

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

THOMAS MICHAEL DUBOIS,	)	<u>Terry Beley</u>
	)	for the applicant
applicant,	)	
	)	<u>Cory Tokar</u>
	)	for the respondent,
- and -	)	Henry Joachim Ostrowski
	)	
	)	<u>Michael Stienstra</u>
TRACEY-LYN MARIE DUBOIS,	)	for the respondent,
HENRY JOACHIM OSTROWSKI,	)	4638817 Manitoba Ltd.
4638817 MANITOBA LTD.,	)	
RAYMOND THOMAS MALECH, and	)	<u>Gavin Wood</u>
ANTHONY PATRICK JOSEPH PAILLE,	)	for the respondent,
	)	Raymond Thomas Malech
respondents.	)	
	)	<u>Patrick Joseph Paille</u>
	)	on his own behalf
	)	
	)	<u>No one Appearing</u>
	)	for the respondent,
	)	Tracey-Lyn Marie Dubois
	)	
	)	<u>Alexander Krush</u>
	)	for the interested parties,
	)	Gracious Living Home Inc. and
	)	Business Credit & Capital LLP
	)	
	)	<u>Kerry UnRuh</u>
	)	for the interested party,
	)	Deeley Fabbri Sellen Law Corporation

) Samuel Thomson
) Faith Daza (Articling-Student-At-Law)
) for the interested parties,
) Manitoba Finance and The Government
) of Manitoba (Employment Standards)
)
) Judgment Delivered:
) October 31, 2025

PERLMUTTER A.C.J.

INTRODUCTION

[1] The applicant Thomas Michael Dubois seeks an order determining the amounts and priorities to be given to various claims against the net sale proceeds of real property sold in the context of divorce proceedings between him and the respondent Tracey-Lyn Marie Dubois. At the time, title to the property was in Ms Dubois's name and was encumbered with several registrations including certificates of judgment, caveats, and a mortgage. The total amount of debt represented by these registrations exceeds the net sale proceeds. Mr. Dubois, the respondents (except for Ms Dubois), and other interested parties who were served and took positions at the hearing of this application (collectively, the "parties") are those who had relevant active interests registered on title to the property before it was sold.

BACKGROUND

[2] In divorce proceedings between Mr. Dubois and Ms Dubois, on May 5, 2015, a final order was granted which included that Ms Dubois was to pay Mr. Dubois an equalization payment of \$75,000.00. Mr. Dubois obtained a related certificate of

judgment that was registered against title to the property, and on Mr. Dubois's application, on August 3, 2016, the court ordered the property be sold. On June 28, 2017, the Master (as he was then known) issued a report and order on sale, which provided that the property was to be sold to named third parties with only one encumbrance (unrelated to this proceeding) carried forward on title. The net sale proceeds of \$320,950.08, with interest, are held in trust by Mr. Dubois's counsel.

[3] At the time that Mr. Dubois brought his application for sale of the property, the relevant active instruments on title were the following:

- November 6, 1995, mortgage by Ms Dubois to CIBC Mortgage Corporation in the amount of \$100,983.00;
- September 2, 1998, transfer of mortgage from CIBC Mortgage Corporation ("CIBC") to Royal Bank of Canada ("RBC") in the amount of \$94,679.23;
- September 29, 2005, homestead notice by Mr. Dubois (divorce judgment was pronounced January 20, 2015);
- October 26, 2005, caveat by Mr. Dubois, with description "equitable owner of an undivided 1/2 interest" (it is undisputed that the May 5, 2015 final order dismissed Mr. Dubois's claim for a declaration of trust regarding the property);
- May 8, 2012, caveat by the respondent Henry Joachim Ostrowski, with description "security for the repayment of a loan";
- October 16, 2012, caveat by Jurgen W. Feldschmid, with description "security for repayment of legal fees and disbursements";

- December 4, 2012, certificate of judgment by The Workers Compensation Board against Ms Dubois, in the amount of \$1,906.59;
- July 16, 2013, notice exercising power of sale ("NEPS") by RBC in the amount of \$13,994.57, with description of "interest rate of 6.3% per annum from July 10, 2013";
- December 3, 2013, certificate of judgment by Gracious Living Home Inc. against The Carpet Girl Inc. (the principal of which was Ms Dubois) and Ms Dubois in the amount of \$19,769.37;
- January 23, 2014, transfer of mortgage from RBC to the respondent 4638817 Manitoba Ltd. (the "numbered company") in the amount of \$1.00;
- June 30, 2014, certificate of judgment by H.M. The Queen (MB) – Dept. of Labour & Immigration against Ms Dubois in the amount of \$996.43;
- June 30, 2014, certificate of judgment by H.M. The Queen (MB) – Dept. of Labour & Immigration against Ms Dubois in the amount of \$1,118.58;
- June 30, 2014, certificate of judgment by H.M. The Queen (MB) – Dept. of Labour & Immigration against Ms Dubois in the amount of \$5,160.69;
- September 15, 2014, certificate of judgment by The Workers Compensation Board against Ms Dubois in the amount of \$9,358.77;
- September 23, 2014, caveat by the respondent Anthony Patrick Joseph Paille, with description "equitable mortgage";

- September 30, 2014, caveat by the respondent Raymond Thomas Malech with description "security for repayment of loan";
- November 7, 2014, certificate of debt by H.M. The Queen (Manitoba) – Dept of Finance against Ms Dubois in the amount of \$12,649.71 with description "The Retail Sales Tax Act";
- February 20, 2015, certificate of judgment by Deeley Fabbri Sellen Law Corporation against Ms Dubois in the amount of \$7,570.96; and
- May 21, 2015, certificate of judgment by Mr. Dubois against Ms Dubois in the amount of \$75,000.00 with description "Q.B. Fiel [*sic*] # FD 00-01-60970".

[4] After the sale of the property was ordered but before the report and order on sale, on June 26, 2017, a certificate of judgment was registered by Business Credit & Capital LLP for \$3,448.96.

[5] The total of the amounts claimed by those with the foregoing registrations on title exceed the amount of the net sale proceeds. As such, by consent, it was ordered that a hearing would be held to determine:

- a) the amount of each party's claim;
- b) whether a party's claim is recoverable against the funds held in trust arising from the sale of the property;
- c) if recoverable, what is a party's priority to these proceeds of sale;
- d) whether a party's entire claim is to be treated equally in terms of recoverability and priority;

- e) ultimately, how should the proceeds of sale be paid out; and
- f) whether the fact that the property has been sold with none of the parties' encumbrances existing on title affects any of the foregoing issues.

[6] At the hearing, the foregoing issues were reduced to (a) the amount of each party's claim; and (c) if recoverable, what is a party's priority to the proceeds of sale?

[7] The consent order also provides that the onus upon the parties is to establish, on a balance of probabilities, any ownership or other entitlement to the sale proceeds which shall be determined on a summary basis and considered as if the sale proceeds, currently held in trust, had been paid into court by Mr. Dubois on an interpleader basis.

[8] Except for The Workers Compensation Board and Jurgen W. Feldschmid, all the parties filed affidavits and they or their counsel attended the hearing. On behalf of The Workers Compensation Board, a letter dated March 27, 2025, was provided which indicates the total debt owed to it is \$4,597.66. Through counsel for Mr. Ostrowski, Mr. Feldschmid confirmed that he would not be pursuing a claim.

[9] It is undisputed that based on s. 64 of ***The Real Property Act***, C.C.S.M. c. R30, instruments registered in respect of or affecting the same estates or interests are entitled to priority according to the serial number assigned to them upon registration.

PARTIES' POSITIONS

Director of Employment Standards

[10] None of the parties take issue, and I agree, with the position of the Government of Manitoba Employment Standards that under ***The Employment Standards Code***, C.C.S.M. c. E110 (ss. 101, 103(1), and 104), in the present circumstances, based on

registration of the three certificates of judgments referencing H.M. The Queen (MB) – Dept. of Labour & Immigration, the Director of Employment Standards has a first priority to recover \$4,615.01 from the net sale proceeds, with the balance of \$2,660.69 ranking in priority according to its order of registration on title.

Mr. Dubois

[11] Mr. Dubois claims he is owed a total of \$100,514.87, made up of the equalization payment ordered in his favour of \$75,000.00, as reflected in the certificate of judgment registered on title, with related interest; amounts he paid to keep the property from foreclosure and tax sale; and several cost orders. His counsel submits he would be content recovering \$25,000.00 from the net sale proceeds. Mr. Dubois does not oppose payment from the net sale proceeds of the judgments of The Workers Compensation Board, Gracious Living Home, Director of Employment Standards, Deeley Fabbri Sellen Law Corporation (now DFS Kaneski UnRuh LLP), and Business Credit & Capital, as well as the certificate of debt in favour of the Department of Finance, all of which he says total \$47,790.70, plus interest. He asserts that these should be paid in priority to those who are claiming to be holders of mortgages.

The Numbered Company

[12] Richard Boon, the principal of the numbered company, deposed that on October 10, 2013, for \$18,009.01, the mortgage with RBC was transferred to the numbered company. He also deposed that Ms Dubois executed a written agreement that the mortgage would now carry an interest rate of 15% per annum with payments of \$200.00 per month commencing November 1, 2013, until paid. It is the numbered

company's position that, as reflected in the default judgment it obtained, with interest compounded at 15%, the amount outstanding under the mortgage is \$78,500.88. The numbered company claims this total amount from the net sale proceeds. It is the numbered company's position that it stands in the place of CIBC (the mortgagee before the mortgage was transferred to RBC) and by virtue of this, it has a priority to payment of the full amount of its claim from the net sale proceeds immediately after payment of \$4,615.01 to the Director of Employment Standards. The numbered company disputes that at law Mr. Dubois has any priority to payment from the net sale proceeds.

Ostrowski

[13] It is Mr. Ostrowski's position that based on an equitable mortgage granted to him by Ms Dubois with respect to the property (as reflected in the caveat he registered), after the numbered company, he is next entitled in order of priority to recover the amount owed to him from the net sale proceeds given the ranking of his caveat registered on title. Under the terms of his alleged equitable mortgage, Mr. Ostrowski says he is entitled to recover up to \$562,567.79, from the net sale proceeds. Mr. Ostrowski takes issue with the quantum of the numbered company's claim against the net sale proceeds.

Malech

[14] Since the initiation of these proceedings, Mr. Malech has passed away. His estate claims \$54,378.58, based on an equitable mortgage it asserts Mr. Malech held with respect to the property (as reflected in the caveat he registered). It is the estate's position that Mr. Malech's equitable mortgage ought to be recoverable on a pro rata

basis from the net sale proceeds as among Mr. Ostrowski, Mr. Paille (whose claim is detailed below), and the estate as each of them claim equitable mortgages. That is, the estate opposes Mr. Ostrowski's position that he is to recover the entire amount of his claim from the net sale proceeds in priority to the estate and Mr. Paille. Otherwise, Mr. Malech's estate supports the position advanced by Mr. Ostrowski including with respect to the lesser quantum recoverable by the numbered company.

Paille

[15] Mr. Paille claims from the net sale proceeds a total of \$29,598.88 (plus an updated interest amount) based on a promissory note that Ms Dubois signed in his favour to reflect the money he loaned to her, and which is the basis for the caveat he filed to support his claim of an equitable mortgage.

Manitoba Finance

[16] Manitoba Finance claims based on its certificate of debt registered November 7, 2014, in the amount of \$12,649.71, for unpaid retail sales taxes, which, due to further assessments for taxes, in accordance with s. 64(2) of ***The Tax Administration and Miscellaneous Taxes Act***, C.C.S.M., c. T2, stands at \$79,832.68, as of March 28, 2025. Manitoba Finance's position is that payment of its claim from the net sale proceeds ranks in priority according to its order of registration on title.

DFS Kaneski UnRuh LLP

[17] Following legal work for Ms Dubois by Deeley Fabbri Sellen LLP, the predecessor to DFS Kaneski UnRuh LLP, a certificate of judgment was obtained for outstanding accounts in the amount of \$7,570.96, which was registered on title. DFS Kaneski

UnRuh LLP claims \$8,875.55 as the amount owing under this judgment as at March 31, 2025, with payment of its claim from the net sale proceeds ranking in priority according to its order of registration on title.

Gracious Living Home Inc.

[18] Gracious Living Home Inc. also claims for its outstanding judgment as registered on title in the amount of \$19,769.37, plus post judgment interest of \$3,275.64, the payment of which from the net sale proceeds it claims ranks in priority according to its order of registration on title.

Business Credit & Capital LLP

[19] Business Credit & Capital LLP claims for its outstanding judgment as registered on title in the amount of \$3,448.96, plus post judgment interest of \$367.47, the payment of which from the net sale proceeds it claims ranks in priority according to its order of registration on title.

Costs

[20] To the extent that parties took positions on costs for this hearing, it is Mr. Ostrowski's position that all parties should bear their own costs, while it is the position of Mr. Malech's estate that costs should be recoverable by the parties from the net sale proceeds.

ANALYSIS

Mr. Dubois

[21] I have empathy for Mr. Dubois's position that he ought to be able to recover some amount from the net sale proceeds as he prompted the conclusion of this long

outstanding matter by bringing this application. However, upon Mr. and Ms Dubois divorcing, Mr. Dubois's homestead rights ceased to exist (***Keith G. Collins Ltd. v. Coutu***, 2011 MBCA 52, paras. 28 - 30) and to the extent such rights previously existed, there was no application to set aside any disposition as provided in s. 6 of ***The Homesteads Act***, C.C.S.M. c. H80. As such, at law (and without any determination about whether he is able to claim against the net sale proceeds amounts beyond the amount of his certificate of judgment), there is no basis for him to recover any of the amounts he claims from the net sale proceeds in priority to the order of registration of his certificate of judgment on title.

The Numbered Company

[22] It is undisputed that on October 10, 2013, for the payment of \$18,009.01, RBC's mortgage registered against title to the property was transferred to the numbered company. There is also no dispute that the numbered company has the same priority and same rights as RBC would have had against the net sale proceeds which is the same priority as originally held by CIBC. However, I find that the quantum recoverable by the numbered company on this priority basis from the net sale proceeds is limited to the amount of \$18,009.01, plus interest at the rate of 6.3%. This interest is to be calculated from the date that the numbered company was transferred the mortgage on October 10, 2013, to the present.

[23] The numbered company's claim for \$78,500.88 is based on Mr. Boon's affidavit evidence that after the RBC mortgage was transferred to the numbered company, Ms Dubois executed a written agreement that the mortgage would now carry an

interest rate of 15% per annum. At the hearing, it was noted that, in contrast to the other parties who are claiming as mortgagees (Mr. Ostrowski, Mr. Malech's estate, and Mr. Paille), each of whom filed their agreements with Ms Dubois or other evidence to corroborate their claims, Mr. Boon, on behalf of the numbered company, did not include corroborating documents such as the asserted written agreement in which Ms Dubois agreed to an interest rate of 15% per annum. Mr. Boon did file as evidence the original CIBC mortgage between CIBC and Ms Dubois, registered on November 6, 1995; however, Mr. Boon did not provide in evidence the standard charge mortgage terms that were incorporated by reference into the CIBC mortgage. The CIBC mortgage does not include any renewal provisions, which, if they exist, are presumably part of the standard charge mortgage terms (which are not in evidence).

[24] Mr. Boon was not cross-examined on his affidavit, and I am treating his affidavit evidence as unchallenged. I also appreciate that corroborating evidence of Mr. Boon's assertion of an agreement between the numbered company and Ms Dubois is not required. Nevertheless, with the numbered company asserting a written agreement with Ms Dubois that the mortgage would "now carry an interest rate of 15%" per annum, while not producing this agreement or the CIBC standard charge mortgage terms (the relevance of which is further discussed in paragraph 29), all of which would be in its control, results in little weight being attached to Mr. Boon's evidence regarding this agreement.

[25] Mr. Ostrowski's counsel points out this agreement (for interest at 15%) was also not registered on title pursuant to s. 110(1) of ***The Real Property Act***, nor was the

requisite consent obtained from subsequent encumbrancers as contemplated by s. 110(2). As such, it is Mr. Ostrowski's position that the numbered company cannot maintain its priority regarding interest at 15% under s. 110(3). Mr. Ostrowski also submits that the numbered company is bound by the interest rate of 6.3% per annum indicated in the NEPS registered by RBC as it remained on title at the time of the transfer of the RBC mortgage to the numbered company.

[26] Subsection 110(1) of ***The Real Property Act*** allows parties to amend certain terms of mortgages and other encumbrances through a memorandum of agreement, which can then be registered with the Land Titles Office; s. 110(2) provides that the consent of subsequent encumbrancers is required to file such an amending agreement; and, s. 110(3) provides that, upon registration, the mortgagee acquires registration priority for the amended terms equal to that of the original mortgage.

[27] In my view, s. 110 of ***The Real Property Act*** captures that (a) mortgage extensions, amendments, and corrections may be made by agreements between the mortgagor and mortgagee — but if the amendment would prejudice a subsequent encumbrancer, the consent of the subsequent encumbrancer, followed by the filing of a registrable amending agreement on title, is necessary for the first mortgagee to preserve its priority rights; but (b) if the subsequent encumbrancers had notice of the first mortgagee's right to make such an extension, amendment, or correction, there is no prejudice to subsequent encumbrancers, such that their consent and registration of an amending agreement are not necessary. So, where the terms of a mortgage allow for modification of the interest rate on an extension of the mortgage, a subsequent

encumbrancer would remain subsequent in priority, even though no amending agreement was registered with their consent, because the subsequent encumbrancer would reasonably know of this term (allowing for modification of the interest rate) at the time it registered its encumbrance. In such circumstances, the subsequent encumbrancer may be subject to the higher rate of interest identified in the subsequent agreement.

[28] Here, the numbered company submits that subsequent encumbrancers would have had notice of the 15% interest rate because the CIBC mortgage provided for a 15% interest rate. However, the original CIBC mortgage was a "fixed rate standard closed mortgage" for a term of five years. As such, it would have long expired before the transfer of the RBC mortgage to the numbered company.

[29] The numbered company also submits that pursuant to the original CIBC standard charge mortgage terms, there was a right to amend the interest rate such that it did not need to file an amending agreement. However, as mentioned above, the CIBC standard charge mortgage terms are not in evidence.

[30] Similarly, the RBC mortgage, which is the mortgage that was transferred to the numbered company, is not in evidence, such that its terms governing the interest rate are also unknown. The only evidence of the interest rate under the terms of the RBC mortgage is contained in the NEPS filed by RBC on July 16, 2013. The NEPS indicates interest at 6.3% per annum, and I infer this is the interest rate under the RBC mortgage which was transferred to the numbered company.

[31] It may be suggested that because a different interest rate was charged under the RBC mortgage (6.3% per annum), it follows that the standard charge mortgage terms incorporated by reference into the original CIBC mortgage must have allowed for a different interest rate. However, this lower interest rate as reflected in the NEPS filed by RBC would not have been to the prejudice of subsequent encumbrancers. Whereas, without knowing whether and to what extent the interest rate may be varied on an extension, presumably increasing the interest rate from 6.3% to 15%, as Mr. Boon deposed occurred, would, in fact, result in such prejudice. In these circumstances, I am not prepared to infer what may have been the terms governing the interest rates on extension under the CIBC mortgage or under the RBC mortgage beyond the interest rate of 6.3% per annum contained in the NEPS.

[32] In sum, it is unknown what conditions, if any, were placed on the interest rate that could be charged on extension of the CIBC mortgage and under the RBC mortgage because the pertinent terms are not in evidence. Moreover, aside from Mr. Boon's assertion in his affidavit, there is no documentary evidence corroborating the existence of the agreement between the numbered company and Ms Dubois which purportedly provides for the increased interest rate beyond the 6.3% rate which I infer was charged by RBC before the mortgage was transferred to the numbered company. In these circumstances, I am unable to accede to the numbered company's position that it is entitled to recover interest at 15%. Rather, I find that 6.3% per annum is the applicable interest rate as reflected in the NEPS filed by RBC.

[33] Accordingly, I find that the quantum that the numbered company is entitled to recover from the net sale proceeds based on the order of registration of its mortgage on title (immediately after recovery of \$4,615.01 from the net sale proceeds by the Director of Employment Standards) is the principal amount of the mortgage of \$18,009.01, with interest at 6.3% per annum, from the date the mortgage was transferred on October 10, 2013, to present. I accept the calculation of the principal and interest (at 6.3% per annum from October 10, 2013, to the hearing date) provided by Mr. Ostrowski's counsel, which totals \$31,245.63 (interest which has since accrued is to be added to this amount).

Equitable Mortgages

[34] Each of Mr. Ostrowski, Mr. Malech's estate, and Mr. Paille advance their claims to the net sale proceeds based on equitable mortgages they allege they hold with respect to the property as reflected in their filed caveats. All parties agree, as do I, that the applicable principles governing equitable mortgages are set out in ***Brown et al v. Boon et al***, 2018 MBCA 14, at para. 23; ***Hyczkewycz v. Hupe***, 2019 MBCA 74; and ***Zubriski v. Bachewich***, 2020 MBQB 56, at paras. 29 to 33, which includes the following from ***Zubriski***:

32 In *Elias Markets Ltd.*, 2006 CanLII 31904 (ON CA), the court explained an equitable mortgage as follows:

[65] In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

Mr. Ostrowski

[35] In his unchallenged affidavit evidence, Mr. Ostrowski deposed as follows. He agreed to loan Ms Dubois and her company, The Carpet Girl, money from his personal savings, loans, lines of credit, pension, and credit cards for her mortgage payments on the property and other expenses. Ms Dubois and The Carpet Girl had attempted to make some repayments to Mr. Ostrowski pursuant to this loan, but those fell through. As a result, in July 2008, Mr. Ostrowski commenced an action in CI 08-01-57557 (the “first Ostrowski proceeding”), at which time Mr. Ostrowski deposed he was out of pocket \$209,003.51, plus interest that continued to grow on his various accounts from which he had loaned money to Ms Dubois and The Carpet Girl.

[36] Ms Dubois always acknowledged the amount she received from Mr. Ostrowski, however, she framed it as a gift. Mr. Ostrowski was hesitant to obtain a judgment in the first Ostrowski proceeding as a judgment would impact the credit of Ms Dubois and The Carpet Girl and in turn impact their ability to repay him. In these circumstances, Mr. Ostrowski’s evidence is that he needed Ms Dubois and The Carpet Girl to succeed in order to have the loan repaid.

[37] In 2012, Ms Dubois advised Mr. Ostrowski that she and The Carpet Girl needed further money as she was worried about the ongoing costs associated with her family proceeding, maintaining her home at the property, and running The Carpet Girl. In response, Mr. Ostrowski advised Ms Dubois that if he was to loan further funds, a settlement would need to be reached on the first Ostrowski proceeding.

[38] Mr. Ostrowski deposed that on May 1, 2012, the parties to the first Ostrowski proceeding reached a settlement, the terms of which included that Ms Dubois acknowledged owing Mr. Ostrowski \$209,003.51, plus interest as claimed in the first Ostrowski proceeding; Ms Dubois agreed to pledge the property as security for the amounts owing; Ms Dubois and/or The Carpet Girl were to make payments to Mr. Ostrowski of \$5,000.00 per month from June 1, 2012 to December 31, 2012, with the outstanding balance to be repaid on January 1, 2013 and interest charges of 10% per annum were to be applied from January 1, 2006, until total repayment was complete; the parties would execute instruments in evidence of the settlement agreement and register them on title to the property; and once these steps were complete, Mr. Ostrowski would then loan Ms Dubois and/or The Carpet Girl further money.

[39] I find that the common intention of Ms Dubois and Mr. Ostrowski was to secure the property for the debt owing by Ms Dubois to Mr. Ostrowski. I make this finding because it is undisputed that Mr. Ostrowski lent Ms Dubois the money referenced in the settlement and that on May 1, 2012, consistent with the terms of the settlement agreement, Ms Dubois and Mr. Ostrowski agreed in writing to a "Repayment Agreement" between them. The Repayment Agreement provides:

Tracey-Lyn Marie Dubois acknowledges and accepts owing the said amount, plus interest, to Henry J. Ostrowski..., that is before the courts ([the first Ostrowski proceeding]) and agrees to a voluntary caveat, on her home and all assets. (209,003.51 – STATEMENT OF CLAIM, DATED/FILED JULY 16, 2008).

[40] In Mr. Ostrowski's caveat registered against title to the property, the "particulars of estate or interest claimed" are indicated to be the repayment agreement, as

"security for the repayment of a loan". In my view, in the circumstances, an equitable mortgage on the terms outlined in the settlement was the true character of this transaction.

[41] Also supporting my finding of an equitable mortgage is that on May 30, 2012, a mortgage was in fact executed by Ms Dubois and Mr. Ostrowski for the principal amount of \$209,003.51. This mortgage was signed by Ms Dubois and witnessed by her lawyer at the time. It was **not** registered on title to the property because Mr. Dubois would not provide his required homestead consent. As well, my finding of an equitable mortgage on the terms of the settlement agreement is demonstrated by Mr. Ostrowski's uncontested affidavit evidence that with the settlement agreement finalized, he, in fact, provided further loans to Ms Dubois and The Carpet Girl.

[42] It is undisputed the Repayment Agreement which is the basis for (and attached to) the caveat registered by Mr. Ostrowski provides for interest at 10% per annum to be applied from the period of January 1, 2006, until repayment. Mr. Ostrowski's counsel has calculated the total amount owing with interest at 10% per annum starting July 1, 2008 (which of course is later than January 1, 2006), as \$562,567.79. Given the amount of the available net sale proceeds, there does not appear to be any practical impact of this difference.

[43] Accordingly, based on the order of ranking of Mr. Ostrowski's caveat reflecting his equitable mortgage, he is entitled to recover the amount of \$562,567.79, from the net sale proceeds after payment of \$4,615.01 to the Director of Employment Standards for its statutory priority claim and payment to the numbered company. For the reasons

discussed below, I disagree with the position of Mr. Malech's estate that the net sale proceeds are to be shared on a pro rata basis among those claiming equitable mortgages.

Mr. Malech's Estate

[44] Mr. Malech's unchallenged evidence is that for the period April 2012 to August 2013, he advanced loans to Ms Dubois of \$62,303.60, which, with interest of \$23,094.29 (to September 30, 2017), totals \$85,397.89, and for which he obtained default judgment on August 3, 2018, of \$101,091.05 plus costs and post-judgment interest. From the net sale proceeds, Mr. Malech's estate claims \$54,378.58, based on a letter of permission dated June 24, 2014, referenced in the caveat that he filed as the "basis for claim". Given that in the letter of permission, Ms Dubois acknowledged that she owes Mr. Malech \$54,378.58 as of March 31, 2014, and she provides him with permission to place a caveat on the property "as security for repayment of this loan", I find that the clear common intention of both Ms Dubois and Mr. Malech was to secure the property for Ms Dubois's debt. Accordingly, I find that Mr. Malech's estate has an equitable mortgage in the amount of \$54,378.58.

[45] Counsel for Mr. Malech's estate argued that s. 155 of ***The Real Property Act***, when read in conjunction with the reference to equity in ***Hyczkewycz***, supports the estate's position that there is to be a pro rata sharing of the net sale proceeds (after payments to the Director of Employment Standards and to the numbered company) as among the holders of equitable mortgages, namely Mr. Ostrowski, Mr. Malech's estate, and Mr. Paille. Section 155 of ***The Real Property Act*** provides:

155 The filing of a caveat by the district registrar or by a caveator gives the same effect, as to priority, to the instrument or subject matter on which the caveat is based, as the registration of an instrument under this Act.

[46] Counsel for Mr. Malech's estate argues that because the evidence on which Mr. Ostrowski's equitable mortgage "is based" does not provide for its priority in terms of registration, it follows that Mr. Ostrowski's equitable mortgage is not in priority sequence to the other equitable mortgages. No case law has been cited for this argument, and I simply do not see this position as supported by either s. 155 of ***The Real Property Act*** or the reasoning in ***Hyczkewycz***. In my view, to accept the position advanced by Mr. Malech's estate would be inconsistent with the priority in registration provided in s. 64 of ***The Real Property Act***. As such, I am unable to accede to this position. Therefore, I conclude that the estate of Mr. Malech's priority to recover the amount it is owed of \$54,378.58 from the net sale proceeds is in accordance with the order of ranking of the caveat reflecting the estate's equitable mortgage as registered on title.

Paille

[47] In his unchallenged affidavit, Mr. Paille deposed as follows. In September 2013, he entered into a verbal agreement with Ms Dubois in which he agreed to grant her access to a line of credit with Toronto-Dominion Bank and she agreed to be responsible for payment of any amount she spent on the line of credit. Between September 23, 2013 and January 22, 2014, she withdrew \$13,787.14 from the line of credit. On December 20, 2013, Mr. Paille gave Ms Dubois a loan of \$2,001.50, and on January 17, 2014, he granted her a loan of \$2,712.28. As a result of Ms Dubois's failure to make all

required payments towards the line of credit and pay down the loans he had given her, Mr. Paille asked her to provide security for the amounts owing.

[48] On September 17, 2014, Ms Dubois executed a demand promissory note and agreement to charge land in the amount of \$18,300.14, with interest at 7.5% per annum compounded and calculated monthly from September 8, 2014, which was the interest rate for the line of credit. On September 23, 2014, the caveat was registered on title to the property in accordance with the promissory note as an equitable mortgage. On November 29, 2018, Mr. Paille obtained default judgment against Ms Dubois of \$24,682.19, with post judgment interest at 2% per annum.

[49] The promissory note also provides that the property shall stand charged as security for not just the debt due to Mr. Paille but also for “all costs, charges, and expenses” incurred in enforcing and obtaining payment. Having regard to Ms Dubois’s debt owing to him along with the costs of obtaining payment, including through this application, Mr. Paille claims a total of \$29,598.88, as of February 17, 2021, which he may revise to reflect additional interest to the present date.

[50] Given that it is undisputed Mr. Paille loaned Ms Dubois the funds reflected in the demand promissory note at the interest rate provided therein; Ms Dubois agreed in the promissory note that the property would stand charged as security for the timely payment of the debt owing to Mr. Paille and that this indebtedness shall be secured by way of a caveat registered against the property; and the express description in Mr. Paille’s caveat to an “equitable mortgage”, I am satisfied that the common intention between Ms Dubois and Mr. Paille was that of an equitable mortgage. Therefore,

Mr. Paille's priority to recover the amount he is owed of \$29,598.88 (plus additional interest to the present date) from the net sale proceeds is in accordance with the order of the ranking of the caveat reflecting his equitable mortgage as registered on title.

Other Title Registrations

[51] There is no challenge to any of the other claims advanced and I find that they are recoverable against the net sale proceeds in accordance with the order on which they were registered on title.

Costs

[52] No party has requested costs as against another party (beyond the costs that I have allowed as recoverable as detailed above). Given the background and history of this matter, in my view, this is sensible. Accordingly, all parties will bear their own costs. While counsel for Mr. Malech's estate suggests that it is appropriate that costs be payable as a priority from the net sale proceeds (as also requested by some other parties), there is simply no legal basis for such an order in the circumstances.

CONCLUSION

[53] In summary, I have concluded that the following amounts are payable from the net sale proceeds in the following order of priority:

1. Director of Employment Standards, \$4,615.01;
2. 4638817 Manitoba Ltd., \$31,245.63, plus interest at 6.3% per annum from the date of the hearing until present;
3. Mr. Ostrowski, \$562,567.79;

4. The Workers Compensation Board, \$1,906.59 (first part of its total claim of \$4,597.66);
5. Gracious Living Home Inc., \$19,769.37, plus post judgment interest;
6. Director of Employment Standards, \$2,660.69 (the balance of its claim);
7. The Workers Compensation Board, \$2,691.07 (the balance of its claim);
8. Mr. Paille, \$29,598.88, plus interest since February 17, 2021;
9. Mr. Malech's estate, \$54,378.58;
10. Department of Finance, \$79,832.68;
11. DFS Kaneski UnRuh LLP, \$8,875.55;
12. Mr. Dubois, \$75,000.00, plus post judgment interest; and
13. Business Credit & Capital LLP, \$3,448.96, plus post judgment interest.

[54] I recognize that the impact of my decision is that after Mr. Ostrowski is paid (albeit only a portion of the amount he is owed), the net sale proceeds will be exhausted such that no other party to whom Ms Dubois is indebted as reflected in their subsequent related registrations on title will recover any funds from the net sale proceeds. Nevertheless, their claims against Ms Dubois, as I have found them to have been established, will remain recoverable against her.

[55] Finally, the parties will bear their own costs.

A.C.J.