by its terms. *A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor. If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the*

> *same rights as the principal debtor which would include both notice and agreement as a party to a renewal.* [Emphasis added.]

[19] The respondents pick up on this passage and submit that they were entitled, to put it in the words of Cory J., "to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal".

National Trust Co. v. Hodgson

[20] The appellant relies upon this court's decision in *Hodgson.* Although decided after *Manulife*, neither in the majority decision written by Catzman and Sharpe JJ.A., nor in the dissent judgment written by Abella J.A. is *Manulife* mentioned. Rather, the case before the court turned entirely on whether there was novation in the contractual relationship in accordance with the test in *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410. The facts of *Hodgson* are complex. The important similarity to this case is that title in the property was transferred during the term of the mortgage to a third party, namely Mr. Batchelar, the mortgagors' dishonest lawyer. The transferee then renewed the mortgage without any notice or participation by the original mortgagors. Abella J.A. found that there had been novation, in that the trust company had accepted Batchelar as the principal debtor and accepted the new contract in full satisfaction and substitution for the old contract. Thus, the original mortgagors' debt was discharged. Catzman and Sharpe JJ.A. disagreed. They found that there had not been novation and that the mere agreement by the trust company to Batchelar assuming the mortgage did not relieve the original mortgagors of liability.

[21] Catzman and Sharpe JJ.A. rejected the argument that because the mortgagors were unaware of the assumption agreement or the renewal they were no longer bound. They relied upon the no prejudice clause and said the following at para. 19:

> Once the element of the fraud on the part of Batchelar is removed, as it must be in accordance with the agreed statement of facts, we are left with a situation that, from the appellant's point of view, appeared to be a normal mortgage transaction with a subsequent sale and assumption of the mortgage by the purchaser of the property. That situation is covered by the standard terms of the "no prejudice" clause, as is the renewal of the mortgage at a lower interest rate.

[22] In reaching this conclusion the majority referred at para. 18 to two trial court decisions and the decision of this court in *Malaviya v. Lankin* (1985), 53 O.R. (2d) 1 for the proposition that the language of the no prejudice clause "preserves the rights of the mortgagee against the mortgagor where the mortgagee deals with the owner of the equity of redemption and renews the term of the mortgage at a different interest rate". However, I would point out that in *Malaviya* there was no renewal agreement. When the mortgage matured the mortgagee permitted the mortgage debt to run on with the new owner continuing to make monthly payments at the same interest rate. The mortgagee and the new owner did not enter into a binding and enforceable agreement extending the term of the mortgage. In *Malaviya,* the court held at p. 3:

> The [original mortgagors] continued as primary debtors and it is sufficient to say that nothing that transpired following maturity can be construed as operating to relieve them of liability under their mortgage covenant.

[23] The appellant submits that the principles in *Hodgson* apply to this case. As in *Hodgson,* the mortgage in this case was renewed without notice to the original mortgagors and the mortgage contains a no prejudice clause that is virtually identical to the clause in *Hodgson.*

Laurentian Bank v. Weingarten

[24] The motions judge also relied upon the decision of C. Campbell J. in *Weingarten*. That case was decided after *Manulife* but before *Hodgson.* The relevant facts are similar to this case. One of the two joint owners and mortgagors, Ms. Merton, transferred her interest in the property to the other, Mr. Weingarten. Later, Mr. Weingarten renewed the mortgage without notice to Ms. Merton. Mr. Weingarten defaulted on the mortgage. The bank sold the property and then looked to Ms. Merton for the deficiency. The mortgage contained a renewal clause similar in all relevant respects to the Renewal and Extension clause in this case and the no prejudice clause in *Manulife*. The mortgage also contained the following clause:

> *PROVIDED further that the terms of this Charge may be amended or extended from time to time by mutual agreement between the Chargor and the Chargee and the Chargor hereby further covenants and agrees that, notwithstanding that the Chargor may have disposed of his interest in the lands hereby secured, the Chargor will remain liable as a principal debtor* and not as a surety for the observance of all of the terms and provisions herein and will in all matters

> pertaining to this Charge well and truly do, observe, fulfil and keep all and singular the covenants, provisos, conditions, agreements and stipulations in this Charge or any amendment or extension thereof notwithstanding the giving of time for the payment of the Charge or the varying of the terms of the payment thereof or the rate of interest thereon or any other indulgence by the Chargee to the Chargor. [Emphasis added.]

[25] I note that the mortgage in this case does not contain a similar clause. In *Weingarten*, Campbell J. held that the principles in *Manulife* applied, although Ms. Merton was not a guarantor. He held that the renewal agreement only bound those mortgagors who had agreed in writing to its terms. He interpreted the language of the mortgage as follows at paras. 30-32:

> In my view the only reasonable conclusion to be drawn from this language is that when the Mortgage is to be renewed, in order for it to become effective, the renewal must be made by an agreement in writing signed by both the Mortgagee and the Mortgagor(s). The word Mortgagor (Chargor) in my view includes someone who has disposed of an interest in the equity of redemption as well as someone who retains the interest.
>
> I have concluded that here where two individuals jointly sign this mortgage which provides that a renewal must be by express agreement in writing, that absent specific language of exemption, the signatures of both mortgagees [sic] is required to bind both individuals to the terms of the renewal.
>
> If it were intended that a sole remaining owner of the equity of redemption could bind an original mortgagor who transferred her interest prior to a renewal made without her knowledge and consent, specific language would be necessary to accomplish that purpose. In the absence of specific language the logical conclusion to be drawn from the language in question is that the renewal only binds those mortgagors who agree in writing to its terms.

ANALYSIS

[26] There can be no doubt that when the respondents sold their interest in the property, that is, when they sold the equity of redemption, they remained liable on the covenant to repay the mortgage. This is clear from the clause set out above that comes under the heading "Default". Under s. 20 of the *Mortgages Act*, when the mortgage went into default the mortgagee had the right to recover the amount of the debt from the respondents as original mortgagors or from the transferee of the equity of the redemption, C.C. Brampton, that is at least during the period of the original mortgage. Cases such as *Malaviya* establish that a sale of the equity of the redemption does not convert the status of the original mortgagors from principal debtors to mere sureties. See *Malaviya* at p. 3. Only if there had been novation, as discussed in *National Trust Co. v. Mead*, would the respondents be relieved of their liability to the mortgagee.

[27] The question in this case is whether the respondents as the original mortgagors and principal debtors remained liable on the covenant to repay the debt when the appellant mortgagee and C.C. Brampton renewed the mortgage without notice to the respondents. But for *Manulife*, I would have thought that the answer to this question depended upon whether there had been novation. Wilson J. discussed this very issue in *Mead*, albeit in *obiter*, in the context of her review of several decisions of the British Columbia Court of Appeal including *Re Bank of Nova Scotia and Vancouver Island Renovating Inc*. (1986), 31 D.L.R. (4th) 560, and *Eaton Bay Trust Co. v. Ling* (1987), 45 D.L.R. (4th) 1. Her discussion of the *Ling* case is of particular interest because the facts are very similar to this case.

[28] In *Ling,* the original mortgagor, Lynch, sold the property to Ling who renewed the mortgage with Eaton Bay at a higher interest rate. The mortgage contained a "no prejudice" clause. At p. 507 of *Mead*, Wilson J. described the holding of the Court of Appeal:

> Notwithstanding the fact that material changes had been made to the original mortgage, the court went on to hold that there had been no novation in the circumstances. *It viewed the "no prejudice" clause in the original mortgage as evidencing in futuro consent on the part of Lynch to the kind of alterations embraced by the renewal agreement between Eaton Bay and Ling*. [Emphasis added.]

[29] Wilson J. was "uneasy" with this result, as she said at p. 507: "It seems to me that the notion of *in futuro* consent may work considerable inequities in some circumstances. Given the conduct of the mortgagee in that case, I would have been inclined to hold that a novation had been effected." There is no suggestion that absent a finding of a novation,

the original mortgagor would not have remained liable on the covenant; however, that, of course, is how this court dealt with the same issue in *Hodgson.* Abella J.A., relying upon *Mead*, would have found novation. The majority of the court disagreed, relying particularly on the form of the no prejudice clause in that case. As I have pointed out, the *Hodgson* court does not appear to have been referred to the *Manulife* case.

[30] To determine the impact of *Manulife* on this case, one must start with interpreting the mortgage. The appellant primarily relies upon the Default clause. Were it not for *Manulife*, I would have thought the appellant's argument to be unanswerable. Unless the respondents could show as a fact that there had been novation, so that the existing contract was extinguished, they would have remained liable on their covenant. Absent novation, and leaving aside the Renewal or Extension clause, the only effect of the renewal agreement would have been that the respondents could not be liable in accordance with the terms of the renewal agreement, as they were not parties to it. See dissenting reasons of Iacobucci J. in *Manulife* at p. 457.

[31] However, in light of *Manulife,* it would seem that one must read the Default clause in this mortgage with the other terms of the mortgage, just as in *Manulife* the meaning of the guarantor clause had to be read in light of the no prejudice clause. Because of *Manulife*, in my view the Default clause standing on its own is not sufficient to continue the liability of the respondents once the appellant made a new agreement (renewal) with the transferee of the equity of redemption.

[32] In his reasons in *Manulife* at pp. 435-36, Cory J. pointed out that clause 7, the no prejudice clause, distinguished between extensions and renewals. He drew the following conclusion from that language in interpreting clause 34, the clause setting out the liability of the guarantor:

> It follows that the failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term which is well known in the commercial world of mortgages.

[33] Similarly, in this case, the Renewal or Extension clause distinguishes between extensions and renewals. In particular, as in *Manulife*, the clause notifies subsequent interests that the mortgage may be renewed "by an agreement in writing". The Default clause in this mortgage does not refer to renewals. Reasoning from *Manulife*, if the

lending institution wanted the clause to apply to renewals, it should have used that specific term in the Default clause.

[34] In my view, the same must be said with respect to the Sale clause, which makes no mention of renewals. For convenience, I repeat part of that clause here:

> SALE, CHANGE OF CONTROL OR ENCUMBERING
>
> …
>
> It is further understood and agreed that any approval given pursuant to subparagraphs (a) (1) or (b) of the herein paragraph shall in no way change the liability of the Mortgagor or in any way alter the rights of the Mortgagee as against the Mortgagor or any other person liable for payment of the moneys hereby secured.

[35] As a result of these clauses, the respondents remained liable to the mortgagee on the covenant during the term of the mortgage, notwithstanding any sale of the equity of redemption. However, those clauses do not apply once the mortgagee entered into a renewal agreement with C.C. Brampton without notice to and the consent of the original mortgagors.

[36] Since the appellant cannot rely upon the Default and the Sale clauses, it would seem that its rights against the respondents as principal debtors are as set out in *Manulife* at pp. 431-32, where it was held that the respondents were entitled to be notified of the renewal agreement:

> In *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. *If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them.* Of course, a guarantor who, by virtue of

> a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.
>
> …
>
> *The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement.* The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor. That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor must have notice of and agree to the renewal before he is bound by its terms. A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor. *If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal*. [Emphasis added.]

[37] According to Cory J. this requirement of notice did not turn on the special status of guarantor. As he said in the first paragraph quoted above, “This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety.” It is not entirely clear where Cory J. found the principal debtor’s entitlement to notice. Clearly, to be bound by the terms of the renewal agreement, the original mortgagors would be entitled to notice and the chance to consent to the renewal. It is not clear to me, however, why lack of notice necessarily extinguished the principal debtor’s liability on the original covenant. See W.M. Traub, *Falconbridge on Mortgage, Fifth Edition* at §14:30. Perhaps Cory J. only intended the passages set out above to apply to guarantors.

Nevertheless, those passages are clear. The principal debtors are entitled to notice; otherwise they are released from their obligations, absent a waiver of those rights.

[38] Thus, in this case the issue is whether the respondents waived their rights. A finding of waiver would depend upon the Renewal or Extension clause. For convenience, I set out that clause again:

> RENEWAL OR EXTENSION OF TIME:
> ATTENTION SUBSEQUENT INTERESTS
>
> PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or any one claiming under him, or any other dealing by the Mortgagee with the owner or owners of the equity of redemption of said lands or of any part thereof, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the money hereby secured, and *that this Mortgage may be renewed by an agreement in writing at maturity* for any term with or without an increased rate of interest notwithstanding that there may be subsequent encumbrancers. And it shall not be necessary to register any such agreement in order to retain priority for this Mortgage so altered over any instrument registered subsequently to this Mortgage. PROVIDED that nothing contained in this paragraph shall confer any right of renewal upon the Mortgagor. [Emphasis added.]

[39] Again, applying *Manulife* and the distinction drawn therein by Cory J. between an extension and a renewal, it would not seem that the respondents waived their rights to notice of a renewal. At worst, it is only an "extension of time" that in no way affects or prejudices the rights of the mortgagee against the mortgagors.

[40] In *Manulife,* Cory J. also relied upon the renewal agreement as evidencing an intention that the guarantor was not to be bound. First, he noted that the agreement itself had a place for the signature of the guarantor. As he said at p. 433, "[t]he requirement by the standard form of a signature by the guarantor then supports the respondent's position that he was not, by the terms of the original agreement, deprived of the equitable and common law protection ordinarily extended to guarantors." Second, he looked at the terms of the renewal agreement that indicated the agreement was a new agreement rather than merely an extension of an old agreement. This served to strengthen his view "that

the respondent was no longer bound by the terms of the original guarantee upon the execution without notice to him of the renewal agreement" (p. 434). The agreement in this case does not have a space for the signature of the original mortgagors. On the other hand, the appellant does not take issue on this appeal with the finding by the motions judge that the agreement was indeed a renewal and not merely an extension. There was other evidence to support this conclusion, such as the letter from the appellant referring to a "new agreement". It is not apparent to me that the difference between the renewal agreement in this case and the agreement in *Manulife* is material to the outcome. In any event, as I read *Manulife*, the result turned primarily on the terms of the original mortgage, in view of what Cory J. said at p. 437:

> *It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor*. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation.
>
> *If the wording of the two clauses should be found to be ambiguous, the contra proferentem rule must be applied against the bank*. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability. [Emphasis added.]

Conclusion

[41] I therefore conclude that the motions judge was correct in applying the principles in *Manulife* to this case rather than the principles in *Hodgson*.[2] As I have pointed out, this court made no mention of *Manulife* in *Hodgson*. Both the majority and dissenting judges treated the case primarily as turning on whether there had been novation. While the majority of the court went on to rely on the no prejudice clause to hold that the original mortgagor remained liable, they did not make the distinction between a renewal and extension, which was pivotal to Cory J.'s conclusion in *Manulife.* Further, as pointed out, the majority relied upon this court's decision in *Malaviya,* which was not a renewal case.

DISPOSITION

[42] Accordingly, I would dismiss the appeal. I would fix the costs payable to the respondents on a partial indemnity scale at $12,000 inclusive of disbursements and GST.

Signed: "M. Rosenberg J.A."
"I agree R. Roy McMurtry C.J.O"
"I agree R.S. Abella J.A."

RELEASED: "RRM" July 8, 2004

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[2] In light of my conclusion concerning notice, I need not decide whether C. Campbell J. was right in *Weingarten* in holding that the original mortgagors must also be parties to the renewal agreement. I agree that absent more explicit language in the mortgage, the original mortgagors cannot be bound by the terms of the renewal agreement if they are not parties to it. I am not sure that it is correct to say that absent their agreement in writing to the renewal they cannot be bound by the covenant in the original mortgage. While the reasons of Cory J. in *Manulife* are not entirely clear on this matter, he appears to focus primarily on the right of a principal debtor to notice of the renewal. In any event, the result in *Weingarten* may also be understood as depending on the clause in the mortgage set out at para. 24, above.