

Case Name:

Canadian Imperial Bank of Commerce v. Allen

Between

**Canadian Imperial Bank of Commerce, Plaintiff, and
Dale Joseph Allen, Defendant**

[2012] O.J. No. 284

2012 ONSC 588

Court File No. 5351/10

Ontario Superior Court of Justice

J.C. Murray J.

Heard: January 13, February 23, October 17, 2011;
teleconference, January 13, 2012.
Judgment: January 24, 2012.

(34 paras.)

Civil litigation -- Civil procedure -- Judgment and orders -- Summary judgments -- Motion by bank for summary judgment for possession and for monies due under covenants in mortgage allowed -- Bank provided line of credit to defendant, which was secured by mortgage registered against property -- Defendant was charged with production of marijuana on property and Crown obtained restraint order and related management order which it registered against property -- As restraint order and related management order attached to defendant's interest in property, it was encumbrance within definition of lien contained in standard charge terms and constituted default under mortgage.

Real property law -- Mortgages -- Mortgage agreement -- Terms -- Mortgagee's remedies -- Action for possession -- Motion by bank for summary judgment for possession and for monies due under covenants in mortgage allowed -- Bank provided line of credit to defendant, which was secured by mortgage registered against property -- Defendant was charged with production of marijuana on property and Crown obtained restraint order and related management order which it registered against property -- As restraint order and related management order attached to defendant's interest in property, it was encumbrance within definition of lien contained in standard charge terms and constituted default under mortgage.

Motion by the bank for summary judgment for possession and for monies due under covenants contained in the mortgage. The bank agreed to provide a revolving line of credit to the defendant, which was secured by a mortgage for \$208,000 that was registered against the defendant's property. The mortgage provided that upon default the balance of the principle and interest was due and payable and the bank was entitled to quiet possession. The defendant was charged with production of marijuana on the property and the Crown obtained a restraint order and a management order was registered against the property based on a finding that the property was a property in respect of which a forfeiture order could be made. With certain exceptions, the order provided that no person could dispose of or deal with the property or any interest in the property except by court order. One exception to the order was that a financial institution could take possession of the property pursuant to its rights under a mortgage. The bank took the position that the registration of the restraint order and related management order amounted to a default under the mortgage. At the time of the alleged default, the defendant was indebted to the bank in the principle amount of \$273,713.

HELD: Motion allowed. As the restraint order and related management order attached to the defendant's interest in the property in the same way as the order would attach to proceeds of sale if the property were sold, it was an encumbrance within the definition of lien contained in the standard charge terms. Consequently, the registration of the restraint order and related management order constituted a default under the mortgage and the bank was entitled to summary judgment.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8
Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 7(1), ss. 14-22, s. 16, s. 17

Counsel:

Mark Hartman, Counsel for the Plaintiff.

Robert A. **Betts**, Counsel for the Defendant.

REASONS FOR JUDGMENT

1 J.C. MURRAY J.:-- This is a motion by the CIBC for summary judgment for possession and for monies due under covenants contained in a charge mortgage dated December 19, 2006.

The Facts

2 The Canadian Imperial Bank of Commerce (hereinafter referred to as "CIBC") agreed to provide a line of credit to the defendant, Dale Joseph Allen, pursuant to a Credit Agreement. The credit facility is a revolving line of credit and is secured by a mortgage/charge between the defendant as mortgagor and the plaintiff, CIBC, as mortgagee. Pursuant to the agreement, the mortgage was registered as Instrument No. SC507582 in the Land Registry Office for the Land Titles Division of Simcoe (No.51) under which mortgage the mortgagor mortgaged the land municipally described as 2403 Sunnidale Road, RR #2, Utopia, Ontario, securing the principal sum of \$208,000.

3 In this Utopia, unlike that island myth, it is apparent all men do not "lead a serene and cheerful life, free from anxieties." On June 2, 2010, the defendant was charged with a criminal offence under s. 7(1) of the *Controlled Drugs and Substances Act* in which it was alleged that the he was engaged in the unlawful production of a controlled substance, cannabis marijuana, on his property. On August 24, 2010, a Restraint Order and Related Management Order was registered against the title of the property as instrument No. SC 847497 by the Attorney General of Canada restraining the property in accordance with the *Controlled Drugs and Substances Act* Justice Fuerst of the Superior Court granted the Order on August 13, 2010 based on her finding that there are reasonable grounds to believe that the property municipally known as 2403 Sunnidale Road, Springwater Township, Ontario is property in respect of which a forfeiture order may be made under section 16 or 17 of the *Controlled Drugs and Substances Act*.

4 Subject to certain exceptions, the Restraint Order and Related Management Order provides that:

... no person shall dispose of or otherwise deal with the property or any interest in the property, in any manner whatsoever, except as provided for in this order or by further order of this court.

5 A recognized exception to the order is:

Any financial institution, as defined by the *Bank Act*, 1991, C. 46, as amended, may take possession, repair and sell the property pursuant to the rights assigned to it under any charge, mortgage or encumbrance that was registered prior to date of this order.

6 The Restraint Order and Related Management Order also provides that any financial institution exercising its rights must provide a full accounting to counsel for the Attorney General of Canada of any proceeds arising from the sale of the property and must forward any net proceeds from that sale to the Ministry of Public Works and Government Services to be held until further order.

7 The mortgage provides that the balance of the principal and interest shall immediately become due and payable upon default and that upon default the mortgagee becomes entitled to quiet possession of the mortgaged premises. CIBC asserts that the registration on August 24, 2010 of the Restraint Order and Related Management Order against the title of the property amounts to a default under the mortgage by the defendant.

8 At the time of the alleged default, the defendant was indebted to the plaintiff in the principal amount of \$273,713.91. On September 24, 2010 the plaintiff, through its solicitors, caused a notice of Sale under Charge Mortgage to the issues and served on all parties entitled to service.

9 The criminal charges against the defendant have not yet gone to trial.

The Position of CIBC

10 The standard charge terms of the collateral charge mortgage provide as follows:

Default

In addition to our other rights under this Mortgage and the Agreements, and without affecting our right to demand payment in any other circumstances, we will not demand payment under section 5 unless one of the following events occurs:

- (e) any lien or notice of lien is registered against the property without our prior written consent.

11 A lien is defined in the standard charge terms as: "any mortgage, charge, lien, assignment, security interest, execution, attachment or other encumbrance (whether given by statute or otherwise)."

12 The plaintiff, CIBC, takes the position that a default under the mortgage has occurred because the Restraint Order and Related Management Order is a lien as defined in the standards charge terms. In particular, CIBC argues that the restraint order is an attachment or other encumbrance.

The Position of the Defendant

13 The defendant argues that the registration of the Restraint Order and Related Management Order is not a lien and that he is not in default. The defendant submits that the order is in the nature of a preservation order analogous to a *Mareva* injunction and is not an attachment or other encumbrance within the definition of lien contained in the standard charge terms.

The Issue

14 The issue is simply stated: Is the Restraint Order and Related Management Order a lien within the definition of lien contained in the standard charge terms? If the answer is yes, CIBC is entitled to summary judgment. If the answer is no, CIBC is not entitled to summary judgment.

Analysis

15 The purpose of the forfeiture provisions of the *Controlled Drugs and Substances Act* have been described by Wittmann J.A. in *R. v. Gisby*, 148 C.C.C. (3d) 549, at para.19, as follows:

The *CDSA* was enacted by Parliament to combat the illicit drug industry. A review of the *CDSA* and in particular, the provisions related to the forfeiture of property, indicate that the *CDSA* does so both through punishment and deterrence. The forfeiture provisions are punitive to the extent that they deprive one of offence-related property, broadcasting the message that Canadian society regards designated substance offences with abhorrence. But they also introduce an element of deterrence in relation to designated substance offences. In this respect, the forfeiture provisions attach a very real cost to the business of drug crime directly equivalent to the monetary value of the offence-related property that is subject to forfeiture, thus raising the stakes associated with the commission of those offences.

16 Under the *Controlled Drugs and Substances Act*, the definition of offence-related property includes any real property, including property not built or significantly modified for criminal purposes. The forfeiture provisions of the *CDSA* are designed to deprive an accused person of specific crime-related property.

17 As is clear from the order of Fuerst J. in the case at bar, the preservation of allegedly offence-related property need not be *in specie*. See also *Maple Trust Co. v. Canada (Attorney General)* [2007] B.C.J. No. 1145 where the B.C.C.A. stated at paras. 25 and 26, as follows:

The Attorney General submits that s. 14(9) limits the judicial discretion by requiring the restraint order to remain in force until the forfeiture proceedings are concluded and a foreclosure sale of the property in the interim is precluded. This submission loses its force once it has been determined that the restraint order can follow the net proceeds of sale. *Canada (Attorney General) v. Matkowski*, 2005 SKCA 132, which held that s. 14(9) does not allow a restraint order to be vacated before the forfeiture process is completed, is distinguishable. The restraint order in the case at bar, as varied, "remains in effect", attached to the net proceeds of the foreclosure sale, and complies with the s. 14(9) requirement.

In my view, the Attorney General's objections to the variation order are unfounded. I am satisfied that the CDSA provisions do not require that offence-related property be retained *in specie* or preclude the Crown from tracing the interest of an offender into his or her equity in the proceeds of sale on foreclosure and obtaining a forfeiture of those proceeds. The emphasis on reasonable terms and judicial discretion imports a flexibility into the statutory scheme for restraint orders and forfeiture that is entirely consistent with the objective of attaching the interests of those implicated in CDSA offences while protecting the rights and interests of innocent third parties. Flexibility requires a jurisdiction to vary a restraint order where circumstances warrant.

18 The above-noted quote from the decision of the B.C.C.A. is consistent with the following statement of Brenner C.J.S.C. in the trial court in the *Maple Trust Co* case (reported at [2006] B.C.J. No. 1223), at para. 38:

Criminal proceedings in Canada can take an inordinate length of time. In the type of case in which a forfeiture order is likely to be sought, the time between the charge and the ultimate disposition is usually measured in years. While large financial institutions may well be able to bear the financial consequences of being kept out of their money for a period of many years, not all mortgage financing is provided by such institutions. For example many individuals rely on mortgage financing as a means of bolstering their retirement income.

19 In *Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708, the Supreme Court of Canada considered the legal character of restraint orders. LeBel J. (also on behalf L'Heureux-Dubé, Gonthier, Iacobucci and Bastarache JJ.) held at para. 54 that a restraint order is a seizure within the meaning of s. 8 of the *Charter*. Justice LeBel stated as follows:

No difficulties arise in determining the legal character of special warrants of seizure under Part XII.2 of the *Criminal Code*. Even if we were to apply the strictest interpretation of that concept, what we have is a seizure with change of possession. The legal character of restraint orders is more problematic, in that such an order does not involve a change in possession of the property to which it applies.

However, when the objectives of a restraint order are considered, there is no doubt that it may be characterized as a seizure within the meaning of s. 8. The name given to that order perhaps too easily invites a comparison to a mere restriction on the exercise of property rights. The conservatory nature of the order reinforces such an inclination. However, given that a restraint order is intended to supplement seizures that are taking place contemporaneously, and that they place property under the control of the justice system that might otherwise have eluded it, whether for the purpose of a criminal investigation or for the punishment of crimes that fall within Part XII.2 of the *Criminal Code*, such an order must be characterized as a seizure within the meaning of s. 8 of the *Charter*.

First, a restraint order freezes the property. As provided in s. 462.33(3) (a) (now s. 462.33(3)), it prohibits disposing of or dealing with the property in question otherwise than as specified by the court. The person in possession of the property is then reduced to the status of caretaker or administrator of his or her own property, and must even obtain judicial permission to receive income or resources [page736] from it. As we saw earlier, that person must bring an application in order to be able to do so, under s. 462.34(4) *Cr. C.* As well, under s. 462.33(3) (b) (now s. 462.331(1)), a judge may order that the management of the property be transferred to a person appointed by the judge. In that case, the decision involves a straightforward change in possession away from the person in possession of the property. In both cases, the property is placed under the legal and actual control of the criminal justice system. Moreover, the objectives of this measure for exercising control are twofold. First, Parliament intended to facilitate criminal investigations, by enacting procedural provisions that make property, and information about it, more readily accessible to the police and the Crown. Second, the purpose of those procedures is to prevent the disappearance or wasting of the property. Doing this makes it possible to punish the crimes in question more effectively, and facilitates the enforcement of the orders of forfeiture that may be made in future. We can conclude from those characteristics, and the context and objectives, that a restraint order must be regarded as a seizure within the meaning of s. 8 of the *Charter*.

20 A consideration of the provisions of the *Controlled Drugs and Substances Act*, in particular sections 14-22, inform a similar conclusion in the case of restraint orders under the *CSDA* as that reached by the Supreme Court of Canada in *Quebec (Attorney General) v. Laroche* which dealt with restraint orders under the *Criminal Code*. A restraint order pursuant to the *Controlled Drugs and Substances Act* is a seizure within the meaning of s. 8 of the *Charter*.

21 As noted above, the standard charge terms contained in the collateral charge mortgage define a lien as: "any mortgage, charge, lien, assignment, security interest, execution, attachment or other encumbrance (whether given by statute or otherwise)." The arguments of the parties centered on whether the Restraint Order and Related Management Order made pursuant to the *Controlled Drugs and Substances Act* is an attachment or other encumbrance within the definition of lien in the standard charge terms.

22 In *Wotherspoon v. Canadian Pacific Ltd.*, [1987] S.C.J. No. 40, at para.100, Estey J. stated that the term "incumbrance" is a general term of law without any classical meaning. The word

should be accorded its plain meaning that is consistent with the context of the statute. Estey J. agreed with the Nova Scotia Supreme Court in *Clark v. Raynor*, [1922] N.S.J. No. 8, 65 D.L.R. 425, at paras 41 and 42, which held that:

The word "encumbrance" has no technical meaning. It is not one of the "terms of the law" and no definition of it will be found in the older books (Rawle on Covenants p. 90 and see also p. 95). By the generally accepted definition it comprehends (Rawle p. 90) "every right to or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance," and Wharton, p. 438 describes it as "a claim, lien or liability attached to property, as a mortgage, registered judgment etc." It is apparent, of course, that the word is to be interpreted according to the context in which it is found.

23 In a similar vein is the case of *Valentini v. Reidco Wellington (1983) Ltd.* (1989), 69 O.R. (2d) 346 (Div. Ct.) in which the Divisional Court was asked to determine whether a subdivision agreement was an encumbrance. Saunders J. for the Court stated:

The word "encumbrance" has no technical meaning and it is to be interpreted in the context in which it is found: see *Clark v. Raynor* (1922), 65 D.L.R. 425 at p. 439 (N.S.C.A.). In Jowitt's *Dictionary of English Law*, 2nd ed. (1977), at p. 697, the words "Encumber; Encumbrance" are defined as follows:

To encumber land is to make it subject to a charge or liability, e.g., by mortgaging it. Encumbrances include not only mortgages and other voluntary charges, but also liens, lites pendentes and registered judgments etc.

The subdivision agreements imposed obligations on the owners from time to time of the subject lands. Some of those obligations had a potential cost. Both Fogo and the municipal engineer admitted that there was a risk to a purchaser if the subdivision agreements remained registered. In *Ronson and Flude*, an unreported decision made February 26, 1982 [summarized 13 A.C.W.S. (2d) 232] the Honourable Judge Fanjoy held a similar agreement to be an encumbrance when considered in the light of what is now s. 50(6) of the Planning Act, 1983. I respectfully agree with that decision and would apply it to the case at bar. No authority to the contrary was brought to our attention. It seems to me in the context of the purchase agreement that at least Instrument No. 615108 was an encumbrance within the meaning of the purchase agreement and was so regarded by the solicitors for the parties.

24 The defendant urges this Court to follow the decision of Justice Gray in *Bank of Nova Scotia v. Suthakaran*, [2011] O.J. No. 5304. In that case, the Bank of Nova Scotia took the position that the defendant was in default under the terms of a collateral mortgage when a *Mareva* injunction was registered on title. The effect of a *Mareva* injunction is to freeze assets and prevent their sale or disposition pending the outcome of litigation. Relying on *Aetna Financial Services Ltd. v. Feigelman*, [1985] S.C.J. No. 1, Gray J. noted that a *Mareva* injunction "is undoubtedly *in personam*" and "affords no priority to the potential creditor". On his analysis, the *Mareva* injunction does not create an

interest in land or affect the security interest of the mortgagee. Gray J. concluded that the *Mareva* injunction did not constitute an encumbrance.

25 I am of the opinion that the Restraint Order and Related Management Order is attached to the defendant's interest in the property in the same way as the order would attach to proceeds of sale if the property were to be sold by the mortgagee. As the BCCA said in *Maple Trust Co.* (supra): "The restraint order in the case at bar, as varied, "remains in effect", attached to the net proceeds of the foreclosure sale, and complies with the s. 14(9) requirement." The restraint order is a claim which is attached to real property owned by the defendant is an encumbrance within the meaning of the cases discussed above: *Wotherspoon v. Canadian Pacific Ltd.*, [1987] S.C.J. No. 40, *Clark v. Raynor*, [1922] N.S.J. No. 8, 65 D.L.R. 425 and *Valentini v. Reidco Wellington (1983) Ltd.* (1989), 69 O.R. (2d) 346 (Div. Ct.).

26 In *Vancouver City Savings Credit Union v. Glass*, [2010] B.C.J. No. 1573, a case relied on by the defendant, Master Baker determined that a restraint order was more in the nature of an injunction than a charge on land and that the mortgagee had not breached the mortgage by encumbering the land without the consent of the mortgagee. Master Baker did not deal with any of the jurisprudence dealing with the meaning of encumbrance and neither did he advert to the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Larocche* (supra). For reasons set out above, respectfully, I disagree with the decision of the Master in *Vancouver City Savings Credit Union*.

27 The Restraint Order and Related Management Order is an encumbrance within the meaning of lien as defined in the standard charge terms.

28 The restraint order is also an attachment. In *W. C. Fast Enterprises Ltd. v. All-Power Sports (1973) Ltd., Astrop and The Royal Bank of Canada*, [1981] A.J. No. 912, the Alberta Court of Appeal had occasion to consider the meaning of "attachment". In that case, McGillivray C.J.A. stated as follows at paras 42 -43:

Black's Law Dictionary (4th Edition) at page 161, characterizes an attachment as flowing from a judicial act:

"The act or process of taking, apprehending, or seizing persons or property, by virtue of a writ, summons or other judicial order ..."

and at page 677:

"Under an attachment, property of defendant is placed in custody of law to await final determination of suit, and the attachment is really a preliminary execution dependent for its ultimate efficacy upon the rendering of a judgment in plaintiff's favour; on the other hand, an 'execution' is a remedy afforded by law for the enforcement of a judgment of the court."

29 In *Re D.S. Paterson & Co. Ltd.*, [1931] O.R. 777 (S.C. in bankruptcy), Sedgewick, J., had to decide if the words "Where personal property ... is under seizure or attachment or has been seized by the sheriff ..." (s. 112(11) of the *Assessment Act*), were wide enough to cover a landlord's distress for rent. He said at p. 780:

I do not think they are wide enough for the purpose. I think 'seizure' and 'attachment' are intended to cover exercise of judicial power. [*page498]

See also *Mintzer v Canada* (C.A.), [1996] 2 F.C. 146 where Stone J.A. stated at para. 14:

As I understand it, "attachment" refers to an attachment under legal process. See e.g. *W.C. Fast Enterprises Ltd. v. All-Power Sports (1973) Ltd., Astrope and Royal Bank of Canada* (1981), 29 A.R. 483 (C.A.), at pages 497-498, where McGillivray, C.J.A. relied, inter alia, on the opinion of Sedgewick J. in *Paterson (D.S.) & Co. Ltd., Re*, [1931] O.R. 777 (S.C. in bankruptcy), at page 780, that the words "seizure or attachment" in an Ontario statute were "intended to cover exercise of judicial power".

30 In the case at bar, the real property of the defendant is placed in custody of law to await final determination of forfeiture proceedings. It is really a "preliminary execution" dependent for its ultimate efficacy upon the rendering of a judgment in the Crown's favour. The restraint order is an attachment under legal process as described in *W.C. Fast Enterprises Ltd. v. All-Power Sports (1973) Ltd., Astrope and The Royal Bank of Canada*.

Conclusion

31 I am of the opinion that the Restraint Order and Related Management Order is an encumbrance and or an attachment within the meaning of lien as defined in the standard charge terms.

32 The defendant Allen is in default under the terms of the mortgage. The plaintiff Bank is entitled to summary judgment.

33 If there is disagreement with the form or substance of the judgment, I may be spoken to by counsel.

Costs.

34 The plaintiff is entitled to its costs. If the parties are not able to resolve the matter of costs, I may be spoken to both with respect to scale and quantum on a date to be fixed by counsel in consultation with the trial co-ordinator. Counsel are invited to suggest to the trial coordinator that costs may be dealt with before me at a time prior to the regular starting time of 10:00 a.m. or later in the afternoon after 4:30 p.m. if this is convenient to counsel and will facilitate a quicker resolution of the costs issue. .

J.C. MURRAY J.

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