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THE NATURE OF A REGISTERED MORTGAGE IN BRITISH COLUMBIA:

Is a Mortgage Granted by the Registered Owner of Title a Valid Charge?



A recent decision of the British Columbia Supreme Court reviewed the law relating to the nature of mortgages under the land title registration system of British Columbia.

It is well known that the *Land Title Act*, R.S.B.C. 1996, c. 250 as amended, and as interpreted by the British Columbia Court of Appeal in *Credit Foncier Franco-Canadien v. Bennett* (1963), 43 W.W.R. 545, does not give to mortgages the indefeasible quality afforded to title. In other words, mortgages are not indefeasible in British Columbia.

But can this distinction be the basis for an argument that a registered mortgage granted by the registered owner of title cannot claim the protection of the Act if the registered owner of title obtained his or her title by a fraudulent act?

In *Gill v. Bucholtz*, [2008] B.C.S.C. 758, the issue was whether or not mortgages granted to mortgagees by a registered owner who obtained her title by fraudulent means, remain a valid charge on title when the “true” owner recovers his title.

Or, are they tainted by the fraudulent actions of the wrongdoer,

even though she was the registered owner at the time the mortgages were granted? Is the “true” owner stuck with the mortgages as valid charges on his title when he recovers it?

Or, as the “true” owner argued, should his title be restored to him free of the mortgages granted by the wrongdoer?

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In the *Gill* case, an unknown person impersonated the “true” registered owner on title of the property in question, Amritpal Singh Gill, the plaintiff in the action, and transferred the fee simple to a confederate, Ms. Gurjeet Gill, who mortgaged the property twice—first to the Bucholtzs and then to an investment company, both defendants in the case.

A key finding of fact is that both mortgagees were unaware of the fraudulent root of Ms. Gill’s title when they advanced the mortgage proceeds.

Mr. Justice Barrow in *Gill v. Bucholtz* framed the issue raised by the facts as being a contest between an innocent owner fraudulently deprived of title to his lands and innocent mortgagees who took their

mortgages relying on the title to the lands as shown in the land title registry—the question being, whose interests prevail?

In reaching his conclusion, Mr. Justice Barrow reviewed the authorities dealing with the operation of the British Columbia land title registration system and especially how it affects the nature of mortgages. He held he was bound by those authorities to find that the mortgages were valid and that the interests of the innocent mortgagees prevailed.

But he raised some important issues that could be considered if this decision is taken on appeal.

In reaching his decision, Mr. Justice Barrow chose to uphold the principle of reliance on the register—one of the pillars of a land title registration system.

Note: In 1858, Sir Robert Torrens created in South Australia what today is referred to as a Torrens system of land title registration system to replace an expensive and time-consuming practice of title searches. Under a Torrens system, a bona fide purchaser (BFPor) who deals with the registered title to land is not required to go behind that title. In a Torrens system, the register is everything and the registered title is considered to be “indefeasible.”

In *Megarry & Wade, The Law of Real Property*, 5th ed, 1984, the distinguished jurists, in Chapter 6, “The New Conveyancing: Registration of Title, Part 1, The Break with Tradition,” refer to the land title registration system as

a wholly new system of conveyancing, designed to replace the traditional system, in its entirety. Its prime object is to substitute a single established title, guaranteed by the State, in place of the traditional title which must be separately investigated on every purchase at the purchaser’s own risk.

Sir Robert’s new system also purported to replace the common law doctrine of *nemo dat non quod habet* (one cannot give what one does not have) and the equitable doctrine of notice. It also attempted to make registration the only means of transferring an estate of interest in land. In most Torrens systems, and especially in British Columbia, these goals have not been totally successful.

One of the key aspects of a Torrens system is “reliance” on the registered title by a bona fide purchaser for value (BFPor) who, without knowledge of fraud or wrongdoing by a registered owner of the fee simple title, purchases an estate or interest in land from the registered owner. The BFPor can rely on the indefeasibility of the registered title—namely, that it is conclusive evidence at law and in equity that the person named as registered owner is so entitled to an estate in fee simple.

Lord Watson, in the classic decision of *Gibbs v. Messer*, [1891] A.C. 248 (J.C.P.C.), and relied on by Barrow J., claimed that reliance was the main object of a land title registration system. Lord Watson stated that the main object of a land title registration system is to save a BFPor dealing with the registered owner from the trouble and expense of going behind the register, to investigate the history of that owner’s title. And once the BFPor becomes registered, he or she acquires an

indefeasible right to the interest registered, notwithstanding the infirmity of the owner’s title.

But his Lordship added a very important caveat—the BFPor must deal with the actual registered owner on title and not with an impostor—that is, someone claiming to be the actual owner.

The key finding in *Gibbs v. Messer*, and the reason why it overturned the lower courts’ findings, is that the person named on title as the registered owner was a “fictitious” person so that when the wrongdoer signed the transfer document as that person, the transfer document was a forgery—a nullity at law—thereby making the transfer document void at law.

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If, as the lower courts had found, the wrongdoer had claimed to be the fictitious person, the transaction still would have been a fraudulent one, but it would not have been a forgery and the BFPors would have received an immediate indefeasible title upon registration because they would have dealt with the person registered on title. Therefore, the key finding in the *Gibbs* case was the forgery that created a void instrument at law.

In discussing the statutory framework on which the *Gill* case was based, Mr. Justice Barrow first reviewed various sections on the *Land Title Act* and found three principles that emerged from the provisions of the Act:

- (i) a registered title in fee simple, while it remains “in force and uncanceled” (section 23(2)), retains its indefeasible quality;
- (ii) the Act does not give to charges the indefeasible quality afforded to title. The holder of the charge is merely “deemed” to be entitled to the interest reflected in the instrument (section 26(1)); and

- (iii) the common law principle of *nemo dat quod non habet* applies to registered interests less than fee simple interests (found in section 297(3) prior to the 2005 amendments; today, this is in section 25.1).

Section 297(3), prior to its repeal, read: “A person taking under a void instrument is not a purchaser and acquires no interest in the land by registration of the instrument.” Section 25(1) reads: “Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire an estate or interest in the land on registration of the instrument.”

With respect to the third principle above, Mr. Justice Barrow referred to the tension underlying the issue between the common law principle of *nemo dat quod non habet* and the indefeasibility of title established by the *Land Title Act*.

Later in his reasoning, Barrow J. returned to this principle and stated that he found the tension to be “more apparent than real” because

...while the *Act* clearly preserves the principle in relation to charges, at the same time, it clothes the registered title holder with an indefeasible right to deal with the property. This from the perspective of a mortgagee dealing with the registered title holder *bona fide* and for value, the title holder owns that which is transferred. Viewed from that perspective, it is not inconsistent with the provisions of the *Act* which preserve the *nemo dat quod non habet* principle to find that a registered owner who acquires title through fraud can still grant a valid charge on the property. (p. 20)

In determining the second principle above, Mr. Justice Barrow referred to the classic decision of the British Columbia Court of Appeal in *Credit Foncier Franco-Canadien v. Bennett* in which an employee of a mortgage company forged the signature of the registered owners

of a property—the Bennetts, on a mortgage that in turn was registered.

The mortgage was assigned first to a mortgage broker, then to Credit-Foncier, a bona fide mortgagee who, in taking the assignment of the mortgage, relied on the state of title to the property that showed the mortgagors as the registered owners of the title. The Bennetts refused to pay and the mortgage fell in default. Credit-Foncier foreclosed, arguing it was entitled to foreclose because the words “deemed entitled” in the *Land Title Act* meant “irrefutably presumed” and as such, the mortgage was a valid charge.

But the British Columbia Court of Appeal held that the words “deemed entitled” did not endow a charge with indefeasibility. Sheppard J. A., for the Court, found that the omission of the word “conclusive” used to describe the effect of indefeasible title, from the section dealing with the effect of charges, together with the use of the word “deemed,” which is capable of meaning “rebuttably presumed,” implied that the Legislature intended the omission to be observed by assigning a meaning not “conclusive” and raising only a rebuttable presumption.

Mr. Justice Barrow reflected that Sheppard J. A. pointed out in *Credit-Foncier* that the case did not involve a mortgage that was granted by the registered owner of land who obtained title by a fraudulent transfer. And in doing so, Sheppard J. A. rejected the plaintiff’s argument to the extent it was based on the finding of “deferred indefeasibility” in *Gibbs v. Messer* because of the difference in the wording of the provisions in the BC legislation dealing with title and charges.

Mr. Justice Barrow in *Gill* wrote that the issue in *Credit-Foncier* “did not involve reliance, by the assignee of the mortgage, on the title to the land. The true owner was the registered owner and that did not change.” He stated that the issue in *Credit-Foncier* “turned on the effect of registration of charges... . The mortgage was created by fraud and the court held

that notwithstanding registration, it was vulnerable to attack because registration raised only a rebuttable presumption that it was a valid charge” (p. 9).

But in *Credit-Foncier*, the issue was reliance. Credit-Foncier as the assignee of the registered mortgage was claiming it was entitled to rely on the register—namely, the fact that the mortgage was registered on title. The Court held otherwise.

The “true” owner would be compensated for his or her loss.

The key issue in the *Gill* case is this: Should mortgagees, as BFPors, be entitled to rely on the indefeasible title of the registered owner, even though that title is tainted by fraud and liable to be restored to the “true” owner?

An important question to ask is what makes a bona fide mortgagee different from a BFPor of the fee simple? After the 2005 amendments to the Act, BFPors of the fee simple who deal with an impostor and not the “true” owner are allowed to remain as the registered owners—section 25.1.

The “true” owner would be compensated for his or her loss. One of the rationales for the amendment was that it was considered unfair to deprive the BFPor of the land and title when it was difficult for the BFPor to discover whether the person with whom he or she was dealing was actually the registered owner. Technology today has unfortunately made identity theft easier to carry out.

The amendment simply could have compensated the BFPor and returned the registered title to the “true” owner; it was, however, considered important to support the reliance factor—that BFPors are entitled to rely on the registered title and once they are registered, should not be removed from title unless they participated in the fraud on the “true” owner.” But no similar amendments were made with respect to charges.

Therefore, the law in British Columbia today with respect to forged mortgages remains unchanged. A mortgagee who deals not with the “real” registered owner, but with a wrongdoer impersonating the “real” registered owner—and thereby takes a mortgage under a forged transfer—obtains nothing because it is a nullity according to the reasoning in *Credit-Foncier v. Bennett*. The mortgagee does not deal with the “true” registered owner and the mortgage, even if registered, cannot be the basis of deferred indefeasibility.

And the principle of the void instrument was incorporated in section 297(3) of the Act prior to the 2005 amendments and in section 25.1(1) of today’s Act.

But what if the mortgagee deals with the actual registered owner? What if the wrongdoer forges the “true” owner’s signature to a transfer form and the wrongdoer becomes the registered owner of title? The wrongdoer does not obtain indefeasible title because he or she is the registered owner—see section 23(2)(i) of the Act.

The “true” owner can recover his or her registered title from the wrongdoer. But until that happens, does the wrongdoer have the ability to grant a valid mortgage in the land to a BFPor/mortgagee? If the wrongdoer transfers the fee simple title to a BFPor, that person is deemed to have acquired that estate on registration of the instrument—section 25(2).

Is not the mortgagee, as the registered owner of a charge, “deemed to be entitled to the estate, interest, or claim created or evidence by the instrument in respect of which the charge is registered” (section 26)? Those facts do not involve a forged mortgage. There would have been a forged transfer of title into the name of the wrongdoer now registered on title, but a mortgage granted by that registered wrongdoer is not a forgery.

The counter argument by the plaintiff (actually, the Land Title and Survey Authority carried the argument on behalf of the plaintiff) was based

on the fact that the Act treats fee simple interests differently than lesser interests and in particular, mortgages, and that it preserves the *nemo dat* maxim in relation to charges. And as charge holders, the mortgagees cannot acquire a valid charge from someone who does not own the interest purporting to be transferred by the charge.

The plaintiff puts in doubt the reasoning in *Gibbs v. Messer* because the land title registration system under review in that case was different than the legislation in British Columbia—namely, the Australian legislation did not make a distinction between the indefeasibility of title and charges. Therefore, it is argued that those British Columbia cases that relied on *Gibbs v. Messer*, namely *Kwan v. Kinsey* (1979), 15 B.C.L.R. 31 (S.C.), and *CMIC Mortgage Investment Corp. v. Viridi*, [2006] BCSC 1126, should be found to be wrongly decided and ought not to be followed.

The plaintiff argued that a recent decision by the Ontario Court of Appeal in *Lawrence v. Maple Trust Co. et al.* (2007), 84 O. R. (3d) 94, although decided under a regime that is different than that in operation in British Columbia, ought to govern the outcome in the *Gill* case.

The mortgagee defendants argued that the issue in *Gill* does not turn on the differential treatment in the Act between fee simple interests and lesser interests. Rather, they argued that it is the indefeasible nature of fee simple interests that supports their position.

They argued that section 23(2) of the Act cloaks the registered owner with indefeasible title as long as that person is shown on the Register as the registered owner and, until the “true” owner acts to recover his or her title to the land, the person actually on title can deal with the land and in doing so, can create a valid charge.

Mr. Justice Barrow put the issue more broadly; he stated the mortgagees argued that the purpose of the Act is to allow those who rely on title to lands as shown in the Register to do so without the need for investigating the root of that

title because, if the plaintiff's position is correct, that principle is significantly undermined.

Mr. Justice Barrow reviewed the reasoning in *Gibbs v. Messer* and the statement by Lord Watson of the purpose of a Torrens system of land title registration. He found, though, that although the Act treats charges differently than fee simple interests, the issue in *Gill* is the effect of the indefeasible quality of fee simple interests in relation to those who rely on that interest when taking as security a lesser interest in the lands.

It reasoned that the homeowner had no opportunity to avoid the fraud...

According to Barrow J., the Act makes no distinction in the indefeasible quality of the title to fee simple lands as between those purchasing the land and those taking lesser interests. He then concluded that he was not persuaded that the often-quoted observations of Lord Watson are not applicable to the statutory context in this province.

Mr. Justice Barrow reviewed the British Columbia decisions that the defendant/mortgagees claimed supported their argument. These were *Kwan v. Kinsey*, *CMIC v. Viridi*, and *Vancouver City Savings Credit Union v. Hu*, [2005] BCSC 712. To this list, he added another case, *Canadian Commercial Bank v. Island Realty Investments Ltd.* (1988), 23 B.C.L.R. (2d) 96, 47 R.P.R. 232 (C.A.).

He stated he was not persuaded that *Kwan* and *CMIC*, which relied on *Kwan*, both relying on the reasoning in *Gibbs*, were wrongly decided. But even if he were so persuaded, he stated he was bound to follow them. Similarly, both *Canadian Commercial Bank* and *Vancouver City Savings Credit Union*, even though their facts did not involve the fraudulent acquisition of title, did endorse the principle of reliance on title as expressed in *Gibbs*.

What then of the reasoning of the Ontario Court of Appeal in *Lawrence v. Maple Trust Co.*? In this case, although the facts were similar to *Gill*, the Court found in favour of the homeowner, not the mortgagee. In *Lawrence* the Court weighed the positions of the homeowner and the mortgagee and found in favour of the innocent homeowner.

It reasoned that the homeowner had no opportunity to avoid the fraud and thereby no ability to discover that her home was being fraudulently sold and mortgaged. The mortgagee, on the other hand, made the decision to advance the money and had the opportunity to avoid the fraud.

Even though Mr. Justice Barrow stated it was unnecessary to deal with the policy considerations, he decided to comment on them anyway.

First, he noted the differences between the legislation in both provinces and that the Ontario legislation treats fee simple interests and lesser interests the same. And, although title to land in Ontario is considered to be indefeasible, the Ontario legislation does not use that word or the phrase “conclusive evidence at law and in equity.”

Second, Barrow J. agreed that the homeowner enjoys less protection than a mortgagee who has dealt with the wrongdoer. The homeowner can recover his or her title from the wrongdoer but cannot raise the fraud of that wrongdoer as against the mortgagee. The homeowner is left to his or her remedy against the assurance fund.

He recognized that this result diluted the protection afforded a registered owner by section 23(2)(i) of the Act, for although the true owner can compel a re-conveyance of the land, it is subject to the financial charges placed against title by the wrongdoer.

While Barrow J. conceded that the mortgagee may be in a better position to detect fraud in the circumstances of the *Gill* and *Lawrence* cases, it seemed to him that ability may be “more apparent than real.” He found that the ability of the mortgagee to detect the underlying fraud being

carried out against the true owner is limited, to say the least.

The wrongdoer is the registered owner and is not impersonating the true owner. According to the judge, to require the mortgagee to go behind the registered title to detect the fraud would defeat the “very purpose of the land title system” (p. 25).

Note: If the homeowner were entitled to recover the registered title free of the mortgages, the mortgagees on the facts in *Gill* would have no claim against the assurance fund. To receive compensation from the fund, a claimant must establish that he or she lost the interest as a consequence of the Torrens system and would have been able to recover that interest if the Act had not been passed.

At common law, the mortgagees as a consequence of the *nemo dat* doctrine would have received no interest in the property. Therefore, they would not have lost their interests as a consequence of the Torrens system.

In conclusion, Mr. Justice Barrow held that while there is merit in the policy considerations advanced by the plaintiff, he did not find them compelling, and in any event he considered himself bound by authority to find that as against the mortgagees, the plaintiff’s action must be dismissed.

BUT!

Can it be argued that *Gill* is wrongly decided? On an appeal, the Court of Appeal might clarify the operation of the land title registration system of BC and especially the nature of mortgages. Would the Court choose to follow the policy considerations adopted by the Ontario Court of Appeal in the *Lawrence* case and give greater weight to the position of the “true” owner who regains his or her registered title?

Would the Court of Appeal accept the argument that the classic decision of *Gibbs v. Messer* has limited value in interpreting the effect of the Torrens system in BC because

the land title registration legislation being considered in *Gibbs* did not distinguish between fee simple titles and mortgages, as does the legislation in BC? As a consequence, those BC cases relying on the reasoning in *Gibbs v. Messer* to determine whether or not mortgages are valid would be wrongly decided and not to be followed.

Also, would the Court agree with Barrow J. that the Act does preserve the common law doctrine of *nemo dat quod non habet* but, contrary to Barrow J.’s determination, find the doctrine inconsistent with the provisions of the Act so that a registered owner who acquired title through fraud cannot grant a valid charge on the property? ▲

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