

focus

on Financial Services



FRASER MILNER CASGRAIN LLP

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THE DEVIL IS IN THE DETAILS, PART 1

Sometimes we all need to be reminded of those frustrating technical details especially when it comes to taking security for a loan. In a recent matter heard by a Registrar in Bankruptcy in Alberta, *Re Hupfer*, the Master **did not accept the lender's claim** that the lender had a **perfected security interest in the "capital account"** of the borrower (the borrower was a partner in a law firm).

The lender claimed to have taken a security interest in the capital account but failed to have the borrower sign a security agreement. The only security documents the lender had were the loan agreement and a comfort letter from the law firm. The Master said that **neither document contained the necessary pledging or charging language that is required under the Alberta PPSA**. The employees of the lender testified that it was understood by the lender and the borrower that the lender had been given a security interest in the capital account. However **without the necessary supporting documentation, the intention of the lender was irrelevant**.

THE DEVIL IS IN THE DETAILS, PART 2

Another aspect of *Re Hupfer* shows that, even if you do have the necessary security documents signed, **if they do not accurately reflect your business deal, they may not save you**. When approached by the borrower for additional financing in 1997, the lender declined but offered to refinance an existing vehicle loan. The borrower signed a chattel mortgage that stated that it was to secure all present and future indebtedness of the borrower to the lender. However, the lender's records showed that the chattel mortgage was only being provided as security for the vehicle loan.

The Master said that the lender's security interest in the borrower's vehicle was not security for all debts owed to it. At the time the mortgage was granted the parties were in complete agreement that the mortgage was to secure the vehicle loan only. The chattel mortgage wrongly expressed the agreement between the parties. The **chattel mortgage was re-written** by the court to limit the obligations that it secured to match the agreement of the parties.

If you would like further information on the *Re Hupfer* case, please call **Stephanie Campbell** of our Calgary office at (403) 268-7186.

FRAUD ON THE REGISTER

In the recent Ontario decision of *Toronto-Dominion Bank v. Jiang et al.*, the fact that a borrower had **granted a mortgage** to the a bank **over property to which he fraudulently held title** did not prevent the bank from enforcing its mortgage.

A fraudulent transfer of the property to the borrower was registered. The borrower then mortgaged the property to the bank for a \$200,000 line of credit which he drew in full. The borrower then defaulted on the loan and the Bank sought to enforce the mortgage.

The *Land Titles Act* (Ontario) says that, "when registered, an instrument shall be deemed to be...effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.". The court decided that as a result of the operation of that provision of the Act and because the Bank was a bona fide mortgagee for valuable

consideration without notice of the fraud, **the Bank was entitled to enforce its mortgage.**

If you would like to discuss the *Jiang* case, please contact **Anita Joshi** of our Toronto office at (416) 863-4590.

DISHONOURABLE DISCHARGE FEES

Mortgages often provide for a “discharge fee” payable to the lender when a mortgage is fully paid out. Recently, in *Pfeiffer v. Pacific Coast Savings Credit Union*, the British Columbia Court of Appeal held that **the lender was not entitled to collect discharge fees as set out in the mortgage terms.** The court’s decision highlights **the importance of precise language.**

The borrower, Ms. Pfeiffer, paid out two residential mortgages. The discharge clauses stated that the credit union would “prepare ... a full release of [its] rights under this Mortgage”. In fact, Ms. Pfeiffer’s notary public prepared the releases, filling in the blanks with information provided by the credit union. The credit union then charged Ms. Pfeiffer \$100 to discharge each mortgage.

The credit union calculated the discharge amount and provided the information to Ms. Pfeiffer’s notary. However, the court said that because the credit union had not actually prepared the release forms, it could not collect the discharge fees. The credit union was a sophisticated lender and had drafted the mortgage terms. If it had intended to charge a fee for the calculation of payout amounts, the mortgage terms should have clearly provided for it.

If you would like more information about the *Pfeiffer* decision, please call **Janelle Dwyer** of our Vancouver office at (604) 622-5163.

WHO AND WHAT IS NEW IN FINANCIAL SERVICES?

Douglas Benson has recently joined our Toronto Real Estate Department as counsel. Douglas’ practice focuses on commercial real estate and structured finance. Douglas has been the recipient of numerous academic awards, and brings with him a substantial national commercial real estate practice.

Douglas Younger joins our Toronto office as counsel in the Business Law Department. Doug’s practice focuses on project development and finance, and on corporate, commercial and securities law.

Barry Corbin recently made a presentation at the Canadian Tax Foundation’s Owner/Manager Estate Planning conference in Halifax entitled “Estate Planning for Clients with Special Needs” and led a workshop with the theme, “Structuring a Flexible Estate Plan: Dealing with the Unanticipated”.

Anneli LeGault delivered a presentation on “Keeping Senior Management on Board” at the Buying and Selling Business Conference.

Janet Bobechko was the Co-Chair and a presenter at the 11th Annual Environmental Management Compliance and Engineering Conference 2003. Janet’s presentation was entitled, “Contaminated Land in Toronto”.

WHAT WE’VE BEEN DOING IN FINANCIAL SERVICES

Here are just some of the recent transactions on which our various offices across Canada have worked:

- Acting for a major industrial manufacturer in capital restructuring
- Acting for a bank in connection with a sale of a loan and security in default
- Acting for a purchaser in connection with the acquisition and administration of a mortgage loan portfolio
- Advising and preparing documentation in connection with an investment loan program