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(Winnipeg Centre)
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520 Portage Avenue Ltd. et al.
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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applicant,	)	TRACY A. MCMAHON for the applicant
- and -	)	
520 PORTAGE AVENUE LTD., HART MALLIN,	)	NO ONE APPEARING for the respondents
respondents,	)	
- and -	)	
THOMAS G. FROHLINGER,	)	JEFFERY D. H. KING for the intervener
intervener.	)	
	)	JUDGMENT DELIVERED:
	)	JULY 19, 2021

CHARTIER J.

INTRODUCTION

[1] The principal issue to be determined on this application is whether it is just and equitable for the Frohlinger mortgage registered in 2003 to either remain, or be removed,

from title to the parking unit of a condominium. The parking unit was ordered transferred to Winnipeg Condominium Corporation 479 ("WCC") from the developer of the condominium, 520 Portage Avenue Ltd. ("520") in a previous proceeding (***Winnipeg Condominium Corp. 479 v. 520 Portage Avenue Ltd. et al.***, 2018 MBQB 197 (CanLII)). The issue arises as a result of the decision of the Manitoba Court of Appeal which granted intervener status to Thomas Frohlinger in the previous proceedings on appeal in relation to three mortgages which were on the title to the parking unit (***Winnipeg Condominium Corporation 479 v. 520 Portage Avenue Ltd et al***, 2020 MBCA 66 (CanLII), ("WCC 479")). In its decision, the Court of Appeal made a ruling regarding the two mortgages that were registered in 2004 and 2006, and ordered those mortgages removed, but referred the matter back to this Court in order that a more complete record be filed in order to determine whether the mortgage registered in 2003, registered prior to the Condominium Plan and the Condominium Declaration, should remain on title to the parking unit or whether it should also be removed as were the 2004 and 2006 mortgages.

[2] In determining that the two mortgages that were registered in 2004 and 2006 should be removed from the title to the parking unit, the Court of Appeal, applying the ***York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.***, 1981 CanLII 1932 (ON CA) case, stated that once the parking unit became a common element of the Condominium Corporation by virtue of representations made by the developer in the Plan and the Declaration, the developer could not mortgage it (see also ***Winnipeg***

Condominium Corporation No. 37 v. 255 Wellington Crescent Ltd. and District Registrar of the Province of Manitoba, 1984 CanLII 3729 (MB CA)).

[3] The principle in ***Newrey*** was succinctly described by Rosenberg J.A. in ***Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.***, [1998] O.J. No. 450 (QL), 1998 CanLII 3245 (ON CA) as follows:

> 39 To summarize, Frontenac and Newrey Holdings stand for the proposition that with respect to the common elements, the declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe or to justifiably assume that the superintendent's suite was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. If this constituted a departure from established contract and real property law, it was a departure required by the exigencies of condominium ownership.

It was on the basis of this principle that the parking unit of the condominium was ordered by this Court be conveyed by the developer 520 to the WCC.

[4] The Court of Appeal in ***WCC 479*** also stated the following:

> [83] In ordering these mortgages removed, I recognise the surrounding circumstances. Frohlinger was not at arms length from the Developer, since he was both its legal counsel and an investor in the condominium building. As counsel, he was aware of the Declaration and the Plan, having provided a detailed report to the Developer about their terms. Furthermore, when these mortgages are removed, any amount due thereunder to Frohlinger by the Developer will still be payable, albeit not secured against the parking unit.
>
> [84] I take a different view, however, with respect to the mortgage that was registered in 2003, prior to the Plan and the Declaration. While I appreciate that Frohlinger assumed that mortgage after the Plan and the Declaration had been registered, he nonetheless stepped into the shoes of the original mortgagee. Without a more complete evidentiary record regarding the mortgage and Frohlinger's assumption of same, I am not in a position to determine whether it should remain on title. There is no evidence before this Court as to the relationship between the original mortgagee and the Developer, the terms of the mortgage or the assignment, when the mortgage advances were made, the purpose for which the funds were used, or the amount that remains due under the mortgage.

[5] There are two further issues that have been raised: what amount, if any, is owing pursuant to the 2003 mortgage (and whether a proper mortgage statement was produced) and whether the mortgagee is statute barred from realizing on the 2003 mortgage. For reasons that follow, the mortgage registered in 2003 should be removed from the title to the parking unit on the basis that it is just and equitable to do so based on an application of the principles set out in ***Newrey***, as well as the previous appellate judgment in this matter.

FACTS

[6] The original mortgagee of the 2003 mortgage was Brian Finnegan. At the time that the 2003 mortgage was granted in December 2003, four individuals had formed an association for the development of two condominium projects (the one at 520 Portage Avenue and another one on Princess Street). The development of the condominium project at 520 Portage Avenue, the one that mostly concerns us here, included the developer Hart Mallin, Brian Finnegan who was the financer for the two condominium developments, and who also maintained the books relating to the projects, and Lon Trickett, who was a designer and contractor. The fourth individual, Mr. Frohlinger, who was a director of the developer until August 1, 2003, was advised of the project by Mr. Mallin, and also knew both Mr. Finnegan and Mr. Trickett. He was involved in the condominium project at 520 Portage Avenue from its inception as counsel.

[7] The 2003 mortgage was registered December 1, 2003 on three titles, which titles include property that became property of WCC and property that did not become part of WCC.

[8] In addition to taking the mortgage as security, Mr. Finnegan, who was financing the projects, obtained personal guarantees from each of the other members of the group, Mr. Mallin, Mr. Trickett and Mr. Frohlinger, as collateral security. Thus on December 24, 2003 after the 2003 mortgage was granted, each of Mr. Mallin, Mr. Trickett and Mr. Frohlinger executed a guarantee to Mr. Finnegan for $250,000.00. The amount of each guarantee represented 25% of the principal amount of the $1,000,000.00 2003 mortgage. Mr. Frohlinger says that his guarantee was given in part as a favour to Mr. Mallin, and in part as a business decision to assist the furtherance of the project which he saw as a lucrative source of ongoing and future legal work.

[9] In late 2005 Mr. Finnegan lost confidence in the project involving both condominiums and tried to call in the guarantees on the 2003 mortgage. The parties settled their differences on March 7, 2007 and entered into a formal Settlement Agreement signed March 22, 2007. As part of the March 2007 settlement, the 2003 mortgage was assigned by Mr. Finnegan to Mr. Frohlinger (and eventually transferred on August 8, 2007). Clause 9 of that Settlement Agreement states as follows:

> 9. Tom acknowledges that he has been involved in the Project and that he is fully familiar with the Project and the security held by Brian on the Project, and that in entering into this Agreement, Tom is relying solely on his own knowledge and investigations and not on any representations or warranties made by Brian as to any aspects of the Project, including without limitation, the financial position of the Project and the security held by Brian on the Project, the balances owing to Brian under the security on the Project or the validity, enforceability or priority of the said security.

ISSUE

Is the 2003 mortgage enforceable against the parking unit owned by the WCC and therefore to remain on title or is it in all of the circumstances inequitable that it remain on title?

[10] The 2003 mortgage was granted to Mr. Finnegan at a time when he was one of the members of the associated group for the development of 520 by the developer. Mr. Mallin, Mr. Trickett and Mr. Frohlinger all provided personal guarantees as collateral security to the 2003 mortgage. Mr. Finnegan was the principal investor of the project. As such he was not an arm's length lender such as, for instance, Cambrian Credit Union. It is significant, for example, that the 2003 mortgage was postponed to the Cambrian Credit Union mortgage. It is significant that the original mortgagee was part of the development project. I also find it significant that the mortgage was assigned from one non-arm's length party, Mr. Finnegan, to another non-arm's length party, Mr. Frohlinger. The Court of Appeal's findings at para. 83 of its judgment regarding the surrounding circumstances are also relevant in regard to the 2003 mortgage.

[11] The decision of the Saskatchewan Court of Appeal in ***Condominium Plan No. 86-S-36901 (Owners) v. Remai Construction (1981) Inc.***, 1991 CanLII 7984 (SK CA), 93 Sask. R. 211, is instructive. In that case the Saskatchewan Court of Appeal found it relevant that the mortgagee Royal Trust "… held the first mortgage against title to the suite, and there was no evidence to show that it was in any way a party to the acts of the developer which have been found to give rise to a right of relief except the act of extending the loan on the strength of the mortgage." (at para. 41). However, the Court ordered that a second mortgage on the title in favour of a company related to the

developer be removed from the title to the caretaker's suite. (It was agreed in that case that the three corporations were controlled by Joseph Remai and could be treated as one entity.)

[12] In my view, the facts here, while not on all fours, more closely resemble the second mortgage scenario in the ***Remai*** case. The parties are not related entities, as in ***Remai***, however the original mortgagee, Mr. Finnegan, was an investor, and as such was not an arm's length party. Nor was Mr. Frohlinger who assumed the mortgage, an arm's length party. It is also relevant that Mr. Frohlinger and Mr. Mallin, the sole shareholder and director of the developer, guaranteed the 2003 mortgage as did the other participant in the project, Mr. Trickett. In ***Remai***, the mortgages were created at the same time as the registering of the Condominium Plan, although some of the units had been occupied prior to the registration of the Plan. In this case, the 2003 mortgage predates the filing of the Plan and the Declaration which occurred on August 16, 2004. I find the fact that the mortgage predates the condominium plan is not materially relevant because of the non-arm's length nature of the relationship between the original mortgagee Mr. Finnegan and the developer.

[13] The ***Newrey*** principle applies in this circumstance in that the original mortgagee was not at arm's length with the developer. The original mortgagee was also in association with the designer and contractor Mr. Trickett, as well as Mr. Frohlinger. When the parking unit became a common element of the WCC by virtue of the representations made by the developer in the Plan and the Declaration, the ***Newrey*** principle extends to the non-arm's length investor of the project, and the 2003 mortgage could no longer

rightfully be enforceable against the parking unit once the Plan and the Declaration were registered. From that point onwards, the developer no longer could mortgage that part of the real property. Moreover, no inequity is caused to the party assuming the 2003 mortgage by having the 2003 mortgage removed from title since the party assuming that mortgage, Mr. Frohlinger, is also a non-arm's length party, who, when he signed the 2007 Settlement Agreement wherein he assumed the 2003 mortgage, was aware of the Plan and the Declaration, having previously given a detailed report to the developer about its terms, and also having acknowledged in the Settlement Agreement that he "has been involved" and is "fully familiar with the Project" including "the validity, enforceability or priority of" the security held by Mr. Finnegan. As such, there is no inequity in removing the 2003 mortgage as no non-arm's length interests or parties are impacted. In other words, Mr. Frohlinger was not an innocent purchaser for value when he assumed Mr. Finnegan's 2003 mortgage.

[14] Mr. Frohlinger submitted that the maxim *nemo dat quod non habet* applied in the circumstances, an argument that he also asserted before the Manitoba Court of Appeal. This property law maxim means "no one can give what he does not have". However, to the extent it applies here at all, I find that it does not apply in his favour, but rather in favour of the WCC. It does not operate in his favour here because once the Plan and the Declaration were filed on August 16, 2004, the 2003 mortgage no longer was enforceable against the parking unit for the twofold reason that the parking unit was no longer the developer's asset to mortgage, and because Mr. Finnegan, the mortgagee, was an investor in the project, and as such, a non-arm's length party to the developer. In

addition, Mr. Frohlinger's assumption of Mr. Finnegan's 2003 mortgage occurred in 2007, subsequent to the filing of the Plan and the Declaration, at a time when Mr. Finnegan's 2003 mortgage was not enforceable against the parking unit. The mortgagee, Mr. Finnegan, did not, at that time, have rightful title to it and the mortgage is therefore unenforceable to the extent it relates to the parking unit. What was transferred by Mr. Finnegan to Mr. Frohlinger in relation to the parking unit was effectively an unenforceable mortgage by virtue of the principle in ***Newrey***.

[15] As to the other factors set out by the Court of Appeal at para. 84 of their decision, none of the factors favour keeping the 2003 mortgage on title or otherwise affect the analysis I have undertaken above. There is nothing in the terms of the mortgage which are particularly relevant one way or another. The mortgage advances were made between February 10, 2002 and September 29, 2005. There was significant argument on the issue of what was owing on the mortgage and whether a proper mortgage statement was produced by the mortgagee, but I find it unnecessary to determine the exact amount that was owing.

[16] Given my findings on the first issue, it is not necessary that I consider the WCC's alternative submissions relating to the amount of the mortgage (and whether a proper mortgage statement was produced by the mortgagee) and whether the mortgage is statute barred.

CONCLUSION

[17] I therefore order that the 2003 mortgage be removed from the title to the parking unit. The applicant Winnipeg Condominium Corporation 479 is entitled to costs of this proceeding.

_____ J.