CITATION: Hermina Developments Inc. v. Epireon Capital Limited et al., 2025 ONSC 4067
COURT FILE NO.: CV-25-00739955-0000
DATE: 20250709

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HERMINA DEVELOPMENTS INC. Applicant	*Caroline Abela, Claire Copland, Dalal Hjjih* for the Applicant
– and –	
EPIREON CAPITAL LIMITED AND PRO-M CAPITAL PARTNERS INC. (amalgamated with FORSGATE INC. previously known as FORSGATE FUNDING CORPORATION INC.) Respondents	*Eric Golden, Lea Nebel* for the Respondents **HEARD:** June 23-24 with additional written submissions June 26, 27, 2025

KOEHNEN J.

REASONS FOR JUDGMENT

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OVERVIEW

[1] This hearing arises out of competing claims for relief by the Applicant and the Respondents. The Applicant seeks relief which would, in effect, prevent the closing of a sale of a property pursuant to a mortgage and a judgment which is scheduled to close on July 15, 2025. The Respondents seek relief which would allow the sale to proceed.

[2] More specifically, the Applicant seeks orders that would: (i) declare two mortgages registered on January 4, 2008 to be unenforceable and expunge those mortgages from title; (ii) quash notices of sale dated March 2, 2009 and October 7, 2021 arising out of one of the mortgages; (iii) limit the Respondents' ability to enforce a judgment dated July 24, 2009 to its principal amount plus interest for only one year; and (iv) grant the Applicant 90 days from the date of these reasons to pay the amount owing on the revised judgment.

[3] For the reasons set out below, I find that at any claim on or effort to enforce the first mortgage is statute barred and order that the first mortgage be discharged from title. I also declare that the Respondents are not entitled to charge management fees of $48,550 set out in the 2021 notice of sale. I otherwise dismiss the application and allow the sale scheduled for July 15, 2025 to proceed. My findings are without prejudice to the Applicant's right to pursue an action for improvident sale in the future should it choose to do so. In doing so, however, I do not mean to suggest that such an action is warranted or advisable.

I. Background Facts

[4] The Applicant, Hermina Developments Inc., is an Ontario company that is the registered owner of a property of approximately 26 acres of vacant land which borders on Highway 401 in Woodstock Ontario (the "Property").

[5] The Respondents, Epireon Capital Limited and Forsgate Inc., are sophisticated private mortgage lenders.

[6] On January 4, 2008, Hermina registered two mortgages on the Property. A first mortgage in favour of a non party to this proceeding in the principal amount of $3 million with an annual interest rate of 10% and a second mortgage in favour of the Respondents in the principal amount of $4.25 million with an annual interest rate of 14.875%.

[7] Hermina defaulted on both Mortgages on January 4, 2009 by failing to redeem them on maturity. The second mortgage was renewed for one month to February 3, 2009.

[8] Both mortgages were guaranteed by Wiebe Scheltema and Moblesource Industries Inc. Scheltema is the sole director and officer of Hermina and Moblesource. Both guarantors are out of the picture so to speak. Scheltema because he completed a proposal to creditors in April 2018 which expunged his guarantee; Moblesource because it was closed in 2009 and has not carried on business since then. In addition, Hermina no longer carries on business. As a result, the only source of recovery on the mortgages is the Property.

[9] On March 2, 2009, the Respondents delivered the 2009 notice of sale under the second mortgage.

[10] Shortly thereafter, the Respondents retained Cushman & Wakefield Inc. to sell the Property using a Request for Proposal process which was intended to lead to the sale of the property within 60 days, failing which it could be listed with a real estate agent.

[11] The Respondents say that the plan was interrupted when Scheltema knocked down custom made for sale signs installed at the Property by Cushman & Wakefield and threatened to burn the signs.

[12] In response, the Respondents moved for an urgent summary judgment motion. They obtained judgment on July 24, 2009 in the principal amount of $4,770,078.07,

with interest at 14.875% from June 25, 2009 onward. In addition to the monetary award, the judgment also required Hermina to deliver possession of the Property, granted the Respondents leave to issue a writ of possession and required the Applicant to pay the Respondents' costs of $26,585.07.

[13] Despite obtaining judgment the Respondents did not resume the Request for Proposal process.

[14] The Respondents issued a writ of seizure and sale in August 2009 which expired six years later and was never renewed.

[15] On October 1, 2009, the Respondents paid $3,239,186.49 to take an assignment of the first mortgage. Notice of the assignment was sent to Hermina, the guarantors, and their counsel two weeks later. The Respondents' affiant described the first mortgage as being added to the second mortgage as a "protective disbursement."

[16] No action has ever been commenced on the first mortgage nor has any notice of sale ever been delivered in relation to it.

[17] On October 7, 2021, the Respondents issued a second notice of sale for the property. The 2021 notice of sale listed the principal amount of $4,796,663.14 pursuant to the judgment plus $8,714,518.46 in post-judgment interest and additional costs of $224,095 which, after crediting the payment in the Scheltema proposal comes to a total of $13,680,276.60. The notice of sale did not include anything on account of the "protective disbursement" for the first mortgage.

[18] Before proceeding to address the substantive legal issues, I address the Respondents' request for a sealing order.

II. The Sealing Order Request

[19] The respondent seeks a sealing order over the agreement of purchase and sale that is scheduled to close on July 15, 2025 as well as on the value of appraisals and offers received since 2021.

[20] The Respondents ask for the sealing order because they are concerned that the applicant and/or Scheltema would take steps to interfere with the sale if a sealing order is not granted. They note that Scheltema continues to be interested in developing the property and that he, the Applicant and Applicant's counsel have refused to sign a nondisclosure agreement that would restrain them from using the information the Respondents wish to seal for anything but a lawsuit against the Respondents.

[21] In *Sherman Estate v. Donovan*,[1] the Supreme Court of Canada held that an applicant for a sealing order must establish that:

(i) court openness poses a serious risk to an important public interest;

(ii) the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent the risk; and,

(iii) as a matter of proportionality, the benefits of the order outweigh its negative

[1] *Sherman Estate v. Donovan*, 2021 SCC 25.

effects.[2]

[22] I am satisfied that all three factors are satisfied here.

[23] **Public Interest**: The documents the Respondents seek to seal contain the values of appraisals of the property and proposed purchase prices for the Property since 2021. If that information is publicly available, it could prejudice any subsequent sale if the proposed sale does not close.[3] There is an important public interest in allowing mortgagees to maximize value. Courts have approved sealing orders where they are required to protect commercially sensitive information, including purchase prices.[4]

[24] **Lack of Reasonable Alternative**: In the present case, these is no reasonable alternative to a sealing order that would prevent the potential adverse effects to the marketability of the Property.

[25] **Proportionality**: The benefits of the proposed sealing order outweigh its disadvantages. No public interest will be served if the information is made public before the transaction closes. The Applicant resists the request arguing that the court has already granted a sealing order which was limited to the agreement of purchase and sale scheduled to close on July 15. While that is correct, that was the only request put to the court at the time. The Applicant objects that it is not being granted access to the sealed information. While that too is correct, that is

[2] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38.
[3] *Canadian Western Bank v 2563773 Ontario Inc.*, 2024 ONSC 1990 at para 51.
[4] *Danier Leather Inc., Re*, 2016 ONSC 1044 (Ont. S.C.J. – Commercial List), at para. 84.

only because the applicant and its counsel were not prepared to sign a nondisclosure agreement. The sealing order will only be in effect for a short period of time and therefore does little damage to the open courts principle.

[26] I am satisfied that the benefits of sealing outweigh the limited negative effects on the open courts principle and therefore grant the order.

[27] As a result, I will issue both public and confidential reasons in this matter. The public reasons will redact appraisal values and purchase prices since 2021. If and when the proposed transaction closes, the confidential reasons will become public.

III. Should the Mortgages Be Expunged from Title?

[28] Sections 4 and 23 of the *Real Property Limitations Act*[5] (the "*RPLA")* establish a limitation period of 10 years from the day the right arose to enter land to take possession, bring an action for possession of land, or bring an action on the covenant for a money judgment. Section 4 deals with entry of land for the purpose of taking possession and actions for possession. It provides:

> 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.[6]

[5] *Real Property Limitations Act*, RSO 1990, c L.15 ("RPLA")
[6] *RPLA* s. 4.

[29] Section 23 deals with money judgments and provides:

> 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.

[30] Section 15 of the *RPLA* provides that on the expiry of the 10 year limitation period, the right of any person to make an entry, distress or bring an action is extinguished.[7] Upon the expiry of the limitation period, the court has broad jurisdiction make equitable orders including an order to discharge the mortgage.[8]

[31] I will address the issue of the limitations period with respect to each mortgage separately.

i. Limitation Period for the First Mortgage

[32] The Respondents submit that the limitation period with respect to the first mortgage is a "red herring" and would only come into play if the amount generated on the sale of the property exceeded the amount owing on the second mortgage. Given

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[7] *RPLA*, s 15.
[8] *McVan General Contracting Ltd v Arthur*, 2002 CanLII 45035, para 56; *Courts of Justice Act*, RSO 1990, c C.43, 11(2).

that: (i) the principal and interest owing on the 2009 judgment as of the hearing date is $16,467,671.59; (ii) a 2025 appraisal that the Respondents obtained values the property at $ **[REDACTION]**; and (iii) the proposed purchase is at a price of $**[REDACTION]**; there will be a significant shortfall on the second mortgage under any scenario. As a result, the Respondents submit that I need not consider the issue of the first mortgage.

[33] The Applicant asks that I expunge the first mortgage from title and that I limit interest on the second mortgage to one year. Doing so would reduce principal and interest on the second mortgage to $4,882,187.50 and result in a surplus available on the sale which makes the status of the first mortgage relevant.

[34] As noted earlier, the first mortgage matured on January 3, 2009. As a result, the limitation period began to run on January 4, 2009, the day after default,[9] and expired on January 4, 2019. The Respondents did not commence power of sale proceedings or start any action in relation to the first mortgage within that time, as a result of which any rights to proceed under the first mortgage are, *prima facie*, extinguished.[10]

[35] The Respondents submit that the first mortgage falls within an exception in s. 23 of the *RPLA* which makes the limitation period begin to run afresh if within the 10 year period:

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[9] *Mortgages Act*, RSO 1990, c M.40, s 32.
[10] *McVan General Contracting Ltd. v. Arthur*, 2002 CanLII 45035 (ON CA) at para. 52 holding that a power of sale proceeding is an attempt to recover land under section 4 of the RPLA and is prohibited after the expiry of 10 years.

> … 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.

[36] The Respondents note that on April 16, 2018 they received a payment of $51,542.30 in Scheltema's proposal to creditors. They say that part of this amount was a payment on the first mortgage which reset the limitations period and would extend the time to bring an action on the first mortgage to April 16, 2028.

[37] The difficulty with this submission is that the Respondents credited the entire amount of the payment to the second mortgage. That credit is also reflected on the 2021 notice of sale. It is only now, seven years after the fact, that the Respondents assert that part of the payment from the proposal to creditors should have been ascribed to the first mortgage. As a result, I find there has been no payment on the first mortgage since default occurred on February 3, 2009 and the first mortgage must be expunged from title.

[38] If I am incorrect in this and a portion of the payment from Scheltema's consumer proposal should have been ascribed to the first mortgage. I find that the payment interrupts the limitation period as against Scheltema but not as against the Applicant. To interrupt the limitation period, the payment must be made by the

person who is being sued for payment or their agent. As *Falconbridge on Mortgages* observes:[11]

> The governing principle is that an acknowledgment or payment made by one person is binding on another person only if some relation exists between them which enables the one to bind the other. No such relation exists between a principal and surety for the same obligation. Therefore, an acknowledgment or payment by the principal does not lose the benefit of the statutory limitation for the surety.[12]

[39] The underlying principle appears to be that a new payment constitutes a new promise to pay, thereby resetting the limitation period. Accordingly, in the context of a principal–guarantor relationship, a purposive interpretation of the statute requires the court to determine whether the payment reflects a promise to pay solely by the payer, or whether it also implies a promise to pay by the other party in the principal-surety relationship.

[40] It is well established law that a mortgagor and a surety are distinct parties with separate legal obligations.[13] A payment or acknowledgement by one does not affect the other's right to the protection of the limitation period.[14] As a result, payment by a guarantor may extend the limitation period against him by a further

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[11] Falconbridge on Mortgages, 5th Ed. § 30:8

[12] Falconbridge on Mortgages, 5th Ed. § 30:8See also: *Thomson, Re,* 1927 CarswellOnt 170, [1927] 2 D.L.R. 254 (ON CA); *Union Bank of Canada v Clark*, 43 SCR 299, 1910 CanLII 5 (SCC); *Imperial Bank of Canada v Kuszko,* [1932] 3 WWR 186, 1932 CarswellSask 69

[13] *Cleland Metal Products Ltd. v Proctor*, et al. 2016 ONSC 1679, para 18; *Thomson, Re,* 1927 CarswellOnt 170, [1927] 2 D.L.R. 254 (ON CA); *Madison Joe Holdings Inc. v. Mill Street & Co. Inc***,** 2020 ONSC 1429 at para 73.

[14] Walter M. Traub, *Falconbridge on Mortgages*, 5th ed, (online: Westlaw, 2025) at § 30:8, Part VI, Chapter 30, "Acknowledgment or Part Payment." *Thomson, Re*, 1927 CarswellOnt 170, [1927] 2 D.L.R. 254 (ON CA); . *Union Bank of Canada v Clark*, 43 SCR 299, 1910 CanLII 5 (SCC); *Imperial Bank of Canada v Kuszko*, [1932] 3 WWR 186, 1932 CarswellSask 69.

10 years from the date of payment but does not extend the limitation period against the principal debtor. As a practical matter, however, the limitation period was not extended against Scheltema because the consumer proposal extinguished his liability on the guarantee.

[41] Although Scheltema was the sole director and officer of Hermina, that is not enough to have Scheltema bind the corporation when he is acting in his personal capacity as guarantor. It is a cardinal principle of corporate law that corporations are separate persons from their shareholders, directors or officers. Shareholders, directors, or officers may bind a corporation when acting in their capacities as such, but that does not mean that each act of a person who happens to be a shareholder, director or officer of a corporation is also a corporate act.

[42] Scheltema as guarantor has a distinct set of interests from Hermina as the principal debtor, especially when considering a payment in a proposal to creditors, one effect of which would be to extinguish Scheltema's guarantee. It may be very much in Scheltema's interest as guarantor to extinguish a potential liability of several million dollars for a payment of $50,000. Hermina may well have the opposite interest. Although courts have been prepared to pierce the corporate veil where the corporation is merely the alter ego of the shareholder or where the

corporation is being used as a vehicle for fraud,[15] the Respondents have led no evidence to that effect here.

ii. Limitation Period for the Second Mortgage

[43] As noted earlier, the limitation period on the second mortgage expired on February 3, 2019. The Respondents delivered notices of sale with respect to the second mortgage on March 2, 2009 and October 7, 2021. The Applicant submits that the notices of sale should be set aside because they are inaccurate and include improper expenses. Setting the notices aside would preclude any fresh notice of sale from being issued because doing so would run afoul of the 10 year limitation period for the exercise of a power of sale under s. 4 of the *RPLA.*

a. Inaccurate Notice of Sale

[44] In *Grenville Goodwin Ltd. v. MacDonald et al.*[16] the Ontario Court of Appeal stated that serious errors will invalidate a notice of sale, but that the required degree of accuracy for notices of sale is evolving towards a standard of commercial reasonableness.[17]

[45] The Applicant submits that the 2021 notice of sale is inaccurate because it failed to claim $7,925,080 on account of the first mortgage even though the Respondents

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[15] *O'Reilly v ClearMRI Solutions Inc*, 2021 ONCA 385 at para. 47.

[16] *Grenville Goodwin Ltd. v. MacDonald (C.A.),* 1988 CanLII 4737 (ON CA).
[17] *1173928 Ontario Inc. v. 1463096 Ontario Inc.*, 2018 ONCA 669, at paras. 65 and 66.

continued to claim it as a “protective disbursement” under the second mortgage. In addition, the Applicant submits that the 2009 notice of sale became inaccurate once the Respondents had decided to claim the first mortgage as a protective disbursement under the second mortgage. To some extent this reflects an inconsistency on the part of the Applicant. On the one hand, it says the first mortgage should be expunged because any claim on it arises outside of the limitation period. On the other hand, it argues that the notices of sale are inaccurate because they do not include a claim for the first mortgage. I have in effect already addressed this question by finding that any claim on the first mortgage is time-barred. The failure to include it in the notices of sale does not therefore make those notices inaccurate.

[46] Failing to issue a revised 2009 notice and excluding the first mortgage from the 2021 notice of sale was not commercially unreasonable. The notices were issued under the second mortgage. A subsequent mortgagee has the right to issue a notice of sale on its mortgage alone. That notice need not refer to prior mortgages.

[47] The Applicant next objects to the 2021 notice of sale because it includes costs of approximately $224,000 for a marketing study on the appropriateness of a development for joint venture proposals, costs of an economist engaged to assess the Property’s marketability if developed, and internal management fees to develop the Property as a joint venture.

[48] In *Grenville Goodwin Ltd v MacDonald*[18] the Ontario Court of Appeal quashed an agreement of purchase and sale because a notice of sale associated with it had overstated the amount owing by $221,331.43. *Grenville* is distinguishable. In *Grenville,* the additional cost was misleading because it was said to be on account of municipal taxes when the mortgagee had never paid the taxes.[19] Here, the amounts at issue were actually paid, with perhaps the exception of the management fees. In addition, in *Grenville* the costs amounted to approximately 4.7% of the amount owing. Here the impugned costs came to approximately 1.66% of the amount owing under the judgment when factums were exchanged. That percentage would now be somewhat smaller due to the accrual of additional interest.

[49] The Respondents submit that the costs at issue here are legitimate and are claimable under s. 8 of the standard charge terms of the Second Mortgage which provides that the mortgagee may add to the principal amount of the mortgage:

> … all costs and expenses which may be incurred …
> (Including… costs incurred in leasing or selling the land or in exercising the power of entering, lease and sale contained in the Charge).

[50] In my view, that provision would cover the realty tax payments, appraisal costs and feasibility/planning/marketing costs listed in the 2021 notice of sale but would not cover the management fees. The costs and expenses listed in s. 8 are ones that

[18] *Grenville Goodwin Ltd v MacDonald* (CA), 1988 CanLII 4737 (ON CA).
[19] *Grenville Goodwin Ltd v MacDonald* (CA), 1988 CanLII 4737 (ON CA) at paras. 2 and 5.

are generally in the nature of disbursements, not in the nature of internal management fees. Where a mortgagee charges for its own time, the terms of the mortgage tend to set out those charges such as for the preparation of discharge statements or notices of default. In my view, a general section relating to charges in the nature of disbursements, would not include the mortgagee's charges for its own time in the absence of a specific provision to that effect. I was not directed to any such provision.

[51] I would not, however, quash the notice of sale for that reason. There are procedures available to challenge the expenses a mortgagee proposes to charge without invalidating the power of sale. A notice of sale should not be quashed simply because the mortgagor wishes to challenge certain expenses.[20] I note in this regard that the Applicant took no steps to challenge any of those expenses until it issued this application four years after receiving the notice of sale.

b. Inaccuracy of Amount Owing

[52] Next, the Applicant submits that the notices of sale should be set aside because the amounts they claim are substantially inaccurate or misleading because of the delay in acting on them. The 2009 notice of sale claims $4,358,472.45 on the second mortgage. The 2021 notice of sale claims $13,680,276. As of the hearing date, the amount claimed on the second mortgage was $16,467,671.59.

[20] *Hornstein v Gardena Properties Inc*., 2006 CanLII 23142 (ON CA) at para. 4.

[53] The Ontario Court of Appeal has held that a notice of sale does not become misleading simply because interest continues to accrue and costs continue to mount.[21] Changes of that nature are usually addressed by having the mortgagor request an updated mortgage statement under s. 22 of the *Mortgages Act*, not by requiring a fresh notice of sale.[22] The Court of Appeal has also noted that "it would not be wise to rule definitively on when a fresh notice of sale is required" and declined to do so.[23]

[54] The Applicant submits that it is inappropriate to have a notice of sale issued in 2009 govern a sale that occurs 16 years later even if the 2009 notice was replaced by a further notice in 2021.

[55] The situation takes on added complexity here because the Respondents also have the benefit of the 2009 judgment. In addition to awarding a monetary amount, the judgment required Hermina to deliver possession of the Property to the Respondents and granted the Respondents leave to issue a writ of possession. There is, in principle, no limitation period on the enforcement of a judgment.[24] The only reason to order Hermina to deliver possession and the only reason to grant the Respondents leave to issue a writ of possession is to allow the Respondents to proceed to enforce their mortgage by way of power of sale. Writs of possession last for one year and can be renewed for successive one year terms.[25] In addition,

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[21] *1173928 Ontario Inc v 1463096 Ontario Inc,* 2018 ONCA 669 at para 71.
[22] *1173928 Ontario Inc v 1463096 Ontario Inc,* 2018 ONCA 669, at para 86.
[23] *1173928 Ontario Inc v 1463096 Ontario Inc,* 2018 ONCA 669 at para 87.
[24] *Limitation Act* s. 16 (1) (b).
[25] Rule 60.10 (3)

the Respondents could also enforce the monetary judgment through a sheriff's sale pursuant to a writ of seizure and sale. Writs of seizure and sale remain in force for six years and can be renewed for successive six-year terms.[26] If a writ of execution has not been issued within six years of judgment, leave is required.[27]

[56] The case at hand therefore creates a potential conflict between the Respondents right to enforce a writ of possession under the judgment which is not subject to a limitation period and the Applicant's right under s. 4 of the *RPLA* not to be subject to an entry to recover land more than 10 years after the right arose.

[57] In *1173928 Ontario Inc. v. 1463096 Ontario Inc.*,[28] the Court of Appeal for Ontario noted that a purposive application of mortgage law requires courts to understand that the overall objective of mortgage law is to mitigate the harshness of the common law in its treatment of mortgagors.[29] At the same time it noted that:

> …it is not the court's function to seek pretexts to invalidate a mortgage sale. The cases insist that the mortgagee is entitled to be paid in full and is entitled to take enforcement steps without undue judicial interference. The courts have taken a functional approach. In a commercial context involving sophisticated parties who know what is going on, reasonable expectations should govern, and a court should be reluctant to force a mortgagee to start over. No useful purpose would be served by replicating the "technical traps and procedural delays" of foreclosure and judicial sale in respect of the contractual power of sale.[30]

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[26] Rule 60.07 (6).
[27] Rule 60.07
[28] *1173928 Ontario Inc. v. 1463096 Ontario Inc.*, 2018 ONCA 669
[29] *1173928 Ontario Inc. v. 1463096 Ontario Inc*., 2018 ONCA 669 at para. 36.
[30] *1173928 Ontario Inc. v. 1463096 Ontario Inc.*, 2018 ONCA 669 at para. 37.

[58] This case involves sophisticated parties. The reasonable expectation of each side is that the Respondents have a judgment that can be enforced without a limitation period. In my view, the enforceability of the second mortgage is better determined by applying principles relevant to the renewal of writs and the duties of mortgagees than by applying principles governing limitation periods. Limitation periods govern the commencement of proceedings, not the enforcement of rights in a judgement. Although I appreciate that the Respondents are not asking for a writ of possession or a writ of seizure and sale, the relief they seek implicates the principles associated with granting those writs after a period of delay.

IV. Should Enforcement of the 2009 Judgment Be Limited?

i. Legal Principles

[59] The test for granting leave to issue a writ of possession or seizure and sale is low even in cases of delay. In *Adelaide Capital Corporation v 412259 Ontario Ltd*, the Court explained the test as follows:

> The plaintiff need only explain the delay such that the court may conclude that the plaintiff has not "waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment." It would be a rare case when a plaintiff could not meet that test. If the plaintiff meets the test the onus is then on the judgment debtor to convince the court that "he has relied to his detriment or changed his financial

> position in reliance on reasonably perceived acquiescence resulting from the delay.[31]

[60] That said, delay in enforcing a judgment is a factor to be considered when granting leave to issue a writ of possession or seizure and sale. A number of cases have refused leave to issue writs where the delay has not been satisfactorily explained.[32]

[61] In other cases where delay has not been satisfactorily explained, the court has issued the writ but has limited the interest payable. In *Genworth Financial Mortgage v. Farooqi*,[33] for example, the court limited a mortgagee to three years of interest after six years of delay noting that "a creditor cannot simply rely on years of its own inaction to accrue interest to the detriment of the debtor."[34]

[62] The Respondents rely generally on case law which holds that courts are loath to interfere with the lawful enforcement of mortgages[35]

[63] Related to delay are the duties on a mortgagee when exercising it's a power of sale. *Falconbridge on Mortgages* states that a mortgagee should either follow or at least address the following steps during the power of sale process:

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[31] *Adelaide Capital Corporation v 412259 Ontario Ltd*, 2006 CanLII 34725 (ON SC), para 13.
[32] *Adelaide Capital Corporation v 412259 Ontario Ltd*, 2006 CanLII 34725 (ON SC) where a 12 year delay was *not* explained; *Adelaide Capital Corporation v Minott*, 2007 CanLII 38554 (ON SCDC) at para 9 unexplained delay of 14 years; *Toro Aluminum v. Sampogna,* 2008 ONCA 125, unexplained delay of 6 years; *Acrylic Fabrication Limited v. Paul Jeffrey*, 2014 ONSC 3676 unexplained delay of 21 years.
[33] *Genworth Financial Mortgage v. Farooqi*, 2019 ONSC 4729, para 15.
[34] *Genworth Financial Mortgage v. Farooqi, 2019 ONSC 4729, para 15.*
[35] *National Bank of Canada v. Guibord* 2021 ONCA 864 at para. 6; *Arnold v. Bronstein* et al., 1970 CanLII 245 (ON SC) at paras. 3-4 ; *Mao v. Liu*, 2024 ONSC 752 (CanLII) at para. 94 ; *Scarecrow Capital Inc. v. Peng Zhang et a*l., 2024 ONSC 1852 (CanLII) at para. 11.

(a) act in good faith in the exercise of the power of sale;

(b) attempt to realize fair market value in the sale;

(c) give some consideration to the interests of the mortgagor as well as the mortgagee's own interests;

(d) not conduct the sale in bad faith;

(e) see that the property comes to the attention of a wide segment of the market;

(f) obtain proper appraisals;

(g) advertise the property for sale;

(h) place “For Sale” signs on the property;

(i) place the property with the Multiple Listing Service; and

(j) ensure that efforts are conducted over a reasonable period of time.[36]

[64] The obligation does not apply to the actual value obtained on the sale but to the care taken in completing the sale.[37]

[65] At the same time, the duty is one to act reasonably, not perfectly.[38]

[66] Applying these principles requires a detailed assessment of the facts surrounding the Respondents’ efforts to sell the Property since 2009.

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[36] *Falconbridge on Mortgages*, Fifth edition § 35:39 citing *Broos v. Robinson* (1984), 23 A.C.W.S. (2d) 556 (Ont. H.C.J.) 1984 CarswellOnt 3862, [1984] O.J. No. 236.
[37] *Falconbridge on Mortgages*, Fifth edition § 35:39 citing *Toronto-Dominion Bank v. 466888 Ontario Ltd.* (2010), 103 O.R. (3d) 502 (S.C.J.); see also *Paradigm Quest Inc. v. Mia*n (2010), 190 A.C.W.S. (3d) 1060 affd 2011 ONCA 149.
[38] *Lay et al. v. 1222055 Ontario Inc. et al*, 2005 CanLII 30865 (ON SC) at para. 30.

ii. The Efforts to Sell

[67] In assessing the Respondents' efforts to sell the Property, I refer in this section to the amounts owing on the mortgages at different times. In doing so, I calculate the value of the first mortgage and second mortgage together up until the expiry of the limitation period for the first mortgage on February 3, 2019. I do that because the first mortgagee had the right to commence an action for principal and interest until that point. After February 3, 2019, the amount owing on the mortgage refers only to the amount owing on the second mortgage.

[68] In April 2009, the Respondents obtained two appraisals for the property one from Metrix Realty Group valuing it at $7,970,000 and another from Valco Real Estate Appraisers & Consultants valuing it at $8,500,000. The Metrix appraisal was premised on an exposure and marketing time of between 6 and 12 months. The Valco appraisal was premised on an exposure and marketing period of 9 to 18 months. In February 2009, the amounts owing on the first and second mortgages including interest was $7,250,000.

[69] In May 2009, the Respondents retained Cushman & Wakefield Inc. to sell the property within 60 days using a Request for Proposal process failing which it could be listed with a real estate agent. The Respondents say they halted this process because Scheltema removed a for-sale sign that they had erected on the property. Although the Respondents obtained a judgment in August 2009, they never reinstituted the Request for Proposal process.

[70] On September 4, 2009 Scheltema wrote to the Respondents acknowledging their right to sell the property under the judgment but advising that if the property were not sold at a value consistent with an appraisal he had obtained from City Management and Appraisal dated March 10, 2009, he would consider the sale to be improvident and would commence legal action. The appraisal Scheltema referred to valued the property at $14,500,000. The same appraiser had valued the property at the same amount in August 2007, before the financial crisis arose. The respondents note that the appraisal relied upon by Scheltema valued the property at the same price in 2009 as it had in 2007, even though 2007 marked the peak of the financial cycle, whereas 2009 was marked by a severe global financial and liquidity crisis.

[71] In September 2009 the Respondents retained Cushman & Wakefield to list the property at $9,500,000 for a period of 90 days. Cushman recommended listing the property at $9,000,000. The Respondents listed it at $9,500,000. On October 5, 2009 the price was reduced to $8,900,000. The listing expired on December 9, 2009.

[72] On January 12, 2010 Cushman recommended reducing the price to $8,599,000 for 30 days. The Respondents did not relist with Cushman.

[73] In January and March 2010 the Respondents received expressions of interest from potential purchasers which did not proceed.

[74] On July 30, 2010 the Respondents received an offer for $7,743,000 which they rejected as too low. As of that date, the amounts owing on the first and second mortgages including interest came to approximately $8,648,281.[39]

[75] On October 18, 2010 the Respondents retained Hospitality Plus Ltd to offer the Property for sale by tender by means of a Tender Offer Package. The process occurred in December 2010 and January 2011 but led to no offers.

[76] On March 8, 2011 the Respondents received an offer of $5,340,000. The Respondents counter offered at $10,300,000 which was rejected. As of February 3, 2011 the amount owing on the first and second mortgages was $9,114,375.

[77] On June 30, 2011 the Respondents received an offer of $7,492,740 which they rejected as too low. At the time, the approximate amount owing on the mortgages was $9,580,468.[40]

[78] On March 12, 2012, the Respondents received an updated appraisal from Metrix valuing the property at $7,910,000 and recommending an exposure and marketing period of between six and nine months. At the time, the amount owing on the first and second mortgages was $10,046,562.

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[39] I arrived at this figure by taking the midpoint of the outstanding amounts indicated on the Respondents' demonstrative aid showing the running balance of the mortgages as of February 3, 2010 and February 3, 2011

[40] Based on the halfway point between the amounts owing as of February 3, 2011 and February 3, 2012 on the Respondents' demonstrative aid.

[79] In May 2014 Colliers International recommended a listing price of $8,056,000 and estimated that the property would have to be marketed for between 8 and 12 months.

[80] In June 2014 CBRE Limited provided an opinion of value of between $5,962,500 - $7,287,500 and suggested a list price of $8,612,000. CBRE believed the value was between $5,962,500 and $6,625,000. It asked for a listing contract of 12 months. At that time, the amount owing on the mortgages was approximately $12,377,031.[41]

[81] On January 20, 2015 the Respondents signed a listing agreement with KP Gillen & Realty Limited for a three month listing between January 20, 2015 and April 20, 2015 with a listing price of $9,000,000. No offers were received. At the time, the amount outstanding on the mortgages was approximately $12,843,125.[42]

[82] On September 28, 2021 the Respondents received an updated appraisal from Colliers which valued the property at $ **[REDACTION]** based on a marketing period of between 6-12 months. By that time, the limitation period on the enforcement of the first mortgage had expired. As of February 3, 2021 the amount outstanding on the second mortgage was $11,836,250.

[83] On November 11, 2021 the Respondents signed a listing agreement with Royal LePage Commercial West Haven for a listing to run until May 9, 2022 at a listing

[41] Based on the midpoint of the Respondents demonstrative aid between February 3, 2014 and February 3, 2015.
[42] Based on the amount owing as of February 3, 2015 on the Respondents' demonstrative aid.

price of one dollar. Royal LePage had recommended an asking price of between one dollar and $13,500,000. On November 19, 2021 the list price was increased to $16,400,000 and then later reduced to $15,750,000.

[84] On December 13, 2021 the Respondents received an offer to purchase the Property for $ **[REDACTION]** which they signed back at $**[REDACTION]** and which was rejected. The amount owing on the second mortgage as of February 3, 2021 was $11,836,250. The amount owing as of February 3, 2022 was $12,468,437. **[REDACTION**

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[85] On January 31, 2022 the Respondents reduced the listing price to $15,750,000.

[86] In February and March 2022 the Respondents received four offers at $**[REDACTION]**, $**[REDACTION]**, $**[REDACTION]** and $**[REDACTION]**. As of February 3, 2022 the amount outstanding on the second mortgage was $12,468,437. **[REDACTION** **]** The four offers were all conditional. Some were expressly conditional on rezoning, others contained unfettered conditional periods of between 30 and 90 days. The Respondents were advised that most of the purchasers were considering using the Property for automotive and trucking uses that were not compliant with the Property's commercial retail zoning.

[87] On March 10, 2022 the Respondents received a further offer at a price of $**[REDACTION]**. It would have resulted in a surplus over the second mortgage. The offer was accepted but it appears that the conditions in it were not satisfied and the deposit was returned to the purchaser.

[88] On August 31, 2022 the Respondents received an offer of $**[REDACTION]**. Conditions were not waived.

[89] On October 27, 2023 the Respondents obtained an updated appraisal from Colliers which valued the property at $**[REDACTION]** with an estimated marketing and exposure period of between nine and 18 months. As of February 3, 2023 the amount outstanding on the second mortgage was $13,100,625.

[90] In July 2024 the Respondents began discussions with the current proposed purchaser.

[91] In April 2025 an unconditional agreement of purchase and sale was finalized with the proposed purchaser at a price of $**[REDACTION]** of which $**[REDACTION]** is a takeback mortgage from the Respondents. The amount outstanding on the second mortgage as of February 3, 2025 is $14,365,000.

iii. Analysis

[92] The primary attack on the Respondents is their apparent lack of sales efforts during much of the time since obtaining judgment in 2009. During that period the Respondents listed the Property for sale only three times: for 90 days in 2009, for 90 days in 2015 and for 7 months between November 2021 and May 2022. There

were large gaps of no apparent sales efforts between 2009 -2015, 2015 – 2021, and 2022 – 2025. There was no for sale sign on the property but for a short time in 2009. The appraisals the Respondents received recommended marketing and exposure times of between 6 and 19 months. Only one of the three realtor listings met that timeline with a listing period of seven months between November 2021 and May 2022. In addition, the Respondents often listed the Property for sale at prices higher than those which their realtor had recommended.

[93] The Respondent's efforts potentially run afoul of several of the duties of mortgagees referred to in paragraph 63 above, namely to see that the property comes to the attention of a wide segment of the market; advertise the property for sale; place "For Sale" signs on the property; and to ensure that efforts are conducted over a reasonable period of time.

[94] This gives rise to a concern that a mortgagee who is accumulating interest of 14.875% over 16 years is not making a good faith effort to sell the property but is merely accumulating an extraordinary rate of interest that it could not achieve elsewhere, all as the court in *Genworth* noted, "to the detriment of the mortgagee."[43] Those are valid concerns which must be examined closely. They must also be tested in light of the provision in the *Rules* to the effect that a writ of possession remains alive for one year. This contrasts with a six-year life for a writ

[43] *Genworth Financial Mortgage v. Farooqi*, 2019 ONSC 4729, para 15..

of seizure and sale and suggests that the drafters of the *Rules* intended for powers of sale to be completed relatively quickly.

[95] After a careful review of the facts, I am satisfied that the Respondents have not let interest accrue “to the detriment of the debtor”.

[96] As of March 12, 2012, all the appraisals that the Defendants received valued the property at less than the amount of principal and interest owing on the mortgages.

[97] Almost all the offers the Respondents received were for less than the amount owing on the mortgages. The few exceptions to this do not appear to have been reliable offers.

[98] The offer of December 13, 2021 at $**[REDACTION]** when the amount outstanding on the second mortgage was just under $12,468,437 would have generated a small surplus. That offer, however, remained subject to a conditional period which allowed the purchaser to withdraw the offer at its sole discretion within 45 days after acceptance. When that offer was made, the property was listed for sale at $16,400,000. The Respondents counter offered at $14,850,000. That does not strike me as an unreasonable counteroffer and indicates a substantial willingness to bargain.

[99] Four of the offers of February and March of 2022 would also have resulted in a small surplus. All offers had conditional periods that allowed the purchaser to withdraw at its sole discretion. The Respondents engaged with one of the purchasers who withdrew during the conditional period.

[100] The Property appears to have major challenges. It is a large piece of land zoned for commercial and retail use surrounded by developments that already had the major candidates for that sort of usage as occupants. A letter in from Royal LePage sets out some of the challenges it encountered when trying to market the property. It approached several likely candidates for large box stores such as Costco, IKEA and Rona who were not already in the vicinity. It introduced the property to retail landlords and developers such as First Capital, Smart Centres, RioCan, Embee & Skyline REIT. It retained a commercial real estate marketing group to regularly distribute a marketing flyer to Royal LePage's curated database which reached 5000 recipients per issue. Royal LePage also noted that 90% of the prospective buyers were interested in zoning the property back to industrial use which was not acceptable to the City of Woodstock. This is particularly relevant when considering the offers of February and March 2022 which would have generated a small surplus. All had conditional periods allowing the purchaser to withdraw in its sole discretion.

[101] Royal LePage also considered the possibility of selling the property in smaller blocks. Given the property's configuration, that would create further difficulties for its development. The most accessible frontage is on a single street. Selling the property in small blocks means selling it in long narrow strips fronting on that street. Doing so would limit the type of development possible on the smaller plot and makes future sales more difficult.

[102] I am satisfied that in the circumstances of this case, the delay in enforcing a mortgage was not an effort by the Respondents to delay for the purpose of enjoying an increased return to the detriment of the Applicant. The Respondents had good reasons for not selling throughout the period. As noted, when the Respondents obtained judgment the economy was in the middle of the worst financial crisis since the depression of the nineteen thirties. The property had numerous challenges which made it difficult to sell at the best of times. Almost all the offers that the Respondents received for the property would have resulted in a shortfall on the mortgage(s). Even the few offers that would have generated a surplus allowed the purchaser to walk away for any reason during a conditional period after the offer been accepted in addition to containing other conditions. When the Respondents pursued those offers, the purchasers withdrew.

[103] I note that on the proposed sale, the Respondents continue to be exposed to serious financial risk. They have lost the entire value of the first mortgage for which they paid $3,239,186.49. The proposed sale continues to leave the Respondents with a significant deficit on the second mortgage. Moreover, the Respondents are not receiving the full purchase price on closing. A significant portion of the purchase price takes the form of a vendor takeback mortgage that the Respondents are extending to the purchaser. If history is any guide, a continued mortgage on the Property is a high risk proposition.

[104] Although it is easy for the applicants to criticize the Respondents' sales efforts, the record indicates that the Applicant continues to want to develop the Property. The

Applicant has been in possession of the property since 2009. That has given the Applicant the complete freedom to try to develop or sell the Property. It failed to or was unable to do so.

[105] I return to the fundamental test for the extension of a writ which requires the judgment creditor to satisfy the court that it has not waived its rights under the judgment or otherwise acquiesced in nonpayment of the judgment.[44] I am satisfied that the Respondents have met that test. Even when the Property was not listed for sale, the Respondents engaged with potential purchasers to try to negotiate agreements. The Applicant contests this and relies heavily on a text exchange in which the principal of Epireon told one potential purchaser on January 12, 2023 that he would advise the potential purchaser "if we decide to market the property for sale." The Applicant submits that this demonstrates that the Respondents were not interested in selling the property. I do not accept that characterization. The purchaser in question was potentially interested in acquiring only a little over two acres of the Property.

[106] In his affidavit, Scheltema said that he did not think the Respondents intended to engage power of sale proceedings or enforce the 2009 judgment because of the delay in doing so. Other paragraphs of his affidavit belie that suggestion. Scheltema also says in his affidavit that during the course of his proposal to creditors, the Respondents offered to buy Hermina. While the Respondents have

[44] *Adelaide Capital Corporation v 412259 Ontario Ltd*, 2006 CanLII 34725 (ON SC), para 13.

a different version of that conversation, it demonstrates that, even on Scheltema's view of things, the Respondents were making continued efforts to realize the on mortgage.

[107] In addition, the Applicant was discussing the potential sale of the property with Scheltema as late as 2023.[45]

[108] Having satisfied the court that the Respondents have not waived their rights under the judgment, the onus shifts to the Applicant to persuade the court that he has relied to his detriment or changed his financial position in reliance on reasonably perceived acquiescence resulting from the delay.[46]

[109] The Applicant says it relied on its understanding that the Respondents would not be pursuing the mortgage by paying taxes on the property since 2009. In my view, this does not amount to detrimental reliance. The Applicant paid those taxes even in the year the Respondents obtained judgment and in the years immediately thereafter before he could have formed any view about the Respondents not pursuing the judgment or the mortgage. Moreover, paying taxes is not a detriment to the Applicant because if taxes went unpaid, they would have resulted in a tax sale or would have been paid by the Respondents and added to the amount owing on the mortgage and then accumulated interest at 14.875% per year. Finally on

[45] Barrett Affidavit para. 84.
[46] *Adelaide Capital Corporation v 412259 Ontario Ltd*, 2006 CanLII 34725 (ON SC), para 13.

this point, the Applicant appears to have rented out the property to farmers and others to generate revenue for the tax payments.

[110] The Applicant suggests that the property is being sold at less than market value and has produced an appraisal which values the property at $25.4M as of January 15, 2025. The appraisal says it is prepared for the sole purpose of this court proceeding and cannot be used for any other purpose. It values the property at its highest and best use which it defines as commercial or industrial use. Those, however, are two different uses. The property is zoned for commercial. The evidence in the record suggests that most potential purchasers wanted to use it as an industrial property but that the City of Woodstock was not prepared to rezone to industrial usage. That makes the appraisal somewhat ambiguous

[111] As an alternative to denying enforcement entirely, the Applicant submits that the respondent should be permitted one year of interest and that the Applicant should then be given an additional 90 days after the order is issued to pay out the second mortgage with one year of interest. I do not find that to be a satisfactory solution. There is no doubt that the first and second mortgages were validly issued mortgages for full consideration. The Applicant had the option and the opportunity to pay out those mortgages at any time since January 2009. It did not do so because it did not have the means to. Both the Applicant and Scheltema were

insolvent as appears from the *Companies Creditors Arrangement Act*[47] application and the proposal to creditors.

[112] To limit interest on the second mortgage to one year and then give the Applicant an additional 90 days to pay after 16 years of nonpayment would set a dangerous precedent. It would discourage the timely payment of mortgages and encourage mortgagors to play tactical games with the comfort that the court will give them additional time after a court hearing to redeem the mortgage in the face of an agreement of purchase and sale.

[113] As a result of the foregoing I decline to impose any restrictions on the ability of the current offer to close on July 15, 2025.

[114] My findings and ruling here are without prejudice to the Applicant's ability to pursue a claim for improvident realization. This application was brought on urgently with limited court time. The analysis that I was required to conduct on this application differs from that involving allegations of improvident sale. While there is some overlap, the sort of evidence parties would lead and the test a court would apply remain different. At the same time, this paragraph is not intended to suggest that such a claim is warranted or advisable.

Conclusion and Costs

[47] *Companies' Creditors Arrangement Act,* RSC 1985, c C-36

[115] For the reasons set out above, I find that at any claim on or effort to enforce the first mortgage is statute barred and order that the first mortgage be discharged from title to the Property. I also declare that the Respondents are not entitled to charge management fees of $48,550 set out in the 2021 notice of sale. I otherwise dismiss the application and allow the sale scheduled for July 15, 2025 to proceed.

[116] Any party seeking costs arising out of these reasons will have three weeks to deliver written submissions. The responding party will have two weeks to deliver its answer with a further one week for reply.

Released: July 9, 2025

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Koehnen J.

CITATION: Hermina Developments Inc. v. Epireon Capital Limited et al.
2025 ONSC 4067
COURT FILE NO.: CV-25-00739955-0000
DATE: 20250709

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HERMINA DEVELOPMENTS INC

Applicant

– and –

EPIREON CAPITAL LIMITED AND PRO-M CAPITAL PARTNERS INC. (amalgamated with FORSGATE INC. previously known as FORSGATE FUNDING CORPORATION INC.)

Respondents

REASONS FOR JUDGMENT

Koehnen J.

Released: July 9, 2025