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1992 CarswellAlta 188, 6 Alta. L.R. (3d) 377, [1993] 2 W.W.R. 683, 131 A.R. 391, 25 W.A.C. 391

Laurentian Bank of Canada v. Chu

LAURENTIAN BANK OF CANADA, formerly EATON TRUST COMPANY, formerly COMMERCE CAPITAL TRUST v. DODD Q. CHU

Alberta Court of Appeal

McClung, Bracco and Irving JJ.A.

Judgment: September 8, 1992
Docket: Docs. Edmonton Appeal 9103 0746-AC; 9103 0750-AC

Counsel: *R.A. **Low***, for plaintiff (respondent).

L.W. Hendrickson, for defendant (appellant).

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Mortgages --- Action on covenant — Liability on covenant — Guarantor

Mortgages --- Action on covenant — Enforcement of covenant — Restrictions — Statutory restrictions — Corporate mortgagor

Mortgages — Action on covenant to pay — Personal judgment — Availability — Statutory restrictions — Original corporate mortgagor transferring title to condominium units to corporate transferee — Original mortgagor becoming bankrupt — Corporate transferee transferring title to shell corporation wholly owned by defendant and defendant's wife — Shell corporation transferring title to defendant personally — Neither defendant nor defendant's family residing in condominium units — Defendant defaulting on mortgage — Mortgagee obtaining Rice orders including negative purchase price on one unit — Mortgagee suing on covenant to pay — Trial court holding bankruptcy of original mortgagor not affecting validity of transfer — Evidence not establishing trust relationship between defendant and shell corporation — Section 43 of Law of Property Act not barring action on covenant to pay — Negative purchase price being appropriate claim — Defendant held personally liable on covenant to pay — Appeal court upholding trial decision.

Mortgages — Implied covenants — Liability of transferee — Original corporate mortgagor transferring property after filing proposal and amended proposal but before assignment in bankruptcy — Corporate transferee transferring property to shell corporation wholly owned by defendant and defendant's wife — Shell corporation trans-

ferring title to defendant personally — Implied covenants in s. 62(1) of Land Titles Act creating contingent liability between transferee and mortgagee providing obligation to indemnify existing between successive parties in chain of title — Bankruptcy of original mortgagor not relieving defendant of liability on mortgage — Evidence not establishing existence of trust relationship between defendant's corporation and defendant — Defendant held personally liable on covenant to pay at trial — Appeal court upholding trial decision. .

Bankruptcy and insolvency — Assignments — Effect — Corporate mortgagor of condominium units transferring property after filing proposal and amended proposal — Mortgagor later assigning into bankruptcy — Bankruptcy not relieving subsequent transferee of liability on mortgage.

Cases considered:

Evans v. Ashcroft (1915), 8 W.W.R. 899 (Alta. T.D.) — *distinguished*

Royal Trust Corp. of Canada v. Turner, 38 Alta. L.R. (2d) 385, [1985] 5 W.W.R. 362, 61 A.R. 27 (Q.B.) — *distinguished*

Statutes considered:

Land Titles Act, R.S.A. 1980, c. L-5

s. 62(1)*considered*

Appeal from judgment of Feehan J., 82 Alta. L.R. (2d) 83, [1991] 6 W.W.R. 563, 20 R.P.R. (2d) 57, 123 A.R. 366, holding defendant liable on covenant to pay contained in mortgage.

Memorandum of judgment delivered orally from the bench by *McClung J.A.*:

1 We are of the view that at the time of the sale of the Pac-West the transferee's obligation on the covenant was fully in place. The appellant [appealing from 82 Alta. L.R. (2d) 83, [1991] 6 W.W.R. 563, 20 R.P.R. (2d) 57], through Mr. Hendrickson's excellent argument, urges that cases such as *Royal Trust Corp. of Canada v. Turner*, 38 Alta. L.R. (2d) 385, [1985] 5 W.W.R. 362 (Q.B.), establish that the acceptance of a proposal in bankruptcy, by itself, breaks the chain of liability necessary to engage s. 62(1) of the *Land Titles Act* [R.S.A. 1980, c. L-5]. But in *Royal Trust* the mortgagee elected its remedy by valuing its security and standing in line with the unsecured creditors to share in the balance of the funds. In doing so it submitted to a clause in the proposal which provided that the claim against the bankrupt would then be "completely discharged and satisfied." That is clearly not the case here, the mortgagee's position being that nothing in the bankruptcy proposal of Abacus relieved it from its covenant to pay. In our view as well as that of the trial judge, the chain of liability remained intact and that despite Abacus' subsequent assignment into bankruptcy.

2 The Paragon purchase was not a true trust arrangement excusing Dr. Chu from liability. The trial judge examined the facts attending the Paragon purchase and its prompt transfer of the funds to Dr. Chu. That on the evidence was Dr. Chu's clear wish at all material times. We can find no fault with Mr. Justice Feehan's conclusion that the true relationship between Dr. Chu and Paragon was one of principal and agent and not trustee and beneficial owner. Therefore Dr. Chu cannot find sanctuary from the implied covenant to pay from cases such as *Evans v. Ashcroft* [(1915), 8 W.W.R. 899 (Alta. T.D.)] and *British Columbia v. Nickerson* which were cited by Mr. Hendrickson.

3 Lastly, at the time of the consent Rice order the appellant agreed to the negative sale price on unit 95. Whether he is now estopped from alleging a lesser sale price in his calculations we will not decide but we do say that the earlier consent was a fact fully supporting the trial finding. The negative sale price was a proper addition to the mortgage debt on unit 95.

4 In the result we adopt the reasoning and conclusions of Mr. Justice Feehan and are obliged to dismiss the appeal.

Appeal dismissed.

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