

1992 CarswellAlta 390, 120 A.R. 152, 8 W.A.C. 152, [1992] A.W.L.D. 253, 31 A.C.W.S. (3d) 1080

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Bank of Nova Scotia v. Bouwsema

Tim Bouwsema Appellant v. Bank of Nova Scotia Respondent

Alberta Court of Appeal

McClung, Foisy, Major JJ.A.

Oral reasons: February 3, 1992

Docket: Doc. Calgary 12499

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Counsel: *R. Low* for the Appellant.

R. Jerke for the Respondent.

Subject: Corporate and Commercial; Civil Practice and Procedure

Mortgages --- Action on covenant — Liability on covenant

Collateral mortgage — Law of Property Act, R.S.A. 1980, c. L-8, s. 41.

Debtor borrowed \$80,000, evidenced by a promissory note. Debtor also granted a mortgage in which he covenanted to repay \$80,000 as well as "all indebtedness or liability now or hereafter owing or incurred". The trial Judge concluded that the note was the primary security and the mortgage was additional security. Debtor appealed. Held, the appeal was dismissed. There was evidence before the trial Judge that the basis of the loan was debtor's personal ability and promise to pay rather than the mortgage security. When the loan was made, lender had serious concerns about the value of the mortgage security, the mortgage itself was described as a "collateral mortgage" and the covenant to pay in the mortgage was broader than that in the note, since it included the \$80,000 as well as all future debts and liabilities.

Action on covenant to pay — Personal judgment — Availability — Statutory restrictions.

The debtor borrowed \$80,000 from the bank, evidenced by a promissory note. As collateral security for the loan, the debtor granted a mortgage in which he covenanted to repay \$80,000 as well as "all indebtedness or liability now or hereafter owing or incurred." The trial judge concluded that the note was the primary security and that the mortgage was additional security. The debtor appealed. *Held*, appeal dismissed. There was evidence before the trial judge that the basis of the loan was the debtor's personal ability and promise to pay rather than the mort-

gage security. At the time the loan was made, the bank had serious concerns about the value of the mortgage security, the mortgage itself was described as a "collateral mortgage," and the covenant to repay in the mortgage was broader than that in the note, since it included the \$80,000 as well as all future debts and liabilities.

McClung, J.A.:

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

1 Mr. Low, I regret that there isn't very much we think we can do for your client. We are agreed that the appeal must be dismissed and the reasons therefore will be delivered by Mr. Justice Foisy.

Foisy, J.A. (for the Court):

2 The issue is whether the mortgage given here by the appellant is collateral to and does not evidence the same obligation as that described in a promissory note. The trial judge found that the mortgage was collateral to the note and thus precluded the appellant from relying on Section 41 of the *Law of Property Act*. We think that the Trial Judge was correct in the result.

3 There was evidence that the basis underlying the loan was the appellant's personal ability and promise to pay rather than the mortgage security. The respondent had, at the time of the granting of the loan, serious concerns about the value of the mortgaged property. The mortgage itself is styled "collateral mortgage" and while for the same sum of \$80,000 described in the note, is granted "in consideration of all indebtedness and liability now or hereinafter owing or incurred by you". The covenant to repay includes the \$80,000 as well as all debts and liabilities present or future, etc. This is a different covenant than that described in the note.

4 It was within the Trial Judge's prerogative to accept the evidence given by the respondent and conclude that the note was the primary security while the land mortgage and chattel mortgage were given as additional security.

5 Accordingly, the appeal is dismissed.

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