

SPECIFIC MORTGAGE ENFORCEMENT ISSUES

**By Barbara L. Grossman
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This paper will address the following five mortgage enforcement topics and issues:

1. Do you have a mortgage?
 - (a) equitable mortgages
 - (b) General Security Agreements covering real property
 - (c) sale and option transactions which in substance are a disguised mortgage
2. Using the remedy of rectification to fix an error in the mortgage document
3. The ordering and timing of remedies:
 - (a) possession, power of sale and deficiency claims - the defence of improvident realization and failure to mitigate
 - (b) limitation period considerations
4. Injunctive relief to restrain a power of sale
5. Receivers and managers:
 - (a) private and court appointed traditional receiver and manager
 - (b) interim receivers appointed under section 47 of the *Bankruptcy and Insolvency Act*

I. Do You Have a Mortgage?

There are times that the answer to this question may not be immediately obvious.

¹ The assistance of Tiffany Soucy, Student-at-Law at Fraser Milner Casgrain LLP, is gratefully acknowledged.

(a) **Equitable Mortgages**

An agreement in writing duly signed, however, informal, whereby real property is made security for a debt due or present advance, creates an equitable charge upon that property.²

The essential element in finding an equitable mortgage is the intention of the parties to make property security for a debt. The document need not use the formal wording of "transfer" or "mortgage" or "assign". It is not necessary that the agreement specifically describe the property, so long as it is otherwise sufficiently ascertained or ascertainable, and the charge created by the agreement may extend to after acquired lands. The terms and extent of the security can be established by extrinsic evidence.³

An agreement to give mortgage security is enforceable by specific performance, provided there is a memorandum in writing sufficient under the *Statute of Frauds* or there is part performance sufficient to take the case out of the *Statute of Frauds*.⁴

Additionally, a declaratory judgment may be obtained from the court⁵ confirming that an informal document constitutes an equitable mortgage over a given piece of property. The declaratory judgment (which should include a proper legal description) can then be registered on title.⁶

An equitable mortgage may be enforced by foreclosure or sale. When foreclosing under an equitable mortgage, the judgment or order should either vest the land in the plaintiff mortgagee, or direct the defendant mortgagor to convey the land to

² Walter M. Traub, *Falconbridge on Mortgages*, (Toronto: Canada Law Book Inc., 2003) (hereinafter "Falconbridge"), p. 5-4.

³ See Falconbridge at p. 5-5.

⁴ See Falconbridge at p. 5-7.

⁵ Pursuant to Rule 14.05(3)(d) and (e) of the *Rules of Civil Procedure*.

⁶ Precisely how this is accomplished in the modern era of electronic conveyancing is beyond the scope of this author's experience.

the plaintiff mortgagee.⁷ The statutory power of sale set out in Part II of the *Mortgages Act* would be applicable to an equitable mortgage if there was no express power of sale in the documentation.⁸

In *Toronto-Dominion Bank v. Coueslan*,⁹ the Saskatchewan Court of Queen's Bench held that a letter in the following terms signed by both Mr. and Mrs. Coueslan and addressed to Toronto-Dominion Bank constituted an equitable mortgage securing a bank loan to consolidate debt itemized in the letter: "We hereby consent to a Caveat being registered against 209 Government Road, (South ½ of Parcel C) as security for personal indebtedness." Maurice J. stated at paragraph 5:

The document contains all the necessary ingredients to create an equitable mortgage: a description of the parties, the property and the sum to be secured. And while the sum to be secured is described as "personal indebtedness" this is a sufficient description on which to found an equitable mortgage, as the secured personal indebtedness can be specifically ascertained by reference to the Applicants' records: [citations omitted].

In *Canadian Imperial Bank of Commerce v. Zimmerman*,¹⁰ the British Columbia Supreme Court came to a similar conclusion on similar facts. In this case, Mr. Zimmerman, a guarantor, had written and signed a letter addressed to the bank acknowledging his ownership of the property in question and stating that he wished to use his equity in the property as continuing collateral security for present and future liabilities of the bank's customer. The letter contained an undertaking to provide the bank with mortgage security or to arrange mortgage financing against the property described in the letter by municipal address, or any others in Mr. Zimmerman's control, in an amount sufficient to liquidate bank loans should the bank so request, and stated that it was understood that the property will not be further sold or otherwise dealt with without the express prior approval of the bank. Approximately 18 months after the letter was written,

⁷ See Falconbridge at p. 5-7 and see chapter 25.

⁸ See sections 24-30 of the *Mortgages Act*, R.S.O. 1990, c. M.40 reproduced in Appendix "A" for ease of reference.

⁹ [2000] S.J. No. 604 (Q.B.) (Q.L.).

¹⁰ [1984] B.C.J. No. 386 (S.C.) (Q.L.).

the bank by letter demanded that Mr. Zimmerman provide a mortgage over the subject property in support of his guarantee of the company loans, but Mr. Zimmerman failed to do so. Cooper L.J.S.C. concluded that there was an equitable mortgage, stating that the intention of Mr. Zimmerman to provide security was clear. A declaratory order was made that the bank was entitled to a second mortgage charge against the subject property in priority to other charges and encumbrances registered after the date the bank demanded a mortgage, and an order nisi of foreclosure was granted.

Referring to an earlier decision of the British Columbia Court of Appeal, Cooper L.J.S.C. stated at paragraphs 9 and 10:

In First City Investments Ltd. v. Fraser Arms Hotel Ltd. et al. 13 B.C.L.R. 107, where the borrower's primary argument to defeat the claim of the lender was that the commitment letter was not a binding agreement as it was too vague or uncertain, the British Columbia Court of Appeal held that if the real intention of the parties can be collected from the language within the four corners of the instrument, the court must give effect to such intentions by supplying anything necessarily to be inferred and that although the agreement is silent on such matters as acceleration on default, taxes and insurance, and consequences of default, that does not necessarily render the agreement void for uncertainty. In the case at bar, in my view there was no uncertainty as to the terms of the agreement when one looks to the terms of the promissory notes signed by Surrey Speed Centre Ltd. and guaranteed by the respondent Zimmerman.

I find that the documents tendered by the petitioner bank sufficiently set out the intentions of the respondent Zimmerman to create an equitable mortgage over the lands and premises described to secure the amount of the promissory notes.

*In Lumen, a Division of Sonepar Distribution Inc. v. Premiere Electric Inc.*¹¹ the parties settled litigation on terms confirmed in correspondence between counsel. The settlement terms included a promissory note, and as collateral security for the promissory note the husband and wife agreed to provide a mortgage on their matrimonial home described by municipal address. Chadwick J. held that the terms of the settlement agreement as recorded in the letter created an equitable mortgage in favour

¹¹ [1997] O.J. No. 1867, rev'd [1998] O.J. No. 373 (C.A.) (Q.L.).

of the plaintiff over the defendants' matrimonial home as of the date of the settlement agreement, ranking in priority to any subsequent mortgages. However, his judgment was overturned by the Ontario Court of Appeal on a different ground. The Court of Appeal held that the settlement was unenforceable because of the absence of an ILA certificate concerning the settlement that the wife was to provide under the terms of the settlement. The Court of Appeal held that the provision of the ILA certificate was, on the evidence before the Court, a condition for the benefit of both parties and therefore could not be waived by the plaintiff creditor alone.

There are also a number of cases in which the courts have refused to find the existence of an equitable mortgage.¹²

(b) General Security Agreements Covering Real Property

A personal property security agreement that contains language granting a security interest in real property as well as personal property, will be effective to constitute a mortgage.

In a 1994 case, *Canadian Independent Stationers Limited v. Shaw et al.*¹³ in which I was involved, the debtor company had granted our client a General Security Agreement, the terms of which granted a security interest in "...all its property and assets, *real* and personal, moveable or immovable of whatsoever nature and kind...". The General Security Agreement did not describe any land of the debtor company and had been registered only under the PPSA. The property out of which the debtor company operated its business was registered in the name of the principals of the debtor company,

¹² See for example: *Shute v. Premier Trust Co.* (1993), 35 R.P.R. (2d) 141(Ont. Ct. (Gen. Div.)) (wife forging husband's signature on mortgage; no equitable mortgage created despite use of mortgage moneys to retire pre-existing mortgage; husband having shown no common intention to enter mortgage agreement); *Re Sikorski* (1978), 21 O.R. (2d) 65 (H.C.) (acknowledgment of loan to purchase property providing for repayment from proceeds of sale; acknowledgment not constituting equitable mortgage; no common intention to make property security for debt due); *Bank of Montreal v. James Main Holdings Ltd.* (1982), 26 C.P.C. 266 (Ont. H.C.); affirmed on other grounds (1982), 28 C.P.C. 157 (Ont. Div. Ct.) (defendant borrowing money from bank and guaranteeing loans made by bank to others; defendant undertaking not to encumber or dispose of real estate without bank's consent; defendant agreeing to raise mortgage funds to pay off bank advances when requested to do so; agreement not indicating defendant obliged to give mortgage to bank; bank not having equitable mortgage).

¹³ (July 7, 1994) Oral Reasons of Mr. Justice E. Loukidelis, Ont.Ct.G.D. (Sudbury).

although it was referred to in the company's financial statements as a company asset and there was no lease from the principals to their company. Further, there was an unexecuted agreement regarding the transfer of the property to the debtor company. When the company became insolvent we registered the General Security Agreement against the real property and sued for a declaration that the company was the beneficial owner of the property as of the date of its bankruptcy, a vesting order pursuant to section 10 (1)(f) of the *Trustee Act*,¹⁴ vesting title to the property in the company's Trustee in Bankruptcy, and a further declaration that the registered General Security Agreement constituted a good and valid charge on the subject property. The application was successful.

In granting the declaratory relief and the vesting order, Loukidelis J. stated as follows:

The evidence that the subject property was an asset of the bankrupt corporation, and was treated as such by the Shaws, is overwhelming. At every turn in their dealings it was considered as such, and never as a personal asset. From the inception of the company it was included in corporate financial statements, an unsigned agreement re partnership asset sale to the corporation, dealings with the Income Tax Department, and depreciation of the building. In addition there was no lease agreement between the Shaws and their corporation. Their protestations at this stage have a somewhat hollow ring.

The law, I find does not require that any type of written trust agreement be entered into in order to establish a trust. The cases are clear that where a person agrees to transfer property to

¹⁴ Section 10(1)(f) of the *Trustee Act*, R.S.O. 1990, c. T.23 provides as follows:

10.(1) In any of the following cases,

...

(f) where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for fourteen days after the date of the requirement,

the Superior Court of Justice may make an order, vesting the land in any such person in any such manner, and for any such estate, as the court may direct, or releasing, or disposing of the contingent right to such person as the court may direct.

another and thereafter holds it out and acts as if it was no longer his property then he holds same as trustee for the benefit of the intended transferee. This principle was set out in the case of Stowell-MacGregor Corporation and John MacGregor Corporation, (1942) 4 DLR, 120.

The Trustee Act, RSO 1990, section 10(1)(f) vests power in the court to correct such errors.

I find that the subject property is an asset of the bankrupt corporation, which was the beneficial owner thereof, as of the date of the bankruptcy. A declaration shall therefore issue to give effect thereto. Further, an order shall issue vesting title of the subject property in favour of the respondent trustee.

The next issue is whether the General Security Agreement in favour of the applicant and registered against the title to the subject property represents a good and valid charge, to the extent of the amount owing, by the bankrupt to the applicant. Mr. Best has raised some rather ingenious points as to why the said agreement does not attach to land. While there is no legal description per se, clause 2(d), which is one of the charging sections specifically states:

"...all its property and assets, real and personal, moveable or immovable of whatsoever nature and kind...".

I find therefore that a declaration should issue that the said Security Agreement registered against the subject property constitutes a good and valid charge on the subject property.

(c) Sale and Option Transactions which in Substance are a Disguised Mortgage

A transaction which in substance is a loan secured on land will be considered a mortgage and treated by the courts as such notwithstanding that it is not in the form of a mortgage.

One example of this is the British Columbia Supreme Court's decision in *Creswell v. Raven Bay Holdings Ltd.*¹⁵ which concerned an agreement of sale with a purchase option back to the plaintiff vendors. The plaintiffs successfully sued for a

¹⁵ [1984] B.C.J. No. 2796 (S.C.) (Q.L.).

declaration that the transaction was in substance a loan from the defendant purchaser to the plaintiffs and that the plaintiffs' failure to exercise their option before its expiry date did not bar them from asserting a right to redeem. Mackoff J. stated at paragraphs 16 and 19:

16. The question of whether a transaction is a disguised form of mortgage is one of fact. Where the document on its face suggests that it is not what it purports to be, then evidence of the surrounding circumstances and all oral and written communication between the parties is admissible for the purpose of showing the real nature of the agreement. If the instrument is full and clear, evidence contradicting its terms must be especially cogent. Falconbridge on Mortgages (4th ed., 1977), p. 60.

. . .

19. In my view, the document is an obvious attempt to disguise a loan agreement by calling it a sale with an option back.

II. Using the Remedy of "Rectification" to Fix an Error in the Mortgage Document

Rectification is an available remedy that can be utilized to correct errors in the stated terms of a mortgage document, including misdescriptions of the mortgaged property or omissions from the lands charged by the mortgage.

If a contractual document is simply ambiguous, the problem is one of interpretation rather than rectification, but when a formal contract document contains terms at variance with those mutually agreed upon by both parties, it may be rectified to reflect the true agreement of the parties.¹⁶

In order to claim the equitable remedy of rectification, the party bringing the claim must show that there was a mistake in recording the agreement in a written form, and the parties arrived at a common intention as to the agreement before the execution of the written agreement.¹⁷

¹⁶ Canadian Encyclopaedic Digest, Contracts, (Toronto: Carswell, 2002) (hereinafter "CED") s. 190.

¹⁷ G.H.L. Fridman, The Law of Contract in Canada, 4th ed. (Toronto: Carswell, 1999) p. 870.

The Supreme Court of Canada has recently had occasion to consider the equitable remedy of rectification in a real estate context in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*¹⁸ The majority judgment was delivered by Binnie J., who observed that the remedy is available not only for mutual mistake but also for unilateral mistake, where certain defined requirements are satisfied. Binnie J. stated, at paragraph 31:

Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct “equivalent to fraud”. The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met.

The Supreme Court of Canada expressly rejected the argument that want of due diligence (or negligence) on the part of the party claiming rectification is an absolute bar. Binnie J. stated at paragraph 66:

I conclude, therefore that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied.

Performance Industries lays down four “high hurdles” that are preconditions to the remedy of rectification. They are designed to ensure that the remedy does not become an escape route for contracting parties seeking to get out of improvident bargains. The party seeking rectification must:

- show the existence and content of the inconsistent prior oral agreement (paragraph 37);
- show that the written document does not correspond with the prior oral agreement and that permitting the other party to take advantage of the mistake in the written document would be fraud or equivalent to fraud. Equity acts on the conscience of a party who seeks to take advantage of an error which he or she either knew or ought

¹⁸ 2002 SCC 19, [2002] S.C.J. No. 20.

reasonably to have known about at the time the document was signed (paragraphs 38 and 39);

- show the precise form in which the written instrument can be made to express the prior intention. The equitable jurisdiction to rectify does not permit speculation about the parties' unexpressed intentions but is limited to putting into words that, and only that, which the parties had already agreed to (paragraph 40); and
- establish all of these requirements on a standard of convincing proof (paragraph 41).

With respect to the common-intention requirement, it is necessary for the plaintiff to show that the agreement reached continued to be valid to the moment of its imperfect expression in the contested document.¹⁹

Since the plaintiff in a rectification case seeks to change a written contract document, parol evidence is generally admissible in such a case.²⁰ Admissible evidence will include both oral and documentary evidence (such as letters and interim agreements), as well as evidence of the parties' subsequent conduct.

The following two cases involve claims to rectify a mortgage to include a second property in addition to the property described in the mortgage. In the first case the rectification claim was unsuccessful; in the second case the rectification claim succeeded.

*McCaskie v. McCaskie*²¹

Mr. and Mrs. McCaskie owned two parcels of land, property #1 and property #2. Property #1 had the McCaskie's home on it and it was registered in Mr. McCaskie's name alone. Property #2 was a vacant property in the name of Mr. McCaskie and the couple's 16 year old daughter, Tammy. The reason for adding Tammy's name to the title to property #2 was stated at trial to be an attempt to avoid having the properties

¹⁹ CED, para 196.

²⁰ S.M. Waddams The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999), para. 337.

²¹ [2002] O.J. No. 1273 (S.C.J.) (Q.L.).

merge. It was also found at trial that Tammy was holding the property in trust for her mother, whose name was not used because she was the owner of the family business. Mr. and Mrs. McCaskie then constructed a commercial building for their business partly on property #1 and partly on property #2 and physically integrated the two properties. After Mr. McCaskie defaulted on his mortgage payments and the mortgagee took action to realize on its security, it discovered that it had only taken security over property #1 and not property #2. The mortgagee brought an action to have the mortgage rectified to include property #2 as well.

The trial judge, Lack J., discussed what was required for the remedy of rectification at paragraph 12:

In *Saskatchewan Wheat Pool v. 1037619 Ontario Inc. et. al*, [2001] O.J. No. 962 Quicklaw, a decision of the Ontario Court of Appeal, Justice Borins made these comments at paragraph 37 on the remedy of rectification:

I would also observe that, by its nature, rectification is a fact-driven equitable remedy. As stated in *Snell's Equity* 29th ed. 1990, at p. 626: "If by mistake a written instrument does not accord with the true agreement between the parties, equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement." Thus, rectification ensures that the instrument contains the provisions which the parties actually intended to contain. At page 628 the elements of rectification are discussed:

The general rule is that rectification will not be granted unless there has been a mistake in expression which is common to all parties. In general, a claim will succeed only if it is established, first, that there was some prior agreement between the parties; second, that this was still effective when the instrument was executed; third, that by mistake the instrument fails to carry out that agreement; and fourth, that if rectified as claimed, the instrument would carry out the agreement.²²

²² *McCaskie*, para 12.

Lack J. found that in the case at bar, rectification could not be imposed to include property #2 because the fourth requirement (as summarized by Borins J.A. in *Saskatchewan Wheat Pool v. 1037619*) had not been satisfied. As the property was held in trust by Tammy McCaskie for her mother, and neither of them was a party to the Mortgage Commitment Agreement, to impose rectification would not be to "carry out the agreement" but rather to create a new agreement to which Tammy and Mrs. McCaskie would be a party, in circumstances where Mrs. McCaskie was not even aware of the agreement at the time it was entered into.

*Bank of Montreal v. Pender*²³

This case also involved two pieces of land - one had the Penders' home on it, lot "A", the other was vacant, lot "B". The Penders took out individual first mortgages on both properties, a second mortgage on the combined properties, and then a third mortgage which was the one in issue in the case. According to the mortgagee, the third charge was supposed to be against both lots, not only the vacant lot "B". The mortgagee sought to rectify the mortgage so as to include lot "A" as well.

The evidence before the court was minimal. The mortgagor had sworn an affidavit but did not appear at trial to be examined. The mortgagee failed to give testimony as well. The only evidence before the Court was that of Mr. Cole, the solicitor who had prepared the mortgage. Cole testified, and the court accepted his testimony, that the mortgage was to include both lots. This was supported by the evidence that: the mortgage document contained a Urea Formaldehyde Foam Insulation warranty; an appraisal report apparently prepared for the mortgage transaction related to both lots and indicated a land only value that was less than the mortgage amount; as well, Cole was instructed by the mortgagee that it required proof of fire insurance. All of this, Cole testified and the trial judge agreed, was consistent with the steps that would be taken when a mortgage was being taken out on a property that included a home. The Newfoundland and Labrador Supreme Court found that the intention was to include lot "A" in the third mortgage and the mortgage was rectified to extend to both lots.

²³ [2002] N.J. No. 39 (S.C.) (Q.L.).

III. Ordering and Timing of Remedies

(a) Possession, Power of Sale and Deficiency Claims - the Defence of Improvident Realization and Failure to Mitigate

When a mortgage goes into default, consideration must be given to the ordering and timing of realization steps and the timing of suing the mortgagors and any guarantors on their covenants.

Mortgagors and guarantors who are sued for the deficiency after a power of sale has been exercised, frequently assert the defence of "improvident realization" in relation to the timing and nature of the realization steps. One way to protect against such a defence is to sue on the covenants at the outset, before any realization steps have taken place. However, even when the mortgagor and guarantors are sued on their covenants after the realization on the security has occurred, the Ontario Court of Appeal's decision in *Manufacturers Life Insurance Co. v. Granada Investments Ltd.*²⁴ has significantly reduced the scope for an improvident realization defence to succeed and significantly enhanced the prospect of obtaining summary judgment on the covenant against a mortgagor or guarantor.²⁵

The *Granada* case involved a mortgagee's claim on the covenant against the mortgagor and the guarantor after the mortgaged golf course properties had been sold. The two golf courses were operated by the mortgagee, through its receiver and manager, from August 31, 1996 until October 1, 1997 when they were sold at auction. The trial judge held that the mortgagee could only recover from the mortgagor and the guarantor the amount of the mortgaged debt as of October 31, 1996, not as of October 1, 1997 when the mortgaged properties were sold under the power of sale rights. The basis of the trial judge's finding, in effect freezing the mortgage account as of October 31, 1996, was his conclusion that from March 1996 the mortgagee was subject to a duty to mitigate its losses. The trial judge held that the mortgagee did not discharge that duty because it

²⁴ [2001] O.J. No. 3932 (C.A.) (Q.L.), leave to appeal to the Supreme Court of Canada denied July 11, 2002.

²⁵ See for example: *Manufacturers Life Insurance Co. v. Huang & Danczkay Properties*, [2003] O.J. No. 3061 (S.C.J.) (Q.L.).

could and should have sold the properties secured by the mortgages between March and October, 1996.

The Court of Appeal reversed the decision of the trial judge and clarified that the general rule is that mortgagees can go into possession or act on a power of sale at their leisure, as long as the sale is reasonable at the time that it occurred. The timing itself is not indicative of a lack of reasonableness.

On the issue of the timing of the mortgagee going into possession, Osborne A.C.J.O., speaking for the Court stated, at paragraph 63:

As a general proposition, although Manulife could have asserted rights to possession under the mortgage before August 30, 1996, it was not under any duty to do so in the March through August, 1996 period. See *Modern Realty Co., Ltd. v. Shantz*, [1928] S.C.R. 213 at 221. Manulife was entitled to exercise its right of possession when it chose to do so.

On the issue of the timing of the exercise of a power of sale, Osborne A.C.J.O., speaking for the Court stated at paragraph 68:

The issue when a mortgagee must exercise its power of sale rights was considered by Anderson J. in *Hausman v. O'Grady* (1986), 61 O.R. (2d) 96 (Ont. H.C.J.), aff'd, (1989), 67 O.R. (2d) 735 (C.A.). In *Hausman*, the mortgagor contended that the mortgagee sold too quickly and for too low a price. Anderson J. referred to and adopted Salmon L.J.'s statement in *Cuckmere Brick Co. Ltd. et al. v. Mutual Finance Ltd.*, [1971] Ch. 949 at 965:

Once the power [the power of sale] has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly at ended [*sic*] and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. [Emphasis added.]

Osborne A.C.J.O. summarized the duties of a mortgagee in possession as follows at paragraphs 64 to 67:

[64] As mortgagee in possession, Manulife had to:

- account to the mortgagor;
- manage the property in a reasonable way, that is as a prudent owner would; and
- act with reasonable care to get a true price, or the best price in the circumstances, once it decided to exercise its power of sale. See *Falconbridge on Mortgages, supra*, at p. 651.

[65] There is no issue in this case with respect to Manulife's duty to account and, as I have said, the trial judge found that KPMG's management of the properties was not improvident. A mortgagee in possession must take reasonable care to manage the property in question prudently, since the property must be returned to the mortgagor if the mortgagor pays the mortgage debt. Only reasonable costs attendant on the management of the property are properly added to the mortgage debt.

[66] Apart from the question of the timing of the sale of the golf course properties, a question I will address shortly, it is not suggested that once in possession as of August 31, 1996, Manulife breached the duties imposed upon it as a mortgagee in possession.

[67] In *Oak Orchard, supra*, a case in which the mortgagor contended that the mortgagee sold the mortgaged property for an insufficient price, Saunders J. extracted six propositions from the decided cases:

1. A mortgagee selling under a power of sale is under a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. This does not mean that the mortgagee must, in fact, obtain the true value.
2. The duty of the mortgagee is only to take reasonable precautions. Perfection is not required. Some latitude is allowed to a mortgagee.
3. In deciding whether a mortgagee has fallen short of his duty, the facts must be looked at broadly and he will not be adjudged to be in

default of his duties unless he is plainly on the wrong side of the line.

4. The mortgagee is entitled to exercise an accrued power of sale for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting, a higher price could be obtained.

5. The mortgagee can accept the best price he can obtain in an adverse market provided that none of the adverse factors are due to fault on his part.

6. Even if the duty to take reasonable precautions is breached, the mortgagor must show that a higher price would have been obtained but for the breach in order to be compensated in damages. [Emphasis added.]

The second important point the Court of Appeal clarified in the *Granada* case, is that the principle of mitigation has no application to a mortgagee's claim for repayment of the mortgage debt, including, in the context of a power of sale, a claim for the deficiency remaining after exercise of a power of sale. On the issue of mitigation, Osborne A.C.J.O. stated as follows at paragraphs 76 to 77:

[76] Lastly, in my opinion, as a general proposition, mitigation does not apply to an action for a fixed debt as it does to tort and contract damage claims. The mitigation issue in a mortgage remedy context arose in *Pacific & Western Trust Corp. v. Gretchen Enterprises Ltd.* (1989), 63 D.L.R. (4th) 764 (Sask. Q.B.). In that case, the mortgagor's position was that since the value of the mortgaged land was equal to or greater than the amount of the mortgage debt, the mortgagee had a duty to mitigate its losses by accepting an offer from the mortgagor to transfer the mortgaged property to the mortgagee in satisfaction of the debt. At pp. 765-66, Estey J., after referring to *Chitty on Contracts*, 24th ed., vol. 1 (1977), at pp. 727-28 and Anson, *Principles of the English Law of Contract*, 21st ed. (1959), at p. 459, concluded that a mortgagee in an action for debt is under no duty to mitigate the mortgage debt by accepting a transfer of the mortgaged land. He concluded that doctrines such as remoteness and mitigation, which place limits on the recovery of damages, do not apply to a debt. I agree. The principle of mitigation has no application to Manulife's claim for repayment of its loans to Granada.

[77] Although mitigation as it is known to tort and contract law does not apply to an action for a debt, the mortgagee is constrained by duties imposed by the law. A mortgagee in possession is required to account and may only add expenses to the mortgage debt that are reasonably incurred in all of the circumstances. Taken that far, I have no problem with the comments of Cusinato J. in *Canada Trustco, supra*. In that case, expenses incurred after Canada Trustco went into possession caused the mortgage debt to increase significantly beyond the value of the property. The mortgagee took no steps for five years to sell in a depressed market. I agree with the proposition as set out in *Canada Trustco* that a mortgagee in possession must take reasonable precautions to obtain the true value of the mortgaged property and should not incur expenses as a mortgagee in possession that are unreasonable. I do not, however, agree with Cusinato J.'s observations about the application of the principle of mitigation. That part of *Canada Trustco* should not be followed.

(b) Limitation Period Considerations

On January 1, 2004, a new statutory limitation period regime came into force in Ontario. Parts II and III of the previous *Limitations Act*²⁶ (the "Old Act") dealing with trusts and personal actions were repealed and replaced by the Ontario *Limitations Act, 2002*.²⁷ Part I of the Old Act which deals with real property was renamed the *Real Property Limitations Act*. Accordingly, there are now two limitation statutes in force in Ontario: The *Limitations Act, 2002* and the *Real Property Limitations Act*. The *Real Property Limitations Act* consists of Part I of the Old Act plus two provisions affecting real property which were previously located in Parts II and III of the Old Act²⁸ and have now been relocated and carried forward in the *Real Property Limitations Act*.

The relevant provisions of the *Real Property Limitations Act* concerning mortgages are sections 4, 17 through 24, 28, 29 and 43. They are reproduced in Appendix B for ease of reference.

²⁶ R.S.O. 1990, c. L.15.

²⁷ S.O. 2002, c. 24., Sch. B.

²⁸ ss. 44 and 45(1)(k) and (l) of the Old Act.

The limitations regime under the new *Limitations Act, 2002* establishes a basic 2-year limitation period, after damage has been discovered, to launch most law suits. It also establishes an ultimate limitation period of 15 years to identify loss or damage and start legal proceedings. Certain exceptions to these time lines are made, for example, to safeguard the environment and to protect victims and vulnerable people. The *Limitations Act, 2002* contains important transitional provisions in section 24 which apply to claims based on acts or omissions that took place before January 1, 2004 and in respect of which no proceeding was commenced before that date.

Although there has been no change to the limitation periods previously applicable to mortgages, which are now carried forward in the *Real Property Limitations Act*, where a mortgage has been guaranteed and the guarantee is in a separate guarantee document rather than being contained within the mortgage document itself, the new basic 2-year limitation period established by the *Limitations Act, 2002* will govern the claim against the guarantor.²⁹ By contrast, in a situation where the guarantee is part and parcel of the mortgage document, the much lengthier limitation period applicable to claims under a mortgage will govern. Accordingly, whereas the difference in the form of the guarantee previously meant the difference between a 6-year vs. a 10-year limitation period, the difference is now a much more significant difference of 2-years vs. 10-years.

In *McVan General Contracting Ltd. v. Arthur*,³⁰ the Ontario Court of Appeal dealt with the applicable limitation periods under the Old Act for a mortgagee's claims for payment and possession and power of sale proceedings. It held that they were all subject to a uniform 10-year limitation period, including the power of sale.

The case arose in the context of a mortgagee commencing power of sale proceedings more than 10 years after the mortgagor had stopped making mortgage payments and more than 10 years after the mortgagee had offered to renew the mortgage

²⁹ The 2 year basic limitation period may be extended from time to time by acknowledgments, but after default such extensions will be subject to the 15-year ultimate limitation period. See ss. 13 and 15 *Limitations Act, 2002*, S.O. 2002, c.24, Sch. B.

³⁰ (2002), 61 O.R. (3d) 240 (C.A.), 216 D.L.R. (4th) 514, [2002] O.J. No. 336 (Q.L.).

for a one year term. Shortly after commencing the power of sale proceedings, the mortgagee also issued a statement of claim against the mortgagors seeking possession and payment. The Court of Appeal held that the mortgagee's failure to commence an action for possession within 10 years after the mortgagor's first default in payment as required by section 4 of the Old Act³¹ meant that its right to possession was extinguished under section 15 of the Old Act.³² The Court of Appeal also held that the power of sale was similarly barred by sections 4 and 15 of the Old Act. The Court reasoned, notwithstanding that the power of sale did not involve a claim asserted in a court proceeding, the mortgagee's exercise of its power of sale was an attempt to "recover land" that was prohibited under section 4 after the expiry of 10 years from the time the power of sale right accrued. The Court of Appeal also held that notwithstanding that the mortgage debt remained unpaid, the Court had jurisdiction under section 11 of the *Courts of Justice Act*³³ that was appropriately exercised to discharge the mortgage and order its deletion from title where the limitation periods for enforcement by the mortgagee had expired.

In summary, the limitation periods applicable to mortgage remedies which existed under the Old Act and have been carried forward under the *Real Property Limitations Act* are as follows:

Claims by a Mortgagee

- To recover interest in arrears on money charged upon or payable out of land: **6 years** following the due date or written acknowledgment.
- To recover out of any land or rent any sum of money secured by any mortgage: **10 years** from the accrual of the right to receive it to some person capable of giving a discharge or release.
- If during those 10 years part of the principal or interest has been paid, or there has been a signed written acknowledgement of the right to payment: **10 years** after

³¹ now section 4 of the *Real Property Limitations Act*.

³² now section 15 of the *Real Property Limitations Act*.

³³ R.S.O. 1990, c. C.43.

the payment or acknowledgement (or the last of the payments or acknowledgements if more than one was made or given).

- On a covenant in a mortgage or other instrument (made on or after July 1, 1894) to repay all or part of the money secured by a mortgage: **10 years** after the day on which the cause of action arose or the date on which the interest of the person liable on the covenant was conveyed or transferred, whichever is later (this is expressly made subject to earlier time limits contained in other legislation).
- By a mortgagee against a grantee of the equity of redemption under section 20 of the *Mortgages Act*: **10 years** after the day on which the cause of action arose (also subject to earlier time limits contained in other legislation).
- To recover the land (i.e. possession) where the mortgage is in arrears: **10 years** from the last payment of any part of the principal or interest secured by the mortgage.
- Foreclosure and power of sale: **10 years** from the date the right to recover the land in this way first arises.
- Where there is concealed fraud, the time for bringing an action for the recovery of land or rent begins to run when the fraud was or with reasonable diligence might have been first known or discovered (except against a good faith purchaser for value).

Claims by a Mortgagor

- By a mortgagor to redeem the mortgage where the mortgagor remains in possession: **no limitation period**.
- By a mortgagor to redeem the mortgage where the mortgagee is in possession: **10 years** from the date the mortgagee obtained possession.
- If during those ten years the mortgagee signed a written acknowledgement of the title of the mortgagor or of the mortgagor's right to redemption: **10 years** from the acknowledgement (or the last of the acknowledgements if more than one has been given).

IV. Injunctive Relief to Restrain a Power of Sale

In 1994, the Supreme Court of Canada³⁴ confirmed the following three stage test which must be met to obtain interlocutory injunctive relief:

³⁴ *R.J.R. MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

1. First, a preliminary assessment must be made of the merits of the case to be tried.
2. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused.
3. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

However, on interlocutory motions to enjoin a power of sale, courts frequently apply or superimpose a different test, the so-called "rule in *Arnold v. Bronstein*" requiring mortgagors to prove bad faith or fraud on the part of a mortgagee as an essential precondition to the granting of an interlocutory injunction.

While many cases have interpreted the decision in *Arnold v. Bronstein*³⁵ in this restrictive fashion, the general rule as formulated in the case was set out as follows at page 650 (D.L.R.):

The general rule developed from numerous cases is that a mortgagee, acting in good faith and without fraud, will not be restrained from a proper exercise of his power of sale, except upon tender by the mortgagor of the principal moneys due, interest and costs. This is of course subject to the statutory relief provided by s. 20 [rep. & sub. 1970, c. 54, s. 1] of the Mortgages Act, R.S.O. 1960, c. 245, which is not here invoked. (emphasis added)

The facts in *Arnold v. Bronstein* were that the mortgage had come due and the mortgagor had made several abortive attempts to refinance. The mortgagee had not yet entered into an agreement of purchase and sale with a third party, however a date had been fixed for an auction sale and the mortgagee had obtained appraisals and received inquiries from potential purchasers. The mortgagor was attempting to postpone the sale in order to keep alive its right of redemption. By virtue of section 22 of the *Mortgages Act*,³⁶ a right of redemption arises when the mortgagee serves a notice exercising power

³⁵ [1971] 1 O.R. 467 (H.C.), 15 D.L.R. (3d) 649.

³⁶ R.S.O. 1990, c. M.40.

of sale, and is not extinguished until such time as a third party purchaser has entered into a sale agreement with the mortgagee.³⁷

Contrary to popular belief, in *Arnold v. Bronstein* the injunction application did not fail for lack of proof of exceptional circumstances of fraud or bad faith on the part of the mortgagee. Rather, the Court ordered as follows at page 652 (D.L.R.):

Upon payment into Court of the principal amount, accumulated interest and costs, the proposed sale will be restrained. *Otherwise*, this application will be dismissed with costs to be paid by the applicant to the respondent David Bronstein in any event of the cause. (emphasis added)

In *Berlianco Inc. v. Wee Rent It Ltd.*,³⁸ Madam Justice Charron granted an interlocutory injunction to restrain a power of sale pending appeal, and clarified that the so-called "rule in *Arnold v. Bronstein*" does not displace the usual three part injunction test and findings of bad faith and fraud are not necessary preconditions to the granting of an injunction to restrain a power of sale. In *Berlianco*, both parties accepted that the governing test for an interlocutory injunction was the three-part test set out by the Supreme Court of Canada in *R.J.R. MacDonald*. However, the mortgagee argued, relying on *Arnold v. Bronstein*, that because this was a mortgage enforcement case, it was necessary for the Court to make a preliminary finding that the mortgagee had acted either in bad faith or fraudulently, before it could consider whether the three part test had been satisfied. Charron, J.A. rejected this submission and stated at paragraph 3:

In my view, the case law, including the case relied upon by the respondent, does not support this proposition. It is clear from the cases that, under ordinary circumstances, a court will not interfere with the proper exercise of a mortgagee's power of sale except upon tender by the mortgagor of the principal moneys

³⁷ *Logozzo v. Toronto-Dominion Bank* (1999), 45 O.R. (3d) 737 (C.A.) at 745-746. Writing for the majority, Borins J.A. expressly left open the question of whether a conditional agreement of purchase and sale constitutes a "sale" for the purpose of section 22(1)(a) of the *Mortgages Act*, as he did not consider that the clause in question in the agreement of purchase and sale whereby the purchaser agreed that the mortgagor had the right to redeem up to the time of waiver or expiration of rights of termination or fulfillment of conditions, rendered the agreement a conditional agreement.

³⁸ [1999] O.J. No. 4081 (C.A.) (Q.L.).

due, with interest and costs, or without ensuring that the mortgagee is otherwise fully protected. However, there are exceptions. Bad faith or fraud on the part of the mortgagee are but two examples of circumstances where the test for injunctive relief will usually have been met. A finding of bad faith or fraud is not a condition precedent to the granting of injunctive relief as contended.

The injunction was made conditional upon the mortgagor paying all monies owing under the mortgage into court and making further accruing interest payments into court.

V Receivers and Managers

(a) Private and Court Appointed Traditional Receiver and Manager

One of the remedies available to a mortgagee is the appointment of a receiver and manager over the mortgaged property. If the mortgage contains a receivership clause, then the private appointment of a receiver and manager will be a possibility. Whether or not the mortgage contains a receivership clause, the court has the authority to appoint a receiver and manager pursuant to section 101 of the *Courts of Justice Act*³⁹ and Rule 41 of the *Rules of Civil Procedure*. The test for the court appointment of a receiver and manager under section 101 of the *Courts of Justice Act* is whether or not the appointment is "just or convenient". Rule 41.02 of the *Rules of Civil Procedure* provides for the appointment of a receiver and manager on motion to a judge in a proceeding or an intended proceeding.

Two significant advantages which flow from the appointment of a receiver and manager as a mortgage enforcement remedy are that:

- (i) it allows the mortgagee to avoid the onerous responsibilities and exposures of becoming a mortgagee in possession; and
- (ii) it allows the mortgagee to take over control of the mortgaged property and capture the net cash flow from subsequent tenants without affecting their existing leases and inadvertently converting long term leases subsequent to the mortgage into year-to-year tenancies terminable by the tenants upon 6 months notice, as was

³⁹ R.S.O. 1990, c. C.43.

found to be the case in *Good Year Canada Inc. v. Burnhamthorpe Square Inc.*⁴⁰

The private appointment of a receiver and manager is a self-help remedy. There is no need to start an action. The receivership clause in a security document typically provides that the receiver and manager, although appointed by the mortgagee, is the agent of the mortgagor. However, notwithstanding such a stipulation, the Ontario Court of Appeal developed a dual agency theory in the case of *Peat Marwick Ltd. v. Consumers' Gas Co.*⁴¹ whereby the private receiver and manager acts as the agent of the debtor pursuant to such a clause, except when realizing on the security out of the ordinary course of business in which case, notwithstanding the clause, the receiver and manager acts as agent of the secured creditor. Accordingly, when operating a commercial property the private receiver and manager acts as agent of the mortgagor, however when selling the property it acts as agent of the appointing mortgagee exercising the appointing mortgagee's power of sale. The privately appointed receiver and manager's powers are those conferred by the mortgage and described in the appointing instrument. If the mortgage authorizes the mortgagee to appoint a receiver and manager but does not contain a clause providing that the receiver and manager shall be the agent of the mortgagor, then the privately appointed receiver and manager acts throughout as the mortgagee's agent with the result that the privately appointed receiver and manager who takes possession renders the mortgagee a mortgagee in possession.

By contrast, a court appointed receiver and manager is not the agent of anyone, but rather is an officer of the court who acts throughout as a principal and not as an agent. The court appointed receiver and manager does not owe a duty to any individual creditor, but rather owes fiduciary duties to all parties including the debtor,⁴² and acts throughout under the supervision of the court. Only the court can provide directions or terminate the receiver and manager.

⁴⁰ (1998), 41 O.R. (3d) 321 (C.A.), leave to appeal to SCC dismissed July 8, 1999.

⁴¹ (1980), 11 B.L.R. 114 at p. 126.

⁴² *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.*, [1992] O.J. No. 729 (Gen. Div.), 12 C.B.R. (3d) 220

The receiver and manager appointed by the court must be disinterested, impartial and fair in order to properly deal with the rights of the parties who have an interest in the property. The mortgagee requesting a court appointed receiver and manager will propose a nominee to act in that role, however the Court has inherent jurisdiction over who to appoint and is not bound to appoint the nominee proposed by the mortgagee. Where the mortgagee and mortgagor propose receivers and managers with similar qualifications, generally speaking the nominee of the mortgagee, who has carriage of the proceedings, will be appointed.⁴³

Insolvency practitioners licensed to act as a trustee in bankruptcy, usually the insolvency arm of accounting firms, are typically the ones who are appointed to act as a receiver and manager, whether the receivership is private or court appointed. When dealing with a commercial real estate asset, it will usually be necessary for the receiver and manager to hire a property management firm to carry out the day-to-day functions. However, in the experience of this author, most property management firms are not sufficiently versed in the law and procedures governing receiverships to be directly appointed as the receiver and manager.

A court appointed receiver and manager often requires independent counsel. Both court and privately appointed receiver and managers will, at a minimum, require independent counsel to conduct a review of all security. The appointing mortgagee should have its own solicitor review its security before the receiver and manager is appointed so that it is aware of any deficiencies and priority issues in advance and can, to the extent possible, take curative action and plan accordingly.⁴⁴

A receiver and manager acquires no title to the mortgaged property. A court appointed receiver and manager usually conveys title to the mortgaged property by way of vesting order made pursuant to section 100 of the *Courts of Justice Act*. The vesting order will transfer title, subject to permitted encumbrances and any subsequent

⁴³ *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Ct. (Gen. Div.)).

⁴⁴ See Note 42.

leases intended to be preserved and transferred. A privately appointed receiver and manager transfers title by means of the exercise of the appointing mortgagee's power of sale.

The main advantages of privately appointing a receiver and manager are that the appointing creditor has greater control over the process and the receiver and manager, and the procedure can be more expeditious and less costly than a court appointed receiver and manager. However, where the receiver and manager's powers outlined in the receivership clause in the mortgage are not adequate for the task at hand, or where there are priority disputes or other contentious issues among the creditors, or contentious issues between the mortgagee and the mortgagor which may result in the mortgagor refusing to give up possession of the property, a court appointment will be advisable. Where a receiver and manager has been privately appointed and the mortgagor refuses to turn over possession, instead of applying for a court appointment, another available option is for the mortgagee to apply to the court to confirm the appointment of the private receiver and manager and direct the mortgagor to turn over possession and control of the mortgaged property to the private receiver and manager.⁴⁵

The extent of the court appointed receiver and manager's powers and the scope of the receivership is spelled out in the appointment order, as amended from time to time. The content of the receivership order should be well thought out in advance in consultation with the proposed receiver and manager, so it is tailored to the specific needs of the situation. Where the mortgagor has other assets and businesses in addition to the mortgaged property, the receivership will be limited to the mortgaged property as opposed to all of the property assets and undertaking of the mortgagor.⁴⁶ The court order appointing a receiver and manager typically includes a provision making the receiver and manager's borrowings, fees and expenses a first charge on the property. However, where the mortgagee who applies for the court appointment is not in first priority, a priority

⁴⁵ *Prudential Assurance Co. v. 90 Eglinton Limited Partnership* (1994), 25 C.B.R. (3d) 139 (Ont. Ct. (Gen. Div.)); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315 (Ont. Ct. (Gen.Div.)).

⁴⁶ See for example: *Confederation Life Insurance Company v. Double Y Holdings Inc. et al.*, [1991] O.J. No. 2613 (Ont. Ct. (Gen. Div.)) (Q.L.).

provision for receivership borrowings and costs is not appropriate unless notice has been given to the prior secured creditors.

A court appointed receiver and manager periodically reports to the Court, on notice to all interested parties, seeking the Court's "after the fact" blessing for its more routine activities to date as set out in its report, and seeking the Court's prior approval and direction with respect to any significant or controversial actions such as the sale of the mortgaged property.⁴⁷ As a result, although the process is less expeditious and often more costly, there is a significant advantage to having the receiver and manager court appointed in any contentious or complicated situation with multiple competing stakeholders. Because all interested parties are served with notice each time the receiver and manager reports to the Court or applies for advice and directions, the receiver and manager's conduct is evaluated by the stakeholders and the Court prior to or as it is occurring and while there is still time to modify its course of action if there is a meritorious objection, rather than long after the fact. The mortgagor and other stakeholders are required to "speak now or forever hold their peace"; they will be afforded very little, if any, scope to later criticize a course of action they did not object to when the opportunity was provided to them prior to or at the time it was occurring. Once a court order has been made granting prior approval or after-the-fact blessing to a course of action, an interested party who has received notice of the motion, must, if not content, appeal the order. The doctrines of collateral attack and issue estoppel will preclude subsequent challenges to the pre-approved or subsequently blessed conduct in the absence of an appeal.⁴⁸

It is permissible for a secured creditor who applies for the court appointed receivership to bid on the purchase of the asset when it is sold by the receiver and manager.⁴⁹ Accordingly, another advantage to a court appointed receivership is that the mortgagee can thereby acquire the mortgaged property (if it is the highest bidder) without

⁴⁷ Ibid.

⁴⁸ *Bank of Montreal v. Tassone*, [1998] O.J. No. 4040 (Ont. Ct. (Gen. Div.)) (Q.L.).

⁴⁹ *Confederation Life Insurance Company v. Double Y Holdings Inc. et al.*, supra.; *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.).

giving up its claim on the covenant. In the receivership of York Mills Centre, the two senior mortgagees jointly purchased the mortgaged property by bidding a portion of their debt.

The following is a non-exhaustive list of circumstances which will generally incline a court towards granting a mortgagee's application for the court appointment of a receiver and manager:

- where the mortgage security provides for a receivership remedy
- where there is threatened or actual waste being committed to the mortgaged property
- where the mortgage is in serious default, particularly if it has matured, and the period of default has been lengthy
- where additional financing is required to complete or lease up the project
- where the mortgagor has very little equity in the project
- where there are priority issues among creditors which might otherwise lead to a scramble with resultant chaos or a multiplicity of litigation
- where the value of the security is deteriorating or otherwise at risk
- where the mortgagor's behaviour in relation to the mortgagee and creditors generally has been less than honest and forthright, or the mortgagor has abandoned the property or no longer has the resources to properly manage it
- where difficulties with the mortgagor or other creditors are anticipated or have been experienced
- where the appointment is necessary to enable the mortgagee or a privately appointed receiver and manager to carry out the mortgagee's or receiver and manager's duties and obligations more effectively

Where the mortgagor is insolvent, the receiver and manager, whether privately or court appointed, will have the duties and responsibilities set out in Part XI of the *Bankruptcy and Insolvency Act*⁵⁰ ("BIA") to give notice of the appointment: s. 245(1), prepare a statement containing prescribed information: s. 246(1), make interim reports: s.

⁵⁰ R.S.C. 185, c. B-3

246(2) and a final report: s. 246(3), and will have a duty to act in good faith and deal with the mortgaged property of the insolvent mortgagor in a commercially reasonable manner: s. 247. If the mortgaged property constitutes "all or substantially all" of an insolvent mortgagor's property, then a mortgagee who goes into possession or control of the mortgaged property will itself be a "receiver" within the meaning of Part XI of the BIA and will have all of these duties and responsibilities.⁵¹

(b) Interim Receivers under s. 47 of the *Bankruptcy and Insolvency Act*

Section 47 of the BIA allows a secured creditor of an insolvent debtor to apply for the court appointment of an interim receiver when it has or is about to deliver the 10-day notice required by section 244 of the BIA. The relevant provisions of the BIA with respect to interim receivers appointed on the application of a secured creditor are attached as Appendix "C" for ease of reference.

The 1992 amendments to the BIA which subjected secured creditors to the restructuring stay of proceedings and restricted the enforcement rights of secured creditors by imposing the mandatory 10 day statutory notice under section 244, were accompanied by an expansion of the BIA interim receivership provisions in order to provide a protective mechanism which would be available to secured creditors while their rights were restricted. However, interim receiverships have evolved over the past decade into a comprehensive remedy that rivals, and has some advantages over, a traditional receivership.

The advantages of an interim receiver under the BIA, rather than a traditional receivership, are the flexibility of the remedy, the fact that the appointment is effective in all other provinces⁵² where the business or assets may be located, that the appointment can be made before a section 244 10-day notice has been served or has expired, and the appointment effectively circumvents a debtor's right to a stay of secured

⁵¹ s. 243(2) BIA.

⁵² see s. 188 of the BIA.

creditor enforcement proceedings under the restructuring provisions and an unpaid supplier's right to repossession.

In order to obtain the appointment of an interim receiver the secured creditor must satisfy the court that the appointment is necessary for the protection of the insolvent debtor's estate or the interests of the applying secured creditor.⁵³

*Canada v. Curragh Inc.*⁵⁴ was decided a few years after the 1992 BIA amendments, and involved the appointment by an Ontario Court of an interim receiver under section 47 of the BIA to take control of a mine in the Yukon Territory. The mine was subject to significant environmental concerns and the interim receivership was used to convey title without the interim receiver actually going into possession. Mr. Justice Farley relied on the jurisdiction in section 47(2)(c) of the BIA for the court to direct the interim receiver to "take such other action as the court considers advisable" and the court's inherent jurisdiction, and granted orders approving the sale of the mine by the interim receiver, vesting title in the purchaser, and providing for a claims filing and claims barring process. In an expansive interpretation of an interim receiver's function, Farley J. observed that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands".

More recently, in *Harris Trust & Savings Bank v. Anicom Multimedia Wiring Systems Inc.*,⁵⁵ the interim receiver was appointed under section 47 of the BIA to sell a business as a going concern following the delivery of a section 244 notice by its primary secured creditor, without the primary secured creditor ever enforcing its security in any other way.

Interim receivership orders have come to include all of the "bells and whistles" typically found in traditional receivership orders, including a stay of proceedings, an order giving the interim receiver a priority charge in respect of its fees

⁵³ s. 47(3) BIA.

⁵⁴ [1994] CarswellOnt 294 (Ont. Ct. (Gen. Div.)) (eC).

⁵⁵ [2001] CarswellOnt 819 (S.C.J. [Commercial List]) (eC).

and disbursements, power to borrow and a priority charge in connection with such borrowings.

A recent Alberta decision,⁵⁶ as well as the latest review process for legislative reform of the BIA, have given rise to debate as to whether interim receiverships have gone too far and should be more limited both as to duration and breadth.

⁵⁶ *Re Big Sky Living Inc.*, [2002] CarswellAlta 875 (Q.B.) (eC).

APPENDIX "A"

Mortgages Act R.S.O. 1990, CHAPTER M. 40

PART II STATUTORY POWERS

Powers incident to mortgages after default

24. Where any principal money is secured by mortgage of land, the mortgagee, at any time after the expiration of three months from the time of default in the payment of any money due under the mortgage or after any omission to pay any premium of insurance that by the terms of the mortgage ought to be paid by the mortgagor, has the following powers to the like extent as if they had been in terms conferred by the mortgage:

Power of sale

1. A power to sell, or to concur with any other person in selling, the whole or any part of the mortgaged property by public auction or private contract, subject to any reasonable conditions the mortgagee may think fit to make, and to buy in at an auction and to rescind or vary contracts for sale, and to resell the land, from time to time, in like manner without being answerable for any loss occasioned thereby.

Power to insure

2. A power to insure and to keep insured against loss or damage by fire any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance are a charge on the mortgaged property, in addition to the mortgage money and with the same priority and with interest at the same rate as the mortgage money. R.S.O. 1990, c. M.40, s. 24.

Receipts for purchase money sufficient discharges

25. A receipt for purchase money given by the person exercising the power of sale conferred by section 24 is a sufficient discharge to the purchaser, who is not bound to see to the application of the purchase money. R.S.O. 1990, c. M.40, s. 25.

Notice before sale

26. (1) No sale under the power conferred by section 24 shall be made until after forty-five days notice in writing in the Form to this Act has been given to the persons and in the manner provided by Part III.

Idem

(2) The notice may be given at any time after fifteen days default in making any payment provided for by the mortgage. R.S.O. 1990, c. M.40, s. 26.

Application of purchase money

27. The money arising from the sale shall be applied by the person receiving the same as follows:

Firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale;

Secondly, in discharge of all interest and costs then due in respect of the mortgage under which the sale was made;

Thirdly, in discharge of all the principal money then due in respect of the mortgage;

Fourthly, in payment of the amounts due to the subsequent encumbrancers according to their priorities;

Fifthly, in payment to the tenants of the mortgagor of the rent deposits paid under section 118 of the *Tenant Protection Act, 1997* where the rent deposit was not applied in payment for the last rent period,

and the residue shall be paid to the mortgagor. R.S.O. 1990, c. M.40, s. 27; 1991, c. 6, s. 1; 1997, c. 24, s. 215 (1).

Conveyance to the purchaser

28. The person exercising the power of sale has power to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein of the mortgagor and of which the mortgagor had power to dispose. R.S.O. 1990, c. M.40, s. 28.

Right to title deeds and conveyance of legal estate

29. At any time after the power of sale has become exercisable, the person entitled to exercise the same is entitled to demand and recover from the mortgagor all deeds and documents in the mortgagor's possession or power relating to the mortgaged property, or to the title thereto, which the person would have been

entitled to demand and recover if the property had been conveyed, appointed, surrendered or assigned to and was then vested in the person for all the estate and interest of the mortgagor and of which the mortgagor had power to dispose, and where the legal estate is outstanding in a trustee the mortgagee, or any purchaser from the mortgagee, is entitled to call for a conveyance of the legal estate to the same extent as the mortgagor could have called for such a conveyance if the mortgage had not been made. R.S.O. 1990, c. M.40, s. 29.

Application of Part II

30. So much of this Part as confers a power to sell does not apply in the case of a mortgage that contains a power of sale, and so much as confers a power to insure does not apply in the case of a mortgage that contains a power to insure; nor do any of the provisions of this Part apply to a mortgage that contains a declaration that this Part does not apply thereto. R.S.O. 1990, c. M.40, s. 30.

APPENDIX "B"

Real Property Limitations Act

R.S.O. 1990, CHAPTER L.15

Limitation where the subject interested

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it. R.S.O. 1990, c. L.15, s. 4.

Maximum of arrears of rent or interest recoverable

17. (1) No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action but within six years next after the same respectively has become due, or next after any acknowledgment in writing of the same has been given to the person entitled thereto or the person's agent, signed by the person by whom the same was payable or that person's agent. R.S.O. 1990, c. L.15, s. 17 (1).

Exception as to action for redemption

(2) This section does not apply to an action for redemption brought by a mortgagor or a person claiming under the mortgagor. R.S.O. 1990, c. L.15, s. 17 (2).

Exception in favour of subsequent mortgagee when a prior mortgagee has been in possession

18. Where a prior mortgagee or other encumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by a person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to the subsequent mortgage or encumbrance may recover in the action the arrears of interest that have become due during the whole time that the prior mortgagee or encumbrancer was in such possession or receipt, although the time may have exceeded the term of six years. R.S.O. 1990, c. L.15, s. 18.

Limitation where a mortgagee in possession

19. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in the mortgage, the mortgagor, or any person claiming through the mortgagor, shall not bring any action to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of the mortgagor's right to redemption, has been given to the mortgagor or to some person claiming the mortgagor's estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through the mortgagee, and in such case no such action shall be brought but within ten years next after the time at which the acknowledgment, or the last of the acknowledgments if more than one, was given. R.S.O. 1990, c. L.15, s. 19.

Acknowledgment to one of several mortgagors

20. Where there are more mortgagors than one or more persons than one claiming through the mortgagor or mortgagors, the acknowledgment, if given to any of such mortgagors or persons, or the agent of one or more of them, is as effectual as if it had been given to all such mortgagors or persons. R.S.O. 1990, c. L.15, s. 20.

Acknowledgment to one of several mortgagees

21. Where there are more mortgagees than one or more persons than one claiming the estate or interest of the mortgagee or mortgagees, the acknowledgment, signed by one or more of the mortgagees or persons, is effectual only as against the person or persons so signing, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under the person or persons, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of the person's or the persons' estate or estates, interest or interests, and does not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons as have given the acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors are entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money that bears the same proportion to the whole of the mortgage money as the value of the divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage. R.S.O. 1990, c. L.15, s. 21.

Limitation where mortgage in arrear

22. Any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover the land at any time within ten years next after the last payment of any part of the principal money or interest secured by the

mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued. R.S.O. 1990, c. L.15, s. 22.

Limitation where money charged upon land and legacies

23. (1) No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of the land or rent, or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive it accrued to some person capable of giving a discharge for, or release of it, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment in writing of the right thereto signed by the person by whom it is payable, or the person's agent, has been given to the person entitled thereto or that person's agent, and in such case no action shall be brought but within ten years after the payment or acknowledgment, or the last of the payments or acknowledgments if more than one, was made or given. R.S.O. 1990, c. L.15, s. 23 (1).

Execution against land

(2) Despite subsection (1), a lien or charge created by the placing of an execution or other process against land in the hands of the sheriff or other officer to whom it is directed, remains in force so long as the execution or other process remains in the hands of the sheriff or officer for execution and is kept alive by renewal or otherwise. R.S.O. 1990, c. L.15, s. 23 (2).

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same

24. No action shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. R.S.O. 1990, c. L.15, s. 24.

Cases where fraud remains concealed

28. In every case of a concealed fraud, the right of a person to bring an action for the recovery of any land or rent of which the person or any person through whom that person claims may have been deprived by the fraud shall be deemed to have first accrued at and not before the time at which the fraud was or with reasonable diligence might have been first known or discovered. R.S.O. 1990, c. L.15, s. 28.

Case of purchaser in good faith for value without notice

[29.](#) Nothing in section 28 enables any owner of land or rent to bring an action for the recovery of the land or rent, or for setting aside any conveyance thereof, on account of fraud against any purchaser in good faith for valuable consideration, who has not assisted in the commission of the fraud, and who, at the time of making the purchase did not know, and had no reason to believe, that any such fraud had been committed. R.S.O. 1990, c. L.15, s. 29.

Mortgage covenant

[43. \(1\)](#) No action upon a covenant contained in an indenture of mortgage or any other instrument made on or after July 1, 1894 to repay the whole or part of any money secured by a mortgage shall be commenced after the later of,

(a) the expiry of 10 years after the day on which the cause of action arose; and

(b) the expiry of 10 years after the day on which the interest of the person liable on the covenant in the mortgaged lands was conveyed or transferred. 2002, c. 24, Sched. B, s. 26 (1).

Equity of redemption

[\(2\)](#) No action by a mortgagee against a grantee of the equity of redemption under section 20 of the *Mortgages Act* shall be commenced after the expiry of 10 years after the day on which the cause of action arose. 2002, c. 24, Sched. B, s. 26 (1).

Same

[\(3\)](#) Subsections (1) and (2) do not extend the time for bringing an action if the time for bringing it is limited by any other Act. 2002, c. 24, Sched. B, s. 26 (1).

APPENDIX "C"

Bankruptcy and Insolvency Act

R.S.C. 1985, CHAPTER B-3

[Appointment of interim receiver](#) **47.** (1) Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.

Directions to interim receiver (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor's property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
- (c) take such other action as the court considers advisable.

When appointment may be made (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of the creditor who sent the notice under subsection 244(1).

R.S., 1985, c. B-3, s. 47; 1992, c. 27, s. 16.

[Enforcement of orders of other courts](#) **188.** (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

Courts to be auxiliary to (2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an

each other order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Advance notice **244.** (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice (2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent (2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception (3) This section does not apply, or ceases to apply, in respect of a secured creditor

- (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
- (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem (4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).