1991 CarswellAlta 137, 82 Alta. L.R. (2d) 83, 20 R.P.R. (2d) 57, [1991] 6 W.W.R. 563, 123 A.R. 366, [1991] A.W.L.D. 684

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1991 CarswellAlta 137, 82 Alta. L.R. (2d) 83, 20 R.P.R. (2d) 57, [1991] 6 W.W.R. 563, 123 A.R. 366, [1991] A.W.L.D. 684

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 Queen's Bench

Feehan J.

Judgment: August 13, 1991
Docket: Edmonton Docs. 8803-23670, 8803-23671

Counsel: *Richard A. **Low***, for plaintiff.

Leonard W. Hendrickson, for defendant.

Subject: Property; 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 — 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.

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.

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 transferring 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.

In 1978 A. Ltd. granted the plaintiff a mortgage on two condominiums. In 1979 a receiver-manager was appointed for A. Ltd. In March 1980 A. Ltd. transferred all its interest in the units to W. Ltd. In April 1981 A. Ltd. was assigned into bankruptcy. In September W. Ltd. transferred its interests in the units to P. Ltd. The defendant was aware of the plaintiff's mortgages and provided the cash portion of the purchase price for P. Ltd. The defendant personally guaranteed the mortgages to W. Ltd., and in October P. Ltd. transferred the units to him. The plaintiff received no payments on the mortgages, and in May 1989 it obtained Rice orders. The units were residential land under s. 43.4(3)(*f*)(ii) of the *Law of Property Act*, but neither the defendant nor any relative of his ever occupied either one. At issue was whether the defendant was personally liable to the plaintiff under s. 62(1) of the *Land Titles Act*, and, if so, whether the amount owed on one of the units included the negative purchase price after payout of two prior mortgages.

Held:

Defendant personally liable; negative purchase price properly included in balance owing.

Section 62 of the *Land Titles Act* creates a contingent liability between the transferee and the mortgagee based on a right of indemnification between the transferee and transferor. However, the obligation to indemnify must exist between successive parties in the chain of title. Section 63(2) of the *Bankruptcy Act* directs that an assignment into bankruptcy will not affect the validity of any sale of property. Therefore, the sale by A. Ltd. to W. Ltd. was not prejudiced, with the result that A. Ltd. continued to be entitled to be indemnified by W. Ltd. Neither was the chain broken at the transfer from W. Ltd. to P. Ltd. The latter was a shell company whose sole shareholders were the defendant and his wife. While the transfer from P. Ltd. to the defendant was for $1, there was no written documentation outlining any trust agreement nor was there any evidence to suggest W. Ltd. knew of the alleged trust agreement. Even if a trust did exist, equity dictates that where the trustees and the beneficiaries overlap, the trustee is liable under the covenant. As the first mortgage was granted to a corporation but the last one was to an individual, an action on the covenant to pay would not be available under s. 43 *Law of Property Act* but for the fact that neither the defendant nor his family ever used the lands as a residence. Finally, the purchase of property pursuant to a Rice order does not constitute foreclosure. Thus an action on the covenant to pay was available, and the negative purchase price was an appropriate claim.

Cases considered:

Canada Permanent Trust Co. v. King Art Developments Ltd., 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172 (C.A.) — *applied*

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

Gilbert v. Nestor, [1923] 3 W.W.R. 15, [1923] 3 D.L.R. 409 (Alta. T.D.) — *applied*

Guaranty Trust Co. of Canada v. Bailey (1985), 38 Alta. L.R. (2d) 262, 59 A.R. 297 (C.A.) — *considered*

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*

Trusts & Guarantee Co. v. Monk, [1925] 1 W.W.R. 5, 21 Alta. L.R. 151, [1925] 1 D.L.R. 350 (C.A.) — *considered*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3

s. 63*considered*

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

s. 62(1)*considered*

Law of Property Act, R.S.A. 1980, c. L-8

s. 41 [am. 1982, c. 24, s. 3]*considered*

s. 43(1)*considered*

s. 43.1 [en. 1983, c. 97, s. 2(5)]*considered*

s. 43.4 [en. 1983, c. 97, s. 2(5)]*considered*

s. 43.4(3)(f)(ii) [en. 1983, c. 97, s. 2(5)]*referred to*

s. 44*referred to*

Action by mortgagee on covenant to pay in mortgage.

***Feehan J.*:**

I. Facts

1 This matter concerns two condominium units in Edmonton located within the complex known as Marlborough Place. At the time the action arose, Dodd Q. Chu (hereinafter referred to as "Chu") was the registered owner of the condominium units known as unit 93 and unit 95. There were mortgages registered against these units. This action concerns the mortgages held by what is now the Laurentian Bank of Canada and what was formerly the Eaton Trust Company and, prior to that, Commercial Capital Trust (hereinafter referred to as "Laurentian"). There was default in the payment of the mortgages on these units. Laurentian, the plaintiff in this matter, has initiated an action in debt on the covenant for payment of the mortgage.

2 The parties have agreed to the following facts:

3 (1) By a mortgage agreement in writing dated April 4, 1978, and registered in the land titles office for the North Alberta Land Registration District as instrument No. 782071520 on April 10, 1978, Abacus Cities Ltd. (hereinafter referred to as "Abacus") mortgaged to Laurentian, lands situated in the city of Edmonton, in the province of Alberta, legally described as:

> CONDOMINIUM PLAN 772 2541 UNIT NUMBER NINETY FIVE (95) AND 91 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY THEREIN EXCEPTING THEREOUT ALL MINES AND

MINERALS

(hereinafter referred to as "unit 95"), which mortgage secured the payment of the principal sum of $4,500 together with interest at the rate of 13 per cent per annum calculated half-yearly not in advance as well after as before maturity, default and judgment, and which mortgage was registered as a third mortgage charge as against unit 95, subject to a prior mortgage in favour of Morguard Trust Company (hereinafter referred to as "Morguard") in the amount of $34,035.19 and a prior mortgage in favour of Royal Trust Company in the amount of $7,000. Abacus covenanted in the said mortgage to pay the principal sum and all interest on August 31, 1985, at which time the whole balance of principal and interest was to be due and owing. This mortgage is hereinafter referred to as the "unit 95 mortgage."

4 (2) By a mortgage agreement in writing dated April 4, 1978, and registered in the land titles office for the North Alberta Land Registration District as instrument No. 782071609 on April 10, 1978, Abacus mort gaged to Laurentian lands situated in the city of Edmonton, in the province of Alberta, legally described as:

CONDOMINIUM PLAN 772 2541 UNIT NUMBER NINETY THREE (93) AND 91 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY THEREIN EXCEPTING THEREOUT ALL MINES AND MINERALS

(hereinafter referred to as "unit 93"), which mortgage secured the payment of the principal sum of $15,000 together with interest at the rate of 13 per cent per annum calculated half-yearly not in advance as well after as before maturity, default and judgment, and which mortgage was registered as a second mortgage charge as against unit 93, subject to a prior mortgage in favour of Morguard in the amount of $34,035.19. Abacus covenanted in the said mortgage to pay the principal sum and all interest on August 31, 1985, at which time the whole balance of principal and interest was to be due and owing. This mortgage is hereinafter referred to as the "unit 93 mortgage."

5 (3) Units 93 and 95 were part of a 49-unit condominium project known as "Marlborough Place."

6 (4) The said sums of $15,000 and $4,500 above mentioned were actually advanced to the mortgagor, Abacus.

7 (5) On May 17, 1979, by an order of the Supreme Court of Alberta, Trial Division, Thorne Riddell Inc. was appointed receiver and manager of Abacus.

8 (6) On June 29, 1979, Abacus filed a proposal in the Supreme Court of Alberta in Bankruptcy.

9 (7) On August 17, 1979, Abacus filed an amended proposal in the Court of Queen's Bench of Alberta in Bankruptcy.

10 (8) Laurentian did not accept or agree except as may be implied by law to the proposal or amended proposal of Abacus and Laurentian did not file a claim thereunder in respect to the indebtedness in question in this action.

11 (9) On October 19, 1979, by an order of the court, the amended proposal made by Abacus was approved.

12 (10) On March 6, 1980, by registration of an instrument transferring land, namely a transfer of land instrument No. 802050986, Abacus transferred all of its rights, title and interest in Marlborough Place, including units 93 and 95, to Pac-West Industries Ltd. (hereinafter referred to as "Pac-West") and created new certificates of title No. 802050986X, subject to the unit 93 mortgage, and No. 802050986Z, subject to the unit 95 mortgage.

13 (11) On April 1, 1981, the Court of Queen's Bench of Alberta in Bankruptcy granted an order assigning Abacus

into bankruptcy.

14 (12) On September 4, 1981, George Schluessel Real Estate Investments Ltd. and Pac-West entered into an offer to purchase agreement with respect to 43 units in Marlborough Place, including units 93 and 95.

15 (13) George Schluessel Real Estate Investments Ltd. did not, at any time, enter into a written agreement with Paragon Holdings Ltd. (hereinafter referred to as "Paragon") or Chu with respect to the assignment of the said offer to purchase.

16 (14) On September 30, 1981, by registration of an instrument transferring land, namely, a transfer of land instrument No. 812233122, Pac-West transferred all of its rights, title and interest in 41 units in Marlborough Place, including units 93 and 95, to Paragon and created new certificates of title No. 812233122J, subject to the unit 93 mortgage, and No. 812233122P, subject to the unit 95 mortgage.

17 (15) A statement of adjustments was prepared in the sale from Pac-West to Paragon.

18 (16) At the time the lands were sold to Paragon, Chu was aware of Laurentian's mortgages being registered against the titles to the lands.

19 (17) Chu personally provided the cash portion of the purchase of the lands by Paragon.

20 (18) Mortgages registered as instrument No. 812233139 and instrument No. 812233144 were granted to Pac-West and personally guaranteed by Chu.

21 (19) On September 22, 1981, Chu sent a letter to his solicitors instructing them to transfer the lands into his name following registration of the transfer to Paragon.

22 (20) By a letter dated October 13, 1981, Chu's solicitor forwarded to Chu a transfer of land.

23 (21) On October 27, 1981, by registration of an instrument transferring land, namely, a transfer of land instrument No. 812254111, Paragon transferred all of its right, title and interest in 43 units in Marlborough Place, including units 93 and 95, to Chu and created new certificates of title No. 812254111W, subject to the unit 93 mortgage, and No. 812254111Y, subject to the unit 95 mortgage.

24 (22) There was no offer to purchase or other written agreement or assignment between Chu and Paragon in relation to the transfer of land from Paragon to Chu.

25 (23) Default has been made in payment of the principal sums and in payment of the interest due pursuant to the terms of both of the aforesaid mortgages, in that the mortgages were not paid when due on August 1, 1985, nor have any payments whatsoever been received from Chu or any predecessor in title.

26 (24) Demand for payment in full of the sums secured by the said mortgages was made by letter dated March 14, 1986, addressed to the firm of Edwards & Co. in Burnaby, British Columbia, which firm represented Chu at the time, which letter was received by said firm on March 18, 1986.

27 (25) The demand for payment was not honoured; therefore, this legal action was commenced.

28 (26) On May 17, 1989, Laurentian purchased units 93 and 95 pursuant to "Rice" orders granted by this honourable court.

29 (27) As at May 17, 1989 (before Laurentian's purchase of the unit by way of "Rice" order), the balance owing to Laurentian, pursuant to the said unit 95 mortgage and the balances owing to prior encumbrances on unit 95 were as follows:

The unit 95 mortgage -- Balance as at April 30, 1989	$16,051.00
(Action 8803-23671) -- Interest to May 17, 1989	97.19
Total Balance Owing	$16,148.19
Prior Encumbrances as at May 17, 1989	
-- Morguard Trust	$32,764.18
-- Royal Trust	$17,563.37
Total Prior Charges	$50,327.55

These prior charges were paid out in full by Laurentian subsequent to the Rice order. No other credits or payments have been made on account of this mortgage debt since May 17, 1989.

30 (28) As at March 31, 1991, the balances owing to Laurentian pursuant to the unit 93 mortgage is as follows:

The unit 93 mortgage (Action 8803-23670)	$55,909.20 (per diem -- $18.51)

31 (29) Units 93 and 95 are "residential land" within the meaning of s. 43.4(3)(*f*)(ii) of the *Law of Property Act* of Alberta, R.S.A. 1980, c. L-8, as amended.

32 (30) Neither Chu nor any member of his family has ever used units 93 or 95 as a bona fide residence at any time during which Chu is or was a registered owner of that land.

33 (31) The name of Laurentian in this action has been changed several times since these two mortgages were granted to the present name of "Laurentian Bank of Canada."

34 As noted above, on September 4, 1981, Pac-West entered into an offer to purchase agreement with George Schluessel Real Estate Investments Ltd. This concerned all of the condominium units, including units 93 and 95. That agreement contained the following clause as para. 5:

> George Schluessel Real Estate Investments Ltd. has the right to transfer his interest under this Interim Agreement to a third party within Thirty (30) days of acceptance. The Vendor has the right to approve the new Purchaser provided that if the nominee or assignee of George Schluessel Real Estate Investments Ltd. is a corporation controlled by Dr. Dodd Q. Chu the right of the Vendor to approve shall not be required so long as Dr. Dodd Q. Chu guarantees the third mortgage to be carried by the Vendor.

That election must have been made because on September 30, 1981, Pac-West transferred the title to the units, including units 93 and 95, to Paragon.

35 Pursuant to Rice orders of the court on May 17, 1989, Laurentian purchased the units 93 and 95. The amount out-

standing on the unit 93 mortgage as of March 31, 1991, was $55,909.20. The amount outstanding on the unit 95 mortgage is in dispute. If the negative purchase price from the sale of the unit to Laurentian is included in the mortgage debt, the amount outstanding as of March 31, 1991, was $24,562.91. If the negative purchase price is not included, the amount is $3,327.55 less.

II. Issues

36 The issues as they now come before this court are as follows:

37 (1) Is the defendant Chu liable to pay the mortgages on units 93 and 95 to the plaintiff Laurentian? To answer this, the following question must be addressed: Does s. 62(1) of the *Land Titles Act*, R.S.A. 1980, c. L-5, operate so as to create an implied covenant between the transferee (Chu) and the mortgagee (Laurentian) and a second implied covenant between the transferee (Chu) and transferor (Pac-West)?

38 (2) If the answer to the above question is in the affirmative, does the amount owing on the unit 95 mortgage include the $3,327.55 negative purchase price on that unit?

III. Discussion

39 In order to answer the first question of Chu's liability certain basic principles are worth reviewing.

40 Section 62(1) of the *Land Titles Act* provides as follows:

> 62(1) In every instrument transferring land for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating it, and will indemnify and keep harmless the transferor from and against the principal sum or other money secured by the instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied on the part of the transferor.

41 According to Harvey C.J.A. in *Trusts & Guarantee Co. v. Monk*, [1925] 1 W.W.R. 5, 21 Alta. L.R. 151, [1925] 1 D.L.R. 350 (C.A.), at p. 159 [Alta. L.R.]:

> ... the statute is merely the expression of the equitable principle requiring the purchaser of encumbered property to protect his vendor from the encumbrance.

42 This section has been addressed more recently in *Guaranty Trust of Canada v. Bailey* (1985), 38 Alta. L.R. (2d) 262, 59 A.R. 297 (C.A.). Harradence J.A. viewed the relationship between the transferee and mortgagee as one of "contingent liability."At p. 268 [Alta. L.R.] of the decision, he had this to say:

> Section 62(1), therefore, creates a contingent liability between the transferee and mortgagee. The transferee's implied promise to the mortgagee is contingent upon there being a right of indemnification existing between the transferee and transferor. If the transferor is not liable to begin with, then there is no circuity of action upon which s. 62(1) might act. Section 62(1) would not apply and no subsequent transferee could be held liable. Therefore, for s. 62(1) to apply in the case at bar, it must be shown that a right to indemnification existed as between the respondents and Nelson, their transferor.

43 It is not all vendors who will have a right of indemnification from the purchasers of their property. Only if the vendor's obligation on a covenant to pay the mortgagee continues to exist will the vendor's right to indemnification and the purchaser's obligation to indemnify exist. This was established in *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.). This means that an obligation to indemnify must exist between successive parties in the previous chain of title. The liability of the defendant Chu in this matter will be dependent upon this chain being unbroken.

44 Therefore, this court must ascertain whether there has been an unbroken chain of liability from the time of the first transfer of land from Abacus to Pac-West in March 1980 until the defendant received the land from Paragon in October 1981. The defendant claims that this chain was broken at two points: the first being at the time of transfer of title from Abacus to Pac-West in March 1990 due to the bankruptcy of Abacus and, secondly, when Pac-West transferred the land to Paragon in September 1981 by reason of the fact that Paragon held the land as trustee for the benefit of Chu and a trustee is not liable on a covenant to pay.

45 (1) Did the assignment into bankruptcy of Abacus on April 1, 1981, break the chain of liability necessary before s. 62(1) of the *Land Titles Act* could be invoked?

46 Abacus sold the land known as Marlborough Place to Pac-West under the court-approved proposal in March 1980. As evidenced in the transfer of land document, the sale was consented to by Thorne Riddell Inc., the receiver-manager. The mortgages on units 93 and 95 held by the plaintiff were assumed by Pac-West in the course of the transfer of land. After the sale had been completed, the court ordered Abacus assigned into bankruptcy due to its default in fulfilling the terms of its proposal. What was the effect of this assignment on the sale of Marlborough Place to Pac-West?

47 Section 63 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, as amended, deals with the situation of a court's annulment of a proposal:

> 63.(1) Where default is made in the performance of any provision in a proposal, or where it appears to the court that the proposal cannot continue without injustice or undue delay or that the approval of the court was obtained by fraud, the court may, on application thereto, with such notice as the court may direct to the debtor, and, if applicable to the trustee and to the creditors, annul the proposal.
>
> (2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the proposal and notwithstanding the annulment of the proposal, a guarantee given pursuant to the proposal remains in full force and effect in accordance with its terms.

48 According to Houlden and Morawetz, [Bankruptcy Law of Canada], 3rd ed. (Carswell, 1991), at p. 2-96:

> If an order is made annulling a proposal, the debtor is deemed to have made an assignment. Unlike s. 57(1) and s. 61(2), there is no retroactive effect to the assignment.

49 This means that the sale by Abacus to Pac-West, being a valid sale, was not prejudiced by the subsequent assignment in bankruptcy. Contrary to the defendant's submission, the plaintiff's claims did not revert to the time of the filing of the proposal.

50 At the time of the sale to Pac-West, the vendor's obligation on the covenant to pay the mortgagee continued to exist. The matter before this court must be distinguished from *Royal Trust Corp. of Canada v. Turner*, supra. In the *Royal*

Trust case, there was a court-approved proposal similar to the matter before this court. In that case, the plaintiff trust company had accepted that proposal and filed a proof of claim against the company. Through a distribution of the company's assets, the plaintiff received the moneys based on its claim and, in accordance with a clause in the proposal, upon distribution of those moneys, the provable claims against the company were "completely discharged and fully satisfied." There is nothing in the amended proposal by Abacus similar to the discharge clause referred to by O'Leary J. in *Royal Trust* which would have relieved Abacus of its covenant to pay. This being the case, it is held that Abacus continued to be entitled to indemnification by Pac-West. This brought Pac-West under s. 62(1) liability of the *Land Titles Act* in accordance with *Guaranty Trust Co. of Canada v. Bailey*, supra.

51 This being the case, the chain of liability existed at the time the sale was completed. It was not broken by Abacus' subsequent assignment into bankruptcy on April 1, 1981.

52 (2) Is the relationship between Paragon and Chu a trust relationship such that it breaks the chain of liability required by s. 62(1) of the *Land Titles Act*?

53 It is alleged by the defendant that because Paragon was acting as a trustee for Chu when it purchased the land from Pac-West, it (Paragon) was not liable under s. 62(1) to indemnify Pac-West. The case supporting this proposition is *Evans v. Ashcroft* (1915), 8 W.W.R. 899 (Alta. T.D.). In that case, McCarthy J. held that [p. 901]:

> There is no doubt on the facts of this case that it was not intended that The British Canadian Trust Co. should take any beneficial interest in the lands ... I cannot think that it was ever intended by the Legislature that where a person takes a transfer of land subject to a mortgage, under such circumstances that the transferee takes no beneficial interest in the land, and under an arrangement which clearly indicates that the transferor has no right to compel the payment of the mortgage moneys by the transferee, the transferee is bound to pay off the mortgage.

54 This has been taken to mean that a transferee purchasing land as a trustee is not liable to indemnify the transferor under s. 62(1), thereby resulting in a break in the chain.

55 In order to determine whether the chain of liability has been broken between Pac-West and Paragon, it must be determined whether a trust relationship exists between Paragon and Chu. If it does, then Chu, the transferee from Paragon, is not liable for the mortgage to Laurentian. If, however, Paragon was not acting as trustee for Chu, then there is no break in the chain of liability and Chu is still liable under s. 62(1).

56 It is clear from the evidence before the court that Paragon was a shell company, the shareholders of which were Chu and his wife. The evidence is that the company had no assets. The defendant claims it was Chu who provided the money ($126,965.75) required to close the deal with Pac-West. The transfer of land shows the consideration to have been paid by Paragon. Paragon transferred the lands to Chu approximately one month after Paragon received title. That transfer indicated the consideration to be "one dollar and other good and valuable consideration being satisfaction of a trust arrangement."Other than this, there is nothing in writing between Chu and Paragon evidencing a trust. Neither is there any evidence to suggest Pac-West's knowledge of this alleged trust relationship.

57 Paragraph 5 in the offer to purchase by George Schluessel Real Estate Investments Ltd. acknowledged that the offeror may transfer his interest to a third party. That paragraph was reproduced above.

58 Can it be said that this clause in the agreement between Schluessel and Pac-West constitutes the equivalent of Pac-West agreeing to or acknowledging a trust arrangement whereby it intended to relieve the transferee of its obligation to indemnify the transferor under s. 62(1)? I think not. The personal guarantee referred to in that paragraph involves the

third mortgage granted to Pac-West in the course of this transfer, not the mortgages to Laurentian.

59 The facts in the matter before this court are different to those before the court in *Evans v. Ashcroft*, supra. In the latter case, a clear trust arrangement and agreement had been established prior to the mortgagee's claim. In the case at bar, the defendant is asking the court to find a resulting trust.

60 On this point, it is concluded that the evidence required to prove a trust relationship between Paragon and Chu has not been established. The statement in the transfer of land from Paragon to Chu and the evidence as provided to the court by Chu is not deemed sufficient to establish that trust arrangement.

61 If I am wrong on this point, and even if a trust relationship does exist, it is the type of trust that would fall within the confines of the proposition established by *Gilbert v. Nestor*, [1923] 3 W.W.R. 15, [1923] 3 D.L.R. 409 (Alta. T.D.). In that case, the transfer of land was to two persons who claimed to have received the land in trust for themselves and two other parties. In holding the two liable under the implied covenant, the court had this to say at pp. 16-17 [W.W.R.]:

> I am of the opinion that the said defendants having acquired the whole of the legal and beneficial interest in the property subject to the mortgage it is immaterial that they acquired the same for themselves and two other parties. They contend that they are trustees for the two undisclosed purchasers. The transfer is absolute on its face ... The transferees having purchased the whole of the mortgaged property it would be inequitable to allow them to say that other parties were interested with them in the transaction and thus defeat the statutory implied covenant. To so hold would virtually render the statute a nullity.

62 Where the trustee(s) and the beneficiaries overlap as they did in *Gilbert v. Nestor*, and as it appears in the matter before this court where Chu and his wife are the sole shareholders of Paragon, equity demands that the trustee Paragon be found liable under the covenant.

63 (3) Of what effect is s. 41 of the *Law of Property Act*?

64 The defendant contends that the plaintiff's action on the covenant for payment is limited to the land only by virtue of the *Law of Property Act*. Section 41 reads as follows:

> 41(1) In an action brought on a mortgage of land, whether legal or equitable, or on an agreement for the sale of land, the right of the mortgagee or vendor is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies
>
> (*a*) on a covenant for payment contained in the mortgage or agreement for sale,
>
> (*b*) on any covenant, whether express or implied, by or on the part of a person to whom the land comprised in the mortgage or agreement for sale has been transferred or assigned subject to the mortgage or agreement for the payment of the principal money or purchase money payable under the mortgage or agreement or part thereof, as the case may be, or
>
> (*c*) for damages based on the sale or forfeiture for taxes of land included in the mortgage or agreement for sale, whether or not the sale or forfeiture was due to, or the result of, the default of the mortgagor or purchaser of the land or of the transferee or assignee from the mortgagor or purchaser.

65 Section 41 does not apply in certain instances. Section 43(1) provides that s. 41 will not apply where the original mortgage is given by a corporation as was the case here. However, s. 43(1) will not apply, that is, s. 41 will apply, where

an action on the mortgage given by a corporation has been brought against an individual. This looks as if it applies to the matter here since the original mortgage was to Abacus, a corporation, and the action is now against Chu, an individual.

66 Further, s. 43.1 of the *Law of Property Act* states that no action on the covenant for payment shall be brought against any individual who is a transferee of land that is subject to a mortgage. However, s. 43.4 provides, inter alia, that s. 43.1 does not apply where the land is residential or farm land and where neither the individual registered owner of the land nor any member of his or her family has used the land as the bona fide residence.

67 In the facts of this case, this means that since neither Chu nor his family has used the units as a personal residence, Chu remains open to an action on the covenant for payment of the mortgage.

68 (4) Is the negative purchase price a proper addition to the mortgage debt?

69 This question concerns unit 95 only. The negative purchase price was calculated as follows:

Fair market value as per Rice order	$47,000.00
Less first mortgage to Morguard Trust as at May 17, 1989	($32,764.18)
Less second mortgage to Royal Trust as at May 17, 1989	($17,563.37)
Negative purchase price	($ 3,327.55)

70 The issue here is whether the mortgage debt being claimed by the plaintiff properly includes the negative purchase price. The plaintiff purchased the unit in question according to the Rice order issued by Master Quinn on May 17, 1989. The purchase was for the fair market value of $47,000 less "all outstanding land taxes, condominium fees, and the amounts owing to prior encumbrances." According to the plaintiff, this left the plaintiff $3,327.55 short of the purchase price.

71 A leading case on this matter is *Canada Permanent Trust Co. v. King Art Developments Ltd.*, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172 (C.A.). In this case, Laycraft J.A. (as he then was) held that a mortgagee who has purchased land through a court-conducted sale such as that resulting from a Rice order has not foreclosed on the mortgage under s. 44 of the *Law of Property Act*. This leaves the mortgagee in the position to be able to take action on a covenant for payment for the deficiency from the sale. This principle will logically extend to the case at bar where neither s. 44 nor s. 41 applies. That is, the plaintiff has the right to pursue a deficiency judgment.

72 What the plaintiff is seeking here is not moneys to cover insurance premiums or taxes which would not be covered according to *Trusts & Guarantee Co. v. Monk*, supra. Rather, the deficiency is for the amounts owing due to the prior encumbrances. These are valid claims under the Rice order and thus the $3,327.55 amount being claimed by the plaintiff is an appropriate inclusion in the mortgage debt.

IV. Conclusion

73 The evidence shows that the defendant was aware, at all material times, of the two mortgages held by the plaintiff on units 93 and 95. As there was no break in the chain of liability under s. 62(1) of the *Land Titles Act*, nor by virtue of an alleged trust relationship established between Paragon and Chu, the defendant remains liable for the mortgages to Laurentian.

74 As to the amount owed on unit 95, it was necessary to consider whether the *Law of Property Act* applied to limit the claim on the mortgage debt to the land. The application of the law to the evidence before the court leads to the conclusion that s. 41 does not apply in this case. As a result, the negative purchase price on unit 95 in the amount of $3,327.55 is properly included in the balance owing on the unit 95 mortgage.

75 The issue before the court was not a simple one. In the recent report of the Alberta Law Reform Institute, *Mortgage Remedies in Alberta* (1991), one of the conclusions made by that body at pp. 37-38 is appropriate to repeat as a conclusion to this decision:

> In terms of the development of Alberta law, no single topic has engendered such an extraordinary volume of legislation and litigation. The whole subject area has been treated as being of such overwhelming importance as to merit the volume of legislative and professional resources which have in fact been devoted to it over the last century. In good times or bad, it seems, Alberta legislates with respect to mortgages and judicial officers judge, as the seemingly endless tug of war between lenders and borrowers goes on.

76 It is of some small comfort that the institute finds the law governing when a lender can sue a person who has bought land subject to a mortgage "very complicated." Certainly, this case bears out that finding.

77 There will be costs in the appropriate column, including $500 for written arguments.

Judgment for mortgagee.

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