

**Bob Reid**



## Recent Cases of Interest to Notaries

1. Is a Purchaser of an Equity of Redemption liable to pay the debt owing under a residential mortgage by reason of section 22 of the *Property Law Act*, RSBC 1996, c. 377?

**Depends whether he or she has expressly agreed to pay or he or she is liable to indemnify the mortgagor/vendor. If neither, then he or she is not liable.**

In *Westminster Savings Credit Union v. Findlay et al.*, [2002] BCSC 1048, Joyce J. determined, on the facts, that the purchaser had not expressly agreed to pay the debt. The purchaser had not executed an assumption agreement expressly agreeing to pay the mortgage debt. A commitment letter sent by the mortgagee, and signed by the purchaser, indicated that a separate assumption agreement was to be completed; it never was. The purchaser made the mortgage payments under the mortgage and under a renewal notice that extended the mortgage maturity date and increased the rate of interest that in turn increased the monthly payments. Then the purchaser ceased making payments.

The mortgagee obtained an order *nisi* of foreclosure and sale, and sought personal judgment against the purchaser

for any deficiency owing on the mortgage debt after the sale. The judge found that neither the application for mortgage nor the commitment contained a covenant to pay by the purchaser. In fact, the purchaser did not execute any document, including the renewal agreement, in which he “agreed to be bound by the covenant contained in the original mortgage.” Therefore, Joyce J. found that the documents executed by [the purchaser] did not impose upon him a personal obligation to pay the mortgage debt.

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What about section 22(3) of the *Property Law Act*? The mortgagee argued that it imposed a statutory liability on the purchaser to pay the mortgage debt. This subsection states that a mortgagee is entitled to recover from the “current owner” [purchaser] any amount due and owing under the mortgage...as though the current owner had entered into those covenants to make payments.

The purchaser countered with section 22(5) that limits the liability of the current owner under subsection (3) to the amount the current owner is under an obligation to pay or indemnify his or her transferor [original mortgagor/vendor] in respect of liability under the mortgage. And there was no liability to indemnify because the original mortgagor/vendor’s liability under the mortgage was extinguished by the operation of section 23(1) of the *Property Law Act* that states that the original mortgagor/vendor’s liability ceases under the personal covenant in the mortgage unless the mortgagee, within three months after the existing term expires, makes demand by written notice for the payment owing under the mortgage.

This term in the original mortgage expired on June 1, 2000, and the mortgagee gave no demand by written notice within the three-month period after the term’s expiry. The mortgagee argued that subsections 22(4) and (5) should be interpreted to enable the mortgagee to recover the mortgage debt from a subsequent purchaser without the need for an assumption agreement. The judge disagreed. He agreed that the statutory provisions were enacted to protect mortgagors who convey their property to new purchasers, not to protect mortgagees.

**HELD:** since the original mortgagor is under no liability to the mortgagee, there is nothing in respect of which the purchaser must indemnify the original mortgagor/vendor. Therefore, the purchaser is under no liability to the mortgagee under section 22 of the *Property Law Act*.

**NOTE:** a mortgagee should ensure it obtains a personal covenant to pay the debt from the purchaser who is assuming the existing mortgage either in a commitment letter or by way of an assumption agreement at the time of the purchase. The original mortgagor/vendor [transferor] remains liable on his or her personal covenant in a residential mortgage unless:

- (i) he or she has obtained an express release of liability from the mortgagee; or
- (ii) the mortgagee has responded positively to the transferor's written request, made no later than three months after the transfer, that the mortgagee approve the purchaser [section 24(1)]; or
- (iii) the mortgagee, within three months after the existing term has expired, has not made a written demand of the transferor for payment of the sum secured [section 23(1)]. In the last situation, the transferor remains liable until three months after the expiration of the existing term. So does the current owner [purchaser] during this period so long as **he or she** is obligated to indemnify the original mortgagor/vendor in respect of the latter's liability under the mortgage [subsections 22(4) and (5)]. His or her liability under section 22(5) is limited to the amount that he or she is under an obligation to pay or indemnify his or her transferor in respect of liability under the mortgage.

## 2. Can mortgagors who made an assignment of bankruptcy during the redemption period of foreclosure be allowed to reinstate the mortgage by paying the arrears and costs to date?

Master McCallum in *Island Savings Credit Union v. Durand et al.*, [2002] BCSC 937, held yes. The intervening bankruptcy was not a bar to reinstatement and the equities favoured the mortgagors who had mortgaged the family home. The mortgagors encountered serious financial difficulties and made an assignment in bankruptcy after the mortgagee commenced foreclosure proceedings. The mortgagors, believing there was no equity in the property, took no steps in the proceedings. But, after the Trustee in Bankruptcy confirmed that he had no interest in the family home, the mortgagors sought from the court:

***The mortgagors, believing there was no equity in the property, took no steps in the proceedings.***

- (i) relief from the acceleration of the entire mortgage debt, and
- (ii) an order to reinstate the mortgage by paying the payments in arrears, the property taxes, and reasonable legal costs incurred by the mortgagee.

Master McCallum found that following the bankruptcy, the mortgagors appeared to have regained their financial footing. He also found that they meet the test for relief from acceleration and for reinstatement set out in *CTF Holdings Ltd. v. Flint Motors Ltd.*, [1995] B. C. J. No. 2305 (BCSC), that relief ought to be granted unless there has been "a flagrant and contemptuous disregard of the parties' contractual obligations."

But relief will not be granted if the court has to make a new bargain for the parties. They must be able to return to their original positions. Since the intervening bankruptcy did not prevent the parties from returning to their original positions, the mortgagors were allowed to reinstate their mortgage even though there appeared to be little equity for them in the property. And the mortgagee's position was not prejudiced from the reinstatement.

## 3. If an unregistered owner arms the registered owner with "the power to go into the world as the absolute owner of the lands," he is thereby estopped from denying the contract of sale negotiated by a purchaser in good faith and acted upon by the purchaser to its prejudice without knowledge of the unregistered owner's interest.

The BC Court of Appeal in *Willoughby Residential Development Corp. v. Bradley*, [2002] BCCA 321, held that the purchaser was entitled to an order of specific performance of the contract against both the owners because the unregistered owner was estopped from denying that his sister, the registered owner in fee simple, had his authority to execute a contract of sale of the property jointly on their behalf.

Philip Bradley had contributed money to the purchase in 1975 of the property in question, a five-acre farm in Langley, initially registered in the names of his parents and sister, Dawne Bradley, as joint tenants. After the parents died, the sister, in 1993, became the sole registered owner under her right of survivorship. The trial judge found that Philip did not want his name to appear on the title to the property, but he was aware that his sister was the sole registered owner; he was content to have his sister look after and represent his interests in the property.

Dawne was approached by Willoughby Residential Development Corp., a real estate developer, who was willing to pay a price higher than market value because it planned to develop residential housing on land that included the Bradley farm. When Philip discovered a contract of sale had been entered into, he registered a certificate of pending litigation [CPL] against the title of the farm. He did not want the farm sold.

At trial he was held to have an equitable interest in the farm because of the doctrine of resulting trust because he had contributed money to purchase the property. Willoughby, unable to complete the contract because of Philip's CPL, commenced this action of specific performance against him and Dawne, and registered its own CPL against the title to the farm.

The trial judge found for Willoughby on the basis that the contract with Dawne was entitled to priority over Philip's unregistered interest because of section 29 of the *Land Title Act*. The judge found that Willoughby did not have notice of Philip's unregistered interest at the time of entering into the contract and therefore was not affected by it.

The trial judge reviewed two cases, *March v. Drab* (1977), 5 B.C.L.R. 396 (S.C.) and *Central Station Enterprises Ltd. v. Shangri-La Estates Ltd.* (1979), 98 D.L.R. (2d) 316 (B.C.S.C.), and he determined that a purchaser is not affected by the fraud exception in section 29 unless he acquires knowledge of the unregistered interest prior to entering into the contract of purchase and sale.

On appeal, Mr. Justice Mackenzie, for the Court, decided that section 29 had no application in the circumstances of this case because Philip's interest "was registered in the form of the CPL and the issue to be determined is which of the two registered interests should have priority." He stated that if Philip had failed to protect his interest by registering a CPL, then Willoughby could have relied on section 29 and the timing issues relating to when notice [knowledge] is equated to fraud would have arisen.

Although Mackenzie J.A. stated it was unnecessary to answer the timing question, he said he was inclined to the view that the critical time is the completion of the contract and delivery of the conveyance. In other words, notice of an unregistered interest prior to completion of the contract would constitute fraud if the purchaser relied on section 29 in order not to be affected by that interest.

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Philip had argued that the scheme of the *Land Title Act* applies and priority is governed by the time of registration. He argued that because he registered his CPL before Willoughby's CPL, he was entitled to priority. Philip referred to section 20 of the Act to state that the contract is ineffective to pass any interest in land unless it is registered. Section 22 directs that the priorities of competing interests are determined by time of registration, and section 31 provides for priority of his registered CPL because:

- (i) it was registered before Willoughby's application to register his CPL, and
- (ii) his claim to an interest in land was established. Moreover, section 29 deals with unregistered interests in land, and his interest is registered through his CPL.

The Court of Appeal agreed: Philip's registration was determined to be first in time and was therefore entitled to priority, based on the proper application of section 20 and section 22 of the Act. Unfortunately for Philip, however, the Court decided the case on the basis of equitable estoppel. Mackenzie J.A. did not think that Philip's priority of interest

by registration under the Act precluded Willoughby from enforcing the contract against him under equitable principles of apparent authority and estoppel.

The sale contract was held to be enforceable against Philip because his sister had apparent authority to bind his interest to the contract at the time of its execution, and he was estopped by the equities from denying that authority. Philip concealed his contribution to the purchase price and his interest in the property for 20 years. He allowed his sister to take registered title in her own name and to manage the property as if she were the sole owner—he "clothed her with all the indicia of ownership."

Willoughby dealt with her on that basis and relied on her apparent authority to its prejudice. Therefore "the balancing of the equities estops [Philip] from denying the authority of [his sister] to make a binding contract with Willoughby." The Court relied on the decision of *Rimmer v. Webster*, [1902] 2 Ch. 163, where:

it was held that when an owner of property gives all the *indicia* of ownership to another person with the intention that he should deal with the property, any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser. In such a case, the owner is estopped from asserting his equitable title against the person to whom the transferee [*sic*] has disposed of the property for value.

This principle was approved in the context of a Torrens system in *Abigail v. Lapin*, [1934] W.W.R. 689 [Privy Council].

**HELD:** Willoughby was entitled to specific performance of the contract of sale, not only against Dawne, but also against her brother, Philip. The appeal was dismissed.

**NOTE:** It is hoped that if Mr. Justice Mackenzie ever has the opportunity in the future to answer the question definitively about the critical time when the fraud exception applies in section 29

that he will come to a different conclusion than it is the completion of the contract. Why should a purchaser be judged fraudulent if, after entering into a contract of sale, he or she has notice of an unregistered interest?

The conclusion of Davie C.J. in a much earlier decision of the BC Court of Appeal, *Hudson's Bay Co. v. Kearns and Rowling* (1895), 4 B.C.R. 536, held that the equivalent of section 29:

must be taken as absolutely protecting a purchaser for value against attack on the ground of notice of any character or nature whatsoever; but its otherwise absolute effect must be held to be subject to this qualification, that a man who in consequence of any knowledge constituting actual notice of a prior unregistered title or interest does any act for the direct purpose of bringing himself within the words of the section, as distinguished from any act in the ordinary course of business or in the natural course of any pending dealing or transaction, and thereby prejudicing the holder of the unregistered title, must be held to be guilty of actual fraud and to be estopped from invoking the protection of the enactment, under the inflexible rule that an Act of Parliament shall not be used as an instrument of, or in defence of, actual fraud.

In this decision, the Chief Justice stated that a person "who enters upon and proceeds with his purchase after *express notice* of an unregistered title or equity might be estopped from claiming the benefit of" section 29. In some other Torrens systems, e.g., Alberta, notice by itself is not sufficient to constitute fraud; there must be something more.

The abolition of the equitable doctrine of notice by section 29 is intended to support the key of a Torrens system—that the register is everything. A person should be able to examine the indefeasible title of a specific property

and see all the interests in land that pertain to it. A purchaser should not be affected by an unregistered interest because if knowledge outside of the register is as good as registration, then the comprehensiveness of a Torrens system is reduced. [Ziff, *Principles of Property Law*, 3rd ed. 2000, at pp. 427–429.]

It is to be hoped that the Court of Appeal in any determination of the scope and effect of section 29 will consider the words of Martin J. [as he then was] in *Jager the Cleaner Ltd. v. Li's Invs. Co.*, [1979] 4 W.W.R. 84, 11 B.C.L.R. 311 (SC), when he refused to accept as a proposition of law that every purchaser who takes with knowledge of an unregistered interest *must* be guilty of fraud so that, in effect, the courts have repealed section 29. According to Martin J., the decisions that state in unqualified terms:

that notice of an unregistered interest before closing bars the purchaser from protection of the Act, like all other decisions in the courts, are authorities only in relation to the facts of a particular case...they cannot be said to lay down a rule of universal application. The question in every case must be whether a fraud would *in fact* be committed if the purchaser were to claim the protection of the Act; fraud, which is never lightly to be inferred, must, I think, be established by the particular facts of the case and cannot be presumed. ▲

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## Internet Chat Lingo

AAMOF: As a matter of fact  
AFAIK: As far as I know  
BAC: By any chance  
B4: Before  
B4N: Before now  
BBL: Be back later  
BRB: Be right back  
BTW: By the way  
CMIIW: Correct me if I'm wrong  
CUL: See you later  
EOF: End of file  
FITB: Fill in the blank  
4U: For you  
F2F: Face-to-face  
FWIW: For what it's worth  
GMTA: Great minds think alike  
HTH: Hope this helps  
IAC: In any case  
IKWUM: I know what you mean  
IMHO: In my humble opinion  
IMO: In my opinion  
IOW: In other words  
IYKWIM: If you know what I mean  
J/K: Just kidding  
JM2C: Just my two cents  
KWIM: Know what I mean  
LOL: Laughing out loud  
NN2R: No need to reply  
OIC: Oh, I see  
OTOH: On the other hand  
ROTFL: Rolling on the floor laughing  
SICS: Sitting in the chair snickering  
TIA: Thanks in advance  
TNX or TXS: Thanks  
TTFN: Ta-ta for now  
2L8: Too late  
2U: To you  
WB: Welcome back  
WRT: With regards to  
WTG: Way to go!  
YSR: Yeah, sure, right  
YWIA: You're welcome in advance