

In the Court of Appeal of Alberta

Citation: Urban v Enright West Ltd, 2026 ABCA 34

Date: 20260205
Docket: 2401-0217AC
Registry: Calgary

Between:

**Dominic Eugene Urban, also known as Dominic Urban
and Kelsi Bree Urban, also known as Kelsi Urban**

Appellants

- and -

**Enright West Ltd, Enright Monterra GP Ltd,
as general partner for and on behalf of Enright Monterra Limited Partnership**

Respondents

The Court:

**The Honourable Justice Michelle Crighton
The Honourable Justice April Grosse
The Honourable Justice Joshua B. Hawkes**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice E.J. Sidnell
Dated the 12th day of August, 2024
(2024 ABKB 490, Dockets: 2303 00075; 2301 03667)

and

Appeal from the Endorsement on Costs by
The Honourable Justice E.J. Sidnell
Dated the 23rd day of October, 2024
(Dockets: 2303 00075; 2301 03667)

Memorandum of Judgment

The Court:

I. Overview

[1] The appellants personally guaranteed a debt owed by a corporation. They granted the creditor a mortgage on their residence as security for the personal guarantees. Subsequent transactions resulted in other properties that stood as security for the corporation's debt being owned by an entity closely related to the creditor. The appellants relied on those circumstances to apply for a declaration that they were no longer bound by their personal guarantees or the guarantor mortgage. The application was dismissed: *Toronto-Dominion Bank v Lukus Developments Inc*, 2024 ABKB 490. For the reasons that follow, the appeal is also dismissed.

II. Factual and Procedural Context

[2] In April 2020, Lukus Development Inc, a corporation owned by the appellant Dominic Urban, purchased four undeveloped bareland condominium units in the MonTerra development in Rocky View County. The vendor was the respondent Enright Monterra GP Ltd, as general partner of Enright Monterra Limited Partnership (collectively, Enright Monterra). Lukus then transferred the units to another corporation owned by Dominic Urban, 2101705 Alberta Ltd. Lukus and 2101705 intended to build homes on the bareland units and sell them. Enright Monterra took a vendor's lien for part of the purchase price and registered the lien on title to the units.

[3] In October 2021, in exchange for financing from Jovica Property Management Ltd and 373624 Alberta Ltd (jointly referred to as Jovica and the debt referred to as the Jovica debt), 2101705 and Lukus granted various security in favour of Jovica, including a mortgage on three of the four bareland units (units 86, 154 and 166) (the Jovica mortgage). Eventually, the appellants Dominic Urban and Kelsi Urban personally guaranteed the Jovica debt, and they mortgaged their residence as security for their guarantees (the guarantor mortgage). Enright Monterra held an option to purchase Jovica's interest in the Jovica debt and related security, including the appellants' guarantees and the guarantor mortgage.

[4] 2101705 and Lukus defaulted on the Jovica debt. They also faced claims by end purchasers of the bareland units alleging that 2101705 or Lukus had misapplied the end purchasers' deposits and failed to meet building deadlines. Enright Monterra exercised its option to purchase the Jovica debt and take an assignment of Jovica's interest in the related security. Enright Monterra also obtained, with 2101705's and Lukus's consent, a receivership order in respect of the four bareland units held by 2101705. On March 31, 2023, Riley Farber Inc was appointed as receiver of the four units.

[5] In November 2023, in the context of the receivership, the Court of King's Bench approved the sale of two of the units (units 86 and 166) to Enright West Ltd (Enright West). Enright West and Enright Monterra are related entities; Enright West and Enright Monterra GP Ltd are both wholly owned by Enright Capital Ltd and they have the same directors.

[6] On January 2, 2024, the appellants applied for an order declaring that Enright West and Enright Monterra have no interest in the title to the appellants' residence and for an order directing the Registrar of Land Titles to remove the guarantor mortgage from title to the residence. They relied in a variety of ways on the sale of units 86 and 166 to Enright West to argue that they are no longer bound by the personal guarantees or the associated guarantor mortgage. The chambers judge dismissed the application: *Toronto-Dominion Bank v Lukus Developments Inc*, 2024 ABKB 490 (chambers decision).

III. Grounds of Appeal

[7] The appellants allege that the chambers judge erred by:

- (a) Finding that the Receiver was the Vendor under the asset purchase and sale agreements with Enright West for units 86 and 166, rather than Lukus and 2101705.
- (b) Allowing Enright West to benefit from one of the equitable exceptions to the application of section 58 of the *Land Titles Act*, RSA 2000, c L-4 when competing equities required the law to prevail.
- (c) Finding the asset purchase and sale agreements with Enright West for units 86 and 166 allowed Enright West to assume the Jovica mortgage and not the Jovica debt, despite the resulting unjust enrichment of Enright West and Enright Monterra to the detriment of the appellants and others.
- (d) Failing to consider and apply the principle of *contra proferentem* against Enright West and Enright Monterra.
- (e) Making two incompatible findings about the asset purchase and sale agreements with Enright West for units 86 and 166, namely, that the agreements evidenced a clear intention on behalf of the parties that Enright West would not take on the Jovica debt, yet also finding that Enright West and Enright Monterra had not expressly negated the implied covenants as required by section 59 of the *Land Titles Act* or as recommended by this Court in *Carnahan v Builders Capital 2019 Ltd*, 2023 ABCA 270.

- (f) Failing to treat the novations in the asset purchase and sale agreements with Enright West for units 86 and 166 as completed, when equity required the court to do so.
- (g) Failing to give effect to the successors and assigns clause in the Jovica mortgage despite it being a permitted encumbrance.
- (h) Failing to consider the irreconcilable conflicts of interest between Enright West and Enright Monterra, the impossibility of them acting in accordance with their good faith obligations and the oppressive nature of permitting Enright West and Enright Monterra to forgive themselves of the Jovica debt despite taking two thirds of the real properly security without consideration or offset.

[8] There is some overlap between the grounds of appeal as stated by the appellants. Further, we have determined that we need not address some of the grounds because others are determinative of this appeal. Therefore, the analysis below is framed to focus on the determinative points - waiver, contractual novation, the equities and indemnity.

IV. Analysis

a) Waiver

[9] The appellants argue that by way of a waiver provision in the asset purchase and sale agreements pursuant to which Enright West purchased units 86 and 166, both Enright West and Enright Monterra waived all right and remedies that they would otherwise have against the appellants, including all rights of Enright Monterra with respect to the personal guarantees and the guarantor mortgage. Section 5.2(c) of each asset purchase and sale agreement reads:

Except for its express rights under this Agreement, the Purchaser hereby waives all rights and remedies (whether now existing or hereinafter arising and including all equitable, common law, tort, contractual, and statutory rights and remedies) against the Vendors or any Vendor Entity in respect of the Property or the Transaction or any representations or statements made, direct or indirect, express or implied, or information or data furnished to the Purchaser or its Representatives, in connection herewith (whether made or furnished orally or by electronic, faxed, written, or any other means).

[10] The chambers judge dismissed the appellants' waiver argument: chambers decision at paras 60-66. First, she found that the appellants are not Vendors or Vendor Entities under the asset purchase and sale agreements so as to benefit from the waiver. Second, even if the appellants were Vendor Entities, neither of the signatories to the asset purchase and sale agreements (the Receiver and Enright West) had authority to waive the appellants' obligations to Enright Monterra under their personal guarantees or the associated guarantor mortgage.

[11] On appeal, the appellants allege that the chambers judge erred in her interpretation of the defined term Vendors in the asset purchase and sale agreements, both by reference to the agreements themselves and by misconstruing the role of a receiver in this context. The standard of review for issues of contractual interpretation is palpable and overriding error unless there is an extricable error of law: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-52; *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, 2024 SCC 20 at paras 27-28. An error with respect to the scope of the receivership could be an extricable legal error. However, we do not need to decide whether the chambers judge erred in determining that 2101705 and Lukus were not Vendors as that term is used in the asset purchase and sale agreements because her second conclusion is determinative of the waiver issue in any event. Enright West was the purchaser of units 86 and 166 and Enright West is the only Enright entity that is a party to the asset purchase and sale agreements. However, the appellants seek relief from their obligations to Enright Monterra. It was Enright Monterra, not Enright West, that took an assignment of Jovica's rights under the appellants' personal guarantees and the associated guarantor mortgage. Enright Monterra and Enright West are related entities but that, on its own, does not pierce the corporate veil and mean that a waiver by Enright West amounts to a waiver by Enright Monterra or to a waiver of rights held by Enright Monterra. The appellants have not identified any error in the finding of the chambers judge that the waiver provision did not waive the rights of Enright Monterra.

b) Contractual Novation

[12] In the asset purchase and sale agreements for units 86 and 166, the stated purchase price payable by Enright West includes: a) a cash payment (undisclosed amount) on account of the Receiver's charges allocable to units 86 and 166; b) assumption of the Jovica mortgage and Jovica caveat regarding assignment of rents and leases; and c) assumption of the Debtors' Lien Indebtedness. The Debtors' Lien Indebtedness is defined as collectively, all liabilities, obligations, and indebtedness of Lukus and 2101705 to Enright Monterra under or in connection with the vendor's lien caveat registered in favour of Enright Monterra and the caveat regarding a purchaser's interest registered in favour of Enright Monterra. The chambers judge seized on the distinction between the wording of the second and third elements of the purchase price, and on other aspects of the asset purchase and sale agreements, to conclude that Enright West assumed the Jovica mortgage and caveat in the sense of allowing them to remain registered on title to units 86 and 166 but did not assume the underlying Jovica debt (then held by Enright Monterra): chambers decision at paras 31, 40, 45.

[13] The appellants argue that the chambers judge erred in her conclusion that Enright West did not take on responsibility for the underlying Jovica debt owed by Lukus and 2101705 to Enright Monterra. The appellants raise interesting interpretive arguments in that regard. However, they acknowledge that to succeed in their appeal, they require this Court to go further and find that the asset purchase and sale agreements for units 86 and 166 not only added Enright West as a party liable for the Jovica debt, but also effected a novation by which the original Jovica debt agreement

and the liability of Lukus and 2101705 were extinguished, along with the associated personal guarantees and guarantor mortgage of the appellants. The result was a new contractual relationship between Enright West and Enright Monterra, with Enright West solely liable for what had been the Jovica debt. The chambers judge also rejected the novation argument: chambers decision at paras 86-91. Since, as explained below, we agree with the conclusion of the chambers judge that there was no novation, we need not decide whether Enright West assumed only the registration of the Jovica mortgage, the obligations of Lukus and 2101705 under the Jovica mortgage document or the full liability of Lukus and 2101705 for the underlying Jovica debt. Similarly, we do not need to address the appellants' argument that section 58 of the *Land Titles Act* implied a covenant into the asset purchase and sale agreements for units 86 and 166 that Enright West would pay the amounts owing under the Jovica mortgage and indemnify and hold harmless Lukus and 2101705 for any liability arising under the Jovica mortgage. Even if the chambers judge erred in finding that section 58 did not apply, section 58 would not operate on its own to release the appellants from their obligations under their personal guarantees or the guarantor mortgage.¹ They would still need the Court to find for them on novation.

[14] The chambers judge applied the three-part test adopted by the Supreme Court of Canada for determining whether a novation has occurred:

1. The new debtor must assume the complete liability;
2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

National Trust Co v Mead, [1990] 2 SCR 410 at 427, 1990 CanLII 73 (SCC).

She held that the appellants' novation argument failed on the first branch of the *Mead* test because, as set out above, she was not convinced that Enright West had assumed any liability for the underlying Jovica debt: chambers decision at para 90. The chambers judge went on to find that even if Enright West accepted responsibility for the Jovica debt, the other branches of the *Mead* test were not satisfied.

[15] The appellants do not challenge the legal test applied by the chambers judge. Rather, they argue that the asset purchase and sale agreements for units 86 and 166 expressly create a novation and that the chambers judge erred by not invoking the principle that equity will treat as completed

¹ In oral argument, counsel for the appellants noted that since the time of the application before the chambers judge, the appellants' focus has shifted from arguing based on section 58 of the *Land Titles Act* to arguing that the wording of the asset purchase and sale agreements themselves renders Enright West liable for the underlying Jovica debt.

that which ought to be completed, citing *Beckerman v Synthion Energy Inc*, 2015 ONSC 2891. The standard of review on the novation issue is palpable and overriding error. This is so whether it is treated as a question of contractual interpretation or as a finding of fact: *Sattva* at paras 50-52; *AMT Finance Inc v Saujani*, 2014 ABCA 385 at para 15; *Mead* at 428.

[16] The only language in the asset purchase and sale agreements for units 86 and 166 that refers to novation is in the definition of Conveyance Documents, which refers to “all conveyances, assignments, transfers, novations, notices of assignment, and declarations, subleases, directions to pay, and other documents and instruments that are reasonably required or desirable in accordance with generally accepted practice in the province where the Lands are located, to convey, assign, and transfer title to the Lands held in the name of the [*sic*] 2101075 to [Enright West] and to novate [Enright West] or its Affiliates in the place and stead of 2101075 or its Affiliates with respect to the Lands.” While the reference to “novation” in this definition is curious, we are satisfied that the asset purchase and sale agreements, read as a whole, do not create a novation. There is no other language in the asset purchase and sale agreements to suggest the parties intended a novation. Enright Monterra, the creditor under the Jovica debt and the appellants’ personal guarantees, is not a signatory to the asset purchase and sale agreements. The record does not include any other documents suggesting that Enright Monterra agreed to release 2101705, Lukus or the appellants from their liability with respect to the Jovica debt and treat Enright West as being solely liable for the Jovica debt. The reference to “novation” in the definition of Conveyance Documents may well be precedent or generic language; we note that the definition of Conveyance Documents also refers in a non-specific way to the “accepted practice in the province where the Lands are located”, even though it was always clear that the lands were located solely within Alberta.

[17] We see no reviewable error in the conclusion of the chambers judge that even if Enright West assumed complete liability for the Jovica debt by way of the asset purchase and sale agreements, the other branches of the *Mead* test are not satisfied and there was no novation. There is no room for application of the equitable maxim relied upon by the appellants.

c) The Equities

[18] In the course of their application and appeal, the appellants have made several arguments that all go to the same point: it was inequitable for the appellants to remain liable under their personal guarantees and the guarantor mortgage once Enright West purchased units 86 and 166, because of the relationship between Enright West and Enright Monterra.

[19] Before the chambers judge, the appellants focused on what they characterized as a fundamental change in their risk as guarantors resulting from the sale of units 86 and 166 to Enright West. The chambers judge rejected that argument: chambers decision at paras 92-98. Part of the reasoning of the chambers judge turned on her conclusion that Enright West did not assume any liability for the Jovica debt itself. However, she also found that even if Enright West had taken on such liability, the appellants had failed to demonstrate a material change in their risk. She noted

that prior to the sale to Enright West, 2101705 had defaulted on its obligations and Enright Monterra was in a position to enforce the guarantees and the guarantor mortgage. The chambers judge also found the appellants to have expressly agreed that their liability as guarantors would continue regardless of another person becoming or ceasing to be liable for the Jovica debt and that their obligations, as guarantors, could be altered.

[20] On appeal, the appellants allege no error in the chambers judge's interpretation of their obligations under the guarantee documents. In their factum, the appellants framed their equitable argument as one of unjust enrichment. They argued that the sale of units 86 and 166 to Enright West enriched the Enright entities collectively because the Enright entities took two out of the three properties that stood as security for the Jovica debt by way of the Jovica mortgage, without making any payment on the Jovica debt. This enrichment was to the detriment of the appellants because Enright Monterra continued to assert a right to enforce the personal guarantees and the guarantor mortgage to collect the Jovica debt. In oral argument, the appellants conceded that this Court is not in a position to assess whether an unjust enrichment occurred on the available record.

[21] The appellants also argue that this Court should find Enright Monterra and Enright West to be "self-dealing" because they have conflicting duties of good faith in contractual performance to each other. When asked in oral argument to elaborate on how any such conflict affects the appellants' obligations under their personal guarantees and the guarantor mortgage, counsel for the appellants responded that when the appellants gave the personal guarantees and the guarantor mortgage, they never could have imagined that both the debt they were guaranteeing and the "underlying assets" would be sold to, in effect, the same entity. The appellants argue that the asset purchase and sale agreements for units 86 and 166 result in Enright Monterra being able to forgive the Jovica mortgage vis à vis Enright West but then pursue recourse against the appellants.

[22] In essence, the appellants arguments about self-dealing and good faith come back to the argument about change of risk that was rejected by the chambers judge. The assessment of the chambers judge in terms of whether the appellants' risk changed, and her balancing of the equities, is entitled to deference. The appellants have not identified any reviewable error in her conclusion. The conclusion of the chambers judge is further supported by the fact that 2101705 was in a default position to Jovica before Kelsi Urban granted her personal guarantee and before the appellants granted the guarantor mortgage at all.

d) Indemnity

[23] The appellants argue that they are entitled to an indemnity from Enright West pursuant to the following provision in the asset purchase and sale agreements for units 86 and 166:

The Purchaser [Enright West] hereby indemnifies the Vendors and their respective Representatives, and saves them fully harmless against, and will reimburse or

compensate them for, any damages arising from, in connection with or related in any manner whatsoever to:

(a) the inaccuracy of its representations or warranties, or breach of its covenants in this Agreement;

[...]

(b) the Purchaser's failure to pay when due and perform and discharge the Assumed Liabilities in accordance with their terms.

[24] The chambers judge rejected the indemnity argument on several bases: chambers decision at paras 76-85. Again, we need not address all the appellants' arguments about the indemnity or all the reasoning of the chambers judge because two conclusions of the chambers judge, with which we agree, are determinative. Even if the appellants had the benefit of the above indemnity and even if it were interpreted to cover amounts paid by the appellants under their personal guarantees, the indemnity would not entitle the appellants to the relief they sought in the application heard by the chambers judge. The appellants sought an order declaring that Enright West and Enright Monterra have no interest in title to their residence and an order directing the Registrar of Land Titles to remove the guarantor mortgage from title to the residence. The indemnity in the agreements of purchase and sale for units 86 and 166 do not have the effect of releasing the appellants from their guarantees or from the guarantor mortgage. At best, they would require Enright West to reimburse the appellants if the appellants made payments on the Jovica debt, or to pay a judgment for damages rendered against the appellants on a matter contemplated by the indemnity clause. The appellants have not articulated any basis on which they could currently benefit from the indemnity on the record before this Court. We agree in substance with the conclusions of the chambers judge at paragraphs 82-84 of the chambers decision.

e) Contra Proferentum

[25] The appellants argue that to the extent the resolution of the above issues involves contractual interpretation of the asset purchase and sale agreements for units 86 and 166, the chambers judge erred by failing to apply the doctrine of *contra proferentem* against Enright West and Enright Monterra. It is questionable whether the appellants could rely on *contra proferentem* as non-parties to the agreements. In any event, the doctrine of *contra proferentem* only applies where there is an ambiguity that cannot be resolved using general interpretive principles: *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at paras 50-51. The appellants have identified no such ambiguity with respect to any interpretations determinative to the outcome of this appeal.

V. Costs

[26] The chambers judge found the appellants liable to Enright Monterra for reasonable solicitor and client costs. The appellants submit that the chambers judge erred in her costs award by erroneously faulting the appellants for failing to comply with the practice note relating to matters for the commercial list. The appellants raise a fair point that they were not necessarily responsible for the application ending up on the commercial list as it did. However, while the chambers judge referred to non-compliance with the practice note, she did so only in the alternative. Her primary reason for awarding solicitor and client costs was because Enright Monterra was entitled to them pursuant to the guarantor mortgage. The appellants have not identified any error in the reasoning of the chambers judge with respect to the contractual entitlement to solicitor and client costs.

VI. Disposition

[27] The appeal is dismissed.

Appeal heard on November 12, 2025

Memorandum filed at Calgary, Alberta
this 5th day of February, 2026

Authorized to sign for: Crighton J.A.

Grosse J.A.

Hawkes J.A.

Appearances:

R. J. Baker
for the Appellants

N. Stewart
for the Respondents