



ONTARIO

Land Titles Act

R.S.O. 1990, Chapter L. 5, as amended

IN THE MATTER OF the title to land registered in the Land Registry Office for the Land Titles Division of Ottawa Carleton (No. 4) as Part of Lots 392, 393 and 394, Plan 207509, and Part of lane to rear of Lots 392 and 394, Plan 207509, City of Ottawa, Regional Municipality of Ottawa-Carleton (PIN 04026-0018) in the name of Susan Jean Ault.

AND IN THE MATTER OF an Application by D. Kenneth Gibson, in Trust, for compensation from the Land Titles Assurance Fund in respect of the alleged forged mortgage against the lands, registered as Instrument no. N731597.

THIS MATTER came before me at Ottawa for hearing on the 28th January, 2003 at which time the following persons appeared:

D. Kenneth Gibson, for D. Kenneth Gibson in Trust, Applicant
Phillip Augustine, of Augustine Bater Polowin Counsel, for Applicant

THE FACTS

A. The Application

The Applicant, D. Kenneth Gibson, in Trust, (Gibson Trust) as represented in person by Mr. Donald Kenneth Gibson (Mr. Gibson), applies for compensation for loss arising out of costs associated with an alleged forged mortgage transaction involving the property described above, and municipally known as 694 Island Park Drive, Ottawa, Ontario (Island Park property). This mortgage was registered on November 9, 1995 as Instrument No. N731597 in the Land Registry office for the Registry Division of Ottawa-Carlton (No. 4) (the Mortgage). The Island Park property was converted to the land titles system on May 27, 1996.

B. The Mortgage Transaction

The granting parties to the Island Park mortgage were Susan Jean Ault, as mortgagor, and Arthur Ault, as guarantor and consenting spouse. At the time of the Mortgage transaction, title to the Island Park property was held solely in the name of Susan Jean Ault. Also at that time, both Susan and Arthur Ault were practicing solicitors in Ottawa. The mortgagee was Kisber & Co. Ltd. (Kisber), and the solicitors for the mortgagee were Gibson & Augustine (now Augustine Bater Polowin). Donald Kenneth Gibson, a partner at Gibson & Augustine at the time, was the solicitor acting on the mortgage transaction for the mortgagee, Kisber. Mr. Gibson was directly involved in negotiating the mortgage between Kisber and Arthur Ault. Mr. Gibson also acted for Kisber in drafting the mortgage documentation for signature by Susan Ault as mortgagor, and Arthur Ault as guarantor and consenting spouse.

The Applicant claims that the owner's signature on the Mortgage was forged, and that the owner's husband, Arthur Ault, was directly involved in the forgery. The Applicant claims to be an innocent party to the forgery.

C. The Law Society and the Criminal and Civil Action

After an exchange of oral and written communication between Mr. Douglas Gadiant (counsel for Susan Ault), Mr. Paul Webber (counsel for Arthur Ault) and Mr. Gibson, in November, 1995, in which Mr. Gadiant asserted that Susan Ault was totally innocent, and Mr. Webber confirmed that Mr. Ault forged the signature of Susan Ault on the mortgage, Mr. Gibson reported the transaction to the Lawyers' Professional Indemnity Company (LPIC). In his letter, Mr. Gibson laid out the sequence of events, and his potential liability in the mortgage transaction for not realizing that the signature on the Island Park mortgage was not genuine.

A criminal investigation proceeded, and in July 1996, Mr. Ault was convicted of fraud in connection with the Mortgage, sentenced to two years' incarceration and ordered to pay compensation for the loss of property to the mortgagee, Kisber. Mr. Ault was also disbarred.

On September 17, 1996, the mortgagee, Kisber commenced a civil action against Susan Ault, Arthur Ault, Mr. Gibson, and others, for their alleged involvement in the forged Mortgage transaction and a related transaction (which related transaction is not a subject of this application).

The Lawyers Professional Indemnity Company (LPIC) launched an investigation in late 1996 and early 1997 into the Mortgage transaction with respect to any potential liability attributable to Mr. Gibson and/or his law firm, Gibson and Augustine. By letter dated January 8, 1997 to Mr. Gibson, counsel to LPIC advised Mr. Gibson initially that LPIC was not willing to indemnify him for his involvement in the Mortgage transaction, as it had found that Mr. Gibson acted as a broker in the transaction. However, LPIC was willing to assist in a claim to, and recommend some compensation from, the Lawyers Fund for Client Compensation, for the victims of the forgery.

In June 1997, LPIC agreed to contribute 50% of Kisber's loss, in the sum of \$97,500.00 toward the settlement, in consideration for Kisber agreeing to discontinue all further legal action against Gibson, the firm of Gibson & Augustine, and all other defendants except the Aults.

On October 24, 1997, the settlement was structured so that **Kisber** entered into an Assignment where it assigned all of its right, title and interest in the civil action against Arthur Ault, Susan Ault and 746772 Ontario Limited; and also assigned all of its right, title and interest in the forged Mortgage, to **D. Kenneth Gibson in Trust**, in consideration for payment by **Gibson & Augustine** (as it then was) and LPIC of the sum of \$97,500.00 each, as equal contribution toward the total settlement of \$195,000.00.

At some point before June, 1998, the civil claim was amended to remove all but Susan Ault and Arthur Ault as defendants, as well as to add Christine Warner as defendant, for allegedly assisting her brother, Arthur Ault, in the forged Mortgage transaction. On June 26, 1998, on a motion for default judgment before Justice Forget, it was ordered that the defendant, Arthur Ault be noted in default, and that Arthur Ault pay to the plaintiff, Kisber, (now Gibson in Trust as a result of the Assignment) the sum of \$260,648.77, with \$250.00 for costs.

On July 24, 2000, after hearing the balance of the matter over 3 days in May, 2000, Justice Chilcott rendered his decision, confirming the forged Charge and subsequent Transfer were to be removed from title. Justice Chilcott found that the defendant Warner directly assisted Arthur Ault in the forgery, and ordered Warner to pay D. Kenneth Gibson, in Trust, the sum of \$60,229.62 plus prejudgment interest. Justice Chilcott also ordered the plaintiff's claim against Susan Ault dismissed as he found that Mrs. Ault was an innocent party to Mr. Ault's actions, and ordered the forged Mortgage deleted from title to the Island Park property. Justice Chilcott then ordered the plaintiff, Gibson in Trust, to pay party and party costs to Susan Ault; and ordered the defendant, Warner, to pay party and party costs to Gibson in Trust.

The Applicant, Gibson Trust, now claims compensation from the Land Titles Assurance Fund on the basis that Gibson in Trust is an innocent party holding a valid interest in land under the land titles system by way of registered Transfer of Charge who has suffered a loss as a result of the Charge being declared invalid and ordered removed from title. Gibson Trust claims the costs associated with its contribution to the settlement and related legal and other expenses, for a total sum of approximately \$350,000.00.

THE EVIDENCE

The Applicant tendered the following as evidence:

Exhibit 1 - Documents Brief of D. Kenneth Gibson, in Trust (submitted on or around April 5/02)
 Exhibit 2 - Updated Damage Summary dated January 20, 2003, prepared by Philip Augustine (handwritten notes added by hearing officer pursuant to oral submissions by Mr. Augustine at hearing)

Mr. Augustine, as counsel to the Applicant, Gibson in Trust, and Mr. Gibson, as witness for the Applicant, are to be commended for providing complete and organized evidence at the hearing, both in documentation and by way of oral testimony. I found Mr. Gibson to be honest and forthright in his testimony regarding his involvement in the Mortgage transaction, even where the evidence demonstrated that Mr. Gibson, as solicitor for Kisber at the material time, did not always employ the standard of care expected of legal counsel to protect his client's interest.

I find on the evidence tendered by way of written documentation and oral testimony of Mr. Gibson, and on the findings of LPIC and Justice Chilcott, that Mr. Gibson did not meet the standard of care required of legal counsel acting on behalf of his client, Kisber. To his credit, Mr. Gibson admitted candidly during the hearing that he did have several opportunities to confirm or verify Mrs. Ault's participation in the Mortgage transaction, and to confirm the validity of the documentation, but for whatever reason, did not do so. Had Mr. Gibson taken up those opportunities to communicate directly with Mrs. Ault, he would have realized that the forged transaction was not valid, and he could have taken appropriate steps to protect his client's interest.

THE LAW

The *Land Titles Act*, R.S.O. 1990, c. L.5, as amended, sets out the requirements the Applicant must meet in order to ground a successful claim for compensation from the Land Titles Assurance Fund. The threshold requirements can be found in sections 57 and 59 of the Act and must be satisfied in order to obtain compensation from the Fund:

- **The applicant must have been wrongfully deprived of an interest in land for one of the reasons set out in the Act.**
- **The applicant must not have caused or substantially contributed to his own loss.**
- **The applicant must be otherwise unable to recover.**

1. Does the Applicant have an interest in land

a) Void vs. Voidable

Counsel submits that the Applicant had a valid interest in the Island Park property first arising from the Transfer of Charge registered as Instrument No. 1086510 on November 4, 1997 which registration took place after conversion of the property to the land titles system on May 27, 1996.

The Mortgage that is the subject of the Transfer, was found to be void by Justice Chilcott in his reasons of July 24, 2000, as Mr. Ault forged the signature of his wife on the Mortgage. Justice Chilcott ordered the Mortgage and the subsequent Transfer removed from title to the Island Park property.

Counsel for applicant asserts that up to the time of that court order, the Mortgage (and subsequent Transfer) were valid, and that rather than being void *ab initio*, were merely voidable. I disagree. It is well settled law that a forged mortgage or other instrument is a nullity and therefore no interest is created: *Cooper v. Vesey* (1881), 20 Ch. D. 61. Thus, contrary to counsel's submissions, where a court declares a mortgage to be void due to forgery, this is not to say that the mortgage is valid until that time, but invalid from that point on. The mortgage is invalid from its creation and therefore no rights or interests pass under that instrument. Therefore, on this basis, I find the forged Mortgage passed no interest in the land to the mortgagee, Kisber, and I accept the decision of the court in this regard.

b) Registration as Validity of Instrument

It remains then to determine whether the Transfer of the void Mortgage, registered under the land titles system creates an interest in land.

Applicant's counsel submits that as the property was in the land titles system when the Transfer was registered, the Transfer automatically gains the protection of the guarantee of title available under the land titles system. I disagree.

Conversion to and registration under the land titles system does not operate to validate instruments that would not have been valid absent registration, or that have been declared invalid by the court. The forged Mortgage was registered on title to the Island Park property while the property was under the registry system. The Transfer of that Mortgage was registered on title to the Island Park property after conversion of the property to the land titles system. Upon conversion, the Mortgage was brought forward on the register under the land titles system. A void instrument (i.e. the Mortgage) does not gain status merely by registration under or conversion to land titles. As the Mortgage would have been void without registration, it remains void despite registration or conversion. Section 53 of the Act operates to require more than the simple act of registration under the land titles system to validate a claim to an interest in land.

Section 53 of the Act states:

Land subject to mortgage at time of registration -- s. 53(1)

53. (1) Where land is registered subject to mortgages existing thereon at the time of the first registration, the mortgages shall be noted in the register in the same order as they are registered in the registry office, if such mortgages have been so registered, or the dates of the respective registrations thereof shall be stated, but this shall not be taken as an affirmation that such mortgages rank in the order in which they were registered or in the order in which they are noted.

Abstracts of instruments -- s. 53(2)

(2) Abstracts of all instruments dealing with such mortgages shall thereafter be entered in the register, and the entry thereof shall be deemed the registration of the instrument, and the rights of the parties interested or claiming to be interested in any such mortgage so far as it affects land under this Act shall, subject to sections 36, 37, 39, 45, 47 and 87 to 90, be decided under the registry law as if the registrations had been made under the Registry Act.

The effect of these provisions is this: where land is subject to a mortgage existing at the time of conversion, the mortgage is brought forward, with all instruments dealing with such mortgage entered on the register, but the rights of the parties claiming under any such instrument or mortgage are determined under the *Registry Act*, R.S.O. 1990, as amended, as the mortgage was registered while the lands were in the registry system. Thus it follows that any rights under the Mortgage are to be determined under the *Registry Act*. It is well settled law that there is no guarantee of title under the registry system.

c) Status of Applicant under Mortgage

At common law, and under the *Mortgages Act*, a transferee of a mortgage stands in the shoes of the original mortgagee, taking all right, title and interest to that mortgage, as if the transferee were privy to the original mortgage transaction, except that the transferee cannot mount a personal claim against the mortgagor, unless specific provisions to that effect are contained within the mortgage document itself. Gibson Trust therefore stands in the shoes of the original mortgagee, Kisber, to the extent of any rights arising under the Mortgage. As Kisber's Mortgage was declared invalid by the court and therefore no interest in the property passed under it to Kisber, it follows that any transferee of that Mortgage, standing in Kisber's shoes, cannot gain any interest in the property under that Mortgage. The original mortgagee under a void mortgage has no title to transfer to the transferee.

d) Principle of Deferred Indefeasibility

As the common law does not assist to validate the Transfer, I must assess the effect of the principles under the *Land Titles Act* on the Transfer. There was some discussion at the hearing regarding whether the principle of deferred or immediate indefeasibility is the appropriate principle encompassed by that Act. It is my opinion, based on an extended review of relevant case law, statutory provisions, past decisions of the Land Titles Assurance Fund and relevant legal commentary, that the principle of deferred indefeasibility is in operation under the land titles system in Ontario. Counsel was so advised at the hearing, and on this basis, made submissions on the principle of deferred indefeasibility.

The principle of indefeasibility operating under the statute does not alter the common law to breath life into a void instrument. Under the *Land Titles Act*, the principle operates to protect the interest of a *bona fide* purchaser for value without notice, whose interest arises from a good faith dealing, even where that dealing may be based on a void instrument.

Gibbs v. Messer, [1891] A.C. 248 (P.C.), an often cited authority for the principle of deferred indefeasibility, is relied on by the Applicant in its assertion that it obtains a defensible interest by registration of its Transfer under the land titles system as a *bona fide* innocent party. In delivering judgment in *Gibbs*, Lord Watson states:

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a *bona fide* purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed. The McIntyres [applicants] cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity.

Thus, under certain circumstances, a void mortgage will serve as a valid root of title to an innocent subsequent party. Section 13 of the *Mortgages Act*, R.S.O. 1990, as amended, supports such a situation. It states:

Defence of purchase for value without notice -- s. 13
 13. The purchaser in good faith of a mortgage may, to the extent of the mortgage, and except as against the mortgagor, set up the defence of purchase for value without notice in the same manner as a purchaser of the mortgaged property might do.

e) Actual Notice

The Applicant relies on *Gibbs*, as well as previous Land Titles Assurance Fund decisions dealing with the principle of deferred indefeasibility, to ground its claim under the land titles system. Counsel submits that the Applicant is a totally innocent party, with a defensible registered interest in the Transfer of Charge under the land titles system, therefore Applicant gains the protection of the system. I completely reject this submission.

The Applicant had actual notice of the forged Mortgage at the time of registration of the Transfer of Charge under which it claims an interest. The evidence confirmed the extent of Mr. Gibson's participation in the Mortgage transaction, and Gibson Trust's (through Mr. Gibson) participation in the settlement transaction. Mr. Gibson participated in the settlement transaction and litigation, which resulted in the registration of the Transfer of Charge. He therefore had actual notice of the invalidity of the mortgage under which Gibson Trust asserts its interest in land at the time of the creation of that interest. The Supreme Court of Canada, in *Dominion Stores Ltd. v. United Trust Co.* [1977] 2 S.C.R. 915, held that the protection under the *Land Titles Act* is tempered by the doctrine of actual notice. Thus, a purchaser cannot assert title under the Act where that purchaser had actual notice of the impropriety of the title through which it takes. The purchaser, or transferee in this case, cannot claim to be innocent and without actual notice, and therefore cannot rely on the guarantee of the land titles system to protect it. The Applicant therefore does not satisfy me under the *Mortgages Act* or the *Gibbs* or *United Trust Co.* tests that it is an innocent transferee of the forged Mortgage, and so it follows that the principle of deferred indefeasibility cannot apply. The Applicant comes to the table with full knowledge of the forgery, and as such is not innocent or *bona fide* in asserting its title. Therefore the Applicant cannot claim the protection of the statute.

2. Did the claimant contribute to his own loss?

Even if the Applicant satisfied the threshold requirements of being a bona fide mortgagee for value without notice having an interest in the land, and was unable to recover its loss, I find that the Applicant does not satisfy the requirements of section 59(1)(c) of the Act. Section 59(1)(c) of the Act states that the claimant must not have caused or substantially contributed to the loss by his own act, neglect or default. Counsel for the Applicant asserts that the claimant, Gibson in Trust, is totally innocent to the Mortgage transaction, and therefore did not cause or substantially contribute to the claimant's loss.

a) Who is the Claimant?

Counsel submits that the applicant, Gibson Trust, is separate and apart from Mr. Gibson, and that the applicant or claimant, Gibson Trust, is a totally innocent party. Section 59(2) of the Act defines the term "claimant" for the purposes of determining who may be denied compensation from the Land Titles Assurance Fund under that section. It states:

59. ...

(2) In this section,

"claimant" includes the person actually making the claim [A] and any person [B] through whom the person [A] claims who the person [A] alleges was wrongfully deprived of land or of some estate or interest therein. [my emphasis added]

The purpose of this section of the Act is to be able to reach the true claimant, where that claimant may be claiming behind or through another party. My interpretation of this section to this particular application is that the true claimant is one and the same as the named Applicant. Therefore, I find that Gibson Trust [B] and Mr. Gibson personally [A], are claimant for the purposes of this application. My finding that Mr. Gibson is the claimant, claiming through the Gibson Trust, is supported by the findings that follow based on the evidence presented to me.

By correspondence dated February 14, 2003 and subsequent to the hearing, counsel confirmed the terms of the Gibson Trust, as there was no formal trust document tendered as evidence at the hearing. In this correspondence, and other supporting material tendered by mail post hearing, counsel confirmed there is no formal written trust agreement; the trust is a creation of the settlement transaction; the trustee is Mr. Gibson; and the beneficiaries of the trust are Mr. Gibson as to 50% and Mr. Augustine as to 50%. While it is not clearly stated in the February 14, 2003 letter, I infer that the trust property is the civil claim assigned to Gibson in Trust, and any compensation that may flow from

c) Other actions of Mr. Gibson

Mr. Gibson admitted at the hearing that on at least five separate occasions he could have verified that Mrs. Ault was a willing participant in the transaction and had signed the mortgage, but he did not. The court found that Mr. Gibson was negligent in his duty of care to his client, and but for that negligence, the Mortgage transaction would not have proceeded. LPIC's report also finds Mr. Gibson negligent for similar reasons. I accept the findings of the court and LPIC investigation in this regard, and therefore I find Mr. Gibson's actions, or his negligence, directly caused or substantially contributed to the Applicant's loss. My findings are further supported by Mr. Gibson's very candid oral evidence during the hearing. Mr. Gibson did not take available steps to assess the veracity of the Mortgage transaction and the identity of the parties to it, despite what can be described as numerous "warning bells".

In my view, the Applicant voluntarily accepted the risk of loss when it entered into the settlement transaction. In exchange for a monetary contribution paid by its Trustee's law firm (which contribution is included in the Applicant's claim to the Fund), the Applicant took an assignment of the Mortgage and civil action. It is this settlement transaction that caused the Applicant's financial loss, a transaction in which the Applicant, through its Trustee, Mr. Gibson, participated fully and voluntarily.

As I interpret section 59(2) to include Mr. Gibson as claimant, and on the basis that the Trust cannot act except through its authorized trustees, I find that Mr. Gibson, by his own action or neglect, for himself personally, and as Trustee for Gibson in Trust and for himself as beneficiary, has caused or substantially contributed to the loss. The Applicant, therefore, does not meet the requirements of section 59(1)(c) of the Act.

At the end of the day, any loss of Gibson Trust is a direct result of Mr. Gibson's actions or inaction, and it is therefore Mr. Gibson who should properly bear the responsibility for the loss. In my view, it is not appropriate for a public fund to be asked to bear the cost of what may be described as Mr. Gibson's lapse in good judgment in this particular transaction.

3. Is the claimant unable to recover from the one who caused the loss?

Even if the Applicant satisfied the requirement of an innocent bona fide mortgagee for value without notice, and did not in any way contribute to its own loss, the Applicant does not satisfy the requirement of section 57(4) of the Act. Section 57(4) requires that the Applicant must be unable to recover from the one who caused the loss before the Applicant may seek compensation from the Fund.

The Applicant is able to recover some or all of its loss under a garnishment order against Christine Warner resulting from Justice Chilcott's decision. Counsel for the Applicant advised at the hearing that the Applicant has received, and may continue to receive, payment under a garnishment order against Christine Warner. There was some evidence that the Applicant voluntarily suspended the garnishment order for a period of time, but that the order could be continued. Counsel advised that Ms. Warner was at the time gainfully employed with a law firm, and that the Applicant will likely be able to recover, albeit in small installments, approximately \$65,000.00 plus interest under the judgment and garnishment order. I therefore find that because the Applicant was found to be equally responsible for its own damages by the court, and the Applicant has recovered, and may continue to recover, some or all of its loss from the garnishment order against Ms. Warner, the Applicant also does not meet the requirement of section 57(4) of the Act.

ORDER

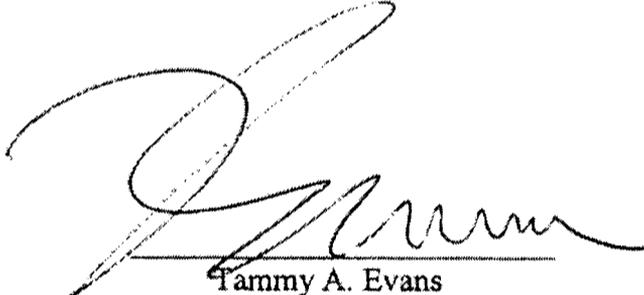
The Applicant's claim for compensation from the Fund is hereby denied.

COSTS

Applicant's counsel submits that in the alternative, or perhaps at the very least, I should award its legal costs. There are two types of claims related to legal costs in this application. The Applicant's claim for compensation encompasses legal costs incurred prior to the application to the Land Titles Assurance Fund. These costs, claimed as compensation, are denied on the basis that the claim for compensation is denied.

Section 57(8) of the Act states that costs of the proceeding, which are a distinct element of costs related strictly to the application process to the Land Titles Assurance Fund, are in the discretion of the Director of Titles (delegated to the Deputy Director of Titles as authorized hearing officer). As I have determined that the Applicant is unsuccessful in its claim on numerous grounds, and further, that Mr. Gibson for himself and on behalf of the Trust, caused or significantly contributed to the loss, I find it is not appropriate to award costs of the proceeding to the Applicant, Gibson Trust. I therefore decline to award these costs.

DATED at Toronto, this ^{27th} day of May, 2003.



Tammy A. Evans
Deputy Director of Titles

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