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## Completed Sale, by Power of Sale, Invalidated

In a recent Ontario case, a dispute centered around whether the sale of a property, completed a year earlier under a lender's power of sale, should be invalidated due to, among other things, technical deficiencies with the Notice of Sale.

The property had been owned by Metropolis Properties, which was in default on a first mortgage for $780,000 in favour of Canadian Investment Corporation ("CIC"). However, there were 12 additional mortgages on the property, totaling another $3,385,000, all of which were in default by mid-2013. By year's end, some of the other lenders had taken initial steps to pursue various remedies, including issuing Notices of Sale, but none of them had progressed very far.

According to CIC, in November of 2013 it commenced power of sale proceedings, purportedly issuing a Notice of Sale and serving it on Metropolis and the other lenders. But as it turned out, that Notice was never actually received. The lawyer for CIC had sent those other lenders the wrong documents by registered mail.

Further, the Notice listed the amount due under the mortgage as being just under $3 million, which was an inaccurate, highly-inflated figure. Nonetheless, in February 2014 the property was sold under power of sale to a new buyer for $5,875,000, while the other lenders remained oblivious.

When the subsequent mortgagees did learn of the completed sale, they immediately, and successfully, brought a motion to set aside the sale; as the court agreed that the sale was legally invalid.

First of all, under the *Mortgages Act* any Notice of Sale must accurately state the amount due on the mortgage under which the power of sale is to be exercised. Here, the $3 million figure in CIC's Notice of Sale was demonstrably incorrect, and this alone invalidated the Notice of Sale.

Next, the Notice of Sale had not actually been served on the other lenders as required by the Act. Although CIC's lawyer prepared the document, intended to serve it, and honestly believed that he had done so, the fact remained that – through human error – the other lenders never received it as the legislation requires.

These two errors were sufficient to completely invalidate the Notice of Sale.

However, even though the Notice of Sale was invalid, the new purchaser could have valid title to the property if it was a *bona fide* purchaser for value without notice of the invalidity of the sale.

But, the court found that although the buyer was a *bona fide* purchaser for value, it had received an e-mail from one of the subsequent lenders advising that CIC never served a Notice of Sale and that its attempts to sell the land were invalid. This amounted to notice of a defect and should have prompted the new buyer to make reasonable inquiries, which it failed to do.

This is where things only get more complicated. The question then arises as to the validity of the mortgages obtained by the new purchaser and registered on title to the property to finance the purchase.

The court found that the new mortgages fell into two categories. There was the first mortgage, which mortgagee was a *bona fide* encumbrancer for value without notice; and there was the remaining new mortgagees, which were caught by the same notice received by the purchaser warning of the invalid Notice of Sale. As the new first mortgage was valid, the court ruled it had an equitable charge in the property. But, all of the new subsequent mortgages were found to be invalid. See: *Stanbarr Services Ltd. v. Metropolis Properties Inc.*, 2015 (ONSC).

## Court Imposes "Easement of Necessity"

A man named Ben owned certain land that he decided to subdivide into Parts 1 and 2. When he died, Part 1 was conveyed to his daughter, and Part 2 was conveyed to his wife Sheila, under the terms of Ben's Will. Sheila used Part 2 to secure two mortgages with a lender Bank, both of which went into default. When the Bank took steps to sell Part 2 under its power of sale, the court was asked to rule on an issue relating to access to the property.

The problem was this: due to its physical location, Part 2 was landlocked – with no access other than by water – unless an easement could be said to exist over Part 1 that now belonged to Ben's daughter. Unfortunately, when making the arrangements to have his estate transfer Part 2 to Shelia, Ben did not grant such right-of-way over Part 1. The Bank, now poised to sell under a power of sale, requested a court order to declare that such an easement exists in favour of Part 2.

Historically, since the land was subdivided, Sheila and Ben had accessed their residence on Part 2 by travelling over the adjacent land also owned by Ben (or his corporations) at the time. But after

Ben's death, that adjacent land had now also been sold to others, as had all of the surrounding properties originally owned by Ben that might otherwise allow for Sheila's access to Part 2.

In entertaining the Bank's request, the court examined the law on what are known as "easements of necessity". These legal constructs arise from public policy dictating that land is intended to be used. Whenever a piece of land is divided into separate lots with one of them being conveyed to a new buyer, the presumption is that he or she will have access to the lot; it should not be landlocked and inaccessible. If the situation is otherwise, the law may step in to allow for the new owner's reasonable enjoyment of the purchased land by implicitly granting him or her an "easement of necessity", enabling the buyer the needed access *via* the adjacent property. Such easements can be granted regardless of what the original owner's intentions may have been, and regardless of whether he or she keeps the adjacent land.

The court added that this legal concept begs the question of what constitutes a lack of "access" for any particular property; the determination must be made in the context of each property's own unique conditions. For land with access by water only, for example, there is no universal test: the outcome may vary with the circumstances. Simply because land is technically accessible by water does not mean that a court is prevented from declaring that an easement of necessity exists. Rather, the test is "whether water access is sufficient to make unnecessary the easement of necessity that is otherwise necessary for the reasonable enjoyment of the property."

On this point, that test of "necessity" is similarly nebulous: mere inconvenience by the new buyer, for example, is not enough to warrant the imposition of an easement, nor is the fact that he or she prefers to access the property by a specific route.

The court concluded that the modern test is not whether the land is rendered "useless" or "worthless" without the contemplated easement being recognized. Instead, the contemporary legal threshold is closer to one of "practical necessity".

Here, but for the requested easement, the only other access to Part 2 would be by water, which was neither viable nor practical in light of the steep shoreline of the land. There was practical necessity to make the order; the court granted an easement of necessity over Part 1 of the land, in favour of Part 2, with a separate trial being ordered to determine where the best, least intrusive location of that easement should be. See: *Toronto-Dominion Bank v. Wise*, 2015 (ONSC).

## Notice of Trust Ordered Removed from Title

In *McLeod v. Walker*, the issue was whether a Notice, registered on title, should be removed by court order.

Randal and Laurie were siblings. Randal had always lived with his mother on property that she owned, and assisted her with the farming operations. His sister Laurie had moved away. In 2002, the mother transferred title to the property to herself and Randal jointly, in order to ensure that he would become the sole owner upon her death.

However, at the mother's behest they both signed an Agreement in 2009, providing that Randal could continue to live on and use the farm as long as he wished, but should he decide to sell it, he would receive 85 percent of the net proceeds, while Laurie was to receive 15 percent. It also clarified that upon a sale, Randal was considered to be merely holding Laurie's 15 percent of the net proceeds in trust, and was required to pay his sister her share immediately.

In legal terms, this immediately created a trust for 15 percent of the future proceeds, in favour of Laurie as the beneficiary. The problem was that such trusts – which relate to sale proceeds and not "interests in land" – normally cannot be registered on title, pursuant to the provisions of the Ontario *Land Titles Act*. Furthermore, a specific section of that Act expressly forecloses trusts from being registered.

Yet this is precisely what Laurie did. She registered a notice of her trust-based interest in the land, to the extent of her 15 percent interest in the net sale proceeds. Randal then succeeded in having a court order the removal of Laurie's notice of interest from title. In doing so, the court examined the effect of the wording of the Agreement between Randal and his mother that gave rise to Laurie's rights in the first place.

One clause required Randall to acknowledge Laurie's interest in the land, while still giving him unfettered decision-making powers on its use and sale. Another clarified that Laurie's 15 percent interest in net sale proceeds arose only once the land was sold. However, a third clause converted that 15 percent interest in sale proceeds into a trust-based interest in land; under the Act, those kinds of interests were expressly prohibited from being registered on title.

Thus, the court directed that Laurie's notice of her trust interest was to be deleted from title, with Randal remaining free to deal with the land or sell it as he saw fit. However, the court also directed that should Randal decide to sell, any net proceeds were to be paid immediately and simultaneously to them both as initially allocated in the Agreement. See: *McLeod v. Walker*, [2015] O.J. No. 4993 (S.C.J.).

## Legislative Update

On December 11, 2015, Finance Minister Bill Morneau announced changes to the rules for government-backed mortgage insurance. Effective February 15, 2016, the minimum down payment for new insured mortgages will increase from 5% to 10% for the portion of a house price above $500,000. The 5% minimum down payment for properties up to $500,000 remains unchanged as does the minimum 20% down payment requirement for properties $1 million and over.