IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1264777 B.C. Ltd. v. Gill,*
2023 BCSC 131

Date: 20230130
Docket: S221670
Registry: Vancouver

Between:

1264777 B.C. Ltd. and Gurdev Kaur Gill

Petitioners

And

Surinder Kaur Gill, 0694813 B.C. Ltd., and Emi Herawati

Respondents

- and -

Docket: S242948
Registry: New Westminster

Between:

0694813 B.C. Ltd.

Petitioner

And

1264777 B.C. Ltd., Emi Herawati and Gurdev Kaur Gill

Respondents

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for 1264777 B.C. Ltd. and Gurdev Kaur Gill, Petitioners in Action No. S221670 and Respondents in Action No. S242948:	B.B. Olthuis N.P.R. Bond
Counsel for 0694813 B.C. Ltd., Respondent in Action No. S221670 and Petitioner in Action No. S242948:	R. Mittal S.L. Clarke J.L. Randall

No other appearances

Place and Date of Hearing:	Vancouver, B.C. December 6, 2022
Place and Date of Judgment:	Vancouver, B.C. January 30, 2023

Table of Contents

INTRODUCTION

[1] In this matter, there are two cross-petitions.

[2] The first is a standard foreclosure petition (the "Foreclosure Petition") in relation to a mortgage (the "First Mortgage") advanced by 1264777 B.C. Ltd. (the "Mortgagor") to 0694813 B.C. Ltd. (the "Mortgagee") over a property located at 74 West 12th Ave., Vancouver (the "Property"). The relief sought on the Foreclosure Petition includes an *order nisi* with a one-day redemption period.

[3] The second (the "Declaration Petition") seeks various forms of declaratory relief on behalf of the Mortgagor and its sole shareholder, Gurdev Kaur Gill ("Gurdev"). It seeks to set aside the First Mortgage and a second mortgage registered in the name of Emi Herawati (the "Second Mortgage").

[4] As many of the parties to this action bear the surname Gill, I will refer to them by their first names in these reasons, but I mean no disrespect by doing so.

[5] The First Mortgage is in the principal amount of $1,200,000 and was registered on October 16, 2020.

[6] The Second Mortgage is in the principal amount of $200,000 and was registered on December 11, 2020.

[7] The First Mortgage is in default, the term of the mortgage expired on May 16, 2021, and none of the monies secured have been paid.

[8] Emi Herawati is a respondent to the Declaration Petition. I understand that she was served with the Declaration Petition and supporting affidavits but delivered no responsive pleadings. During the course of the hearing, she appeared in the courtroom. A friend, who was permitted to speak for her on the basis of her language difficulties, advised the court that Ms. Herawati opposes the Foreclosure Petition and has an interest in the outcome, being a second mortgagee. She did not participate further in the hearing.

[9] I note that the Second Mortgage appears to be "out of the money" in the sense that the amount owing on the First Mortgage exceeds the equity in the Property. As a result, it appears unlikely that Ms. Herawati will be entitled to any relief against the Property regardless of whether I determine that the mortgages ought to be set aside or that the mortgages are valid and enforceable.

THE MORTGAGOR'S EVIDENCE

[10] The Mortgagor's position is that the First Mortgage was obtained by fraud, engineered by Tarsem Singh Gill ("Tarsem") and his spouse Surinder Kaur Gill ("Surinder"). Surinder is a respondent to the Declaration Petition and has been served, but has not appeared or responded.

[11] Gurdev and her husband Kuldip Gill ("Kuldip"), both of whom made affidavits in this proceeding, made the decision to purchase the Property after Tarsem asked Kuldip in September of 2020 whether his family would be interested in receiving an assignment of a purchase and sale agreement for the Property in the amount of $1,538,000.

[12] Tarsem is a "distant relative" of Gurdev and Kuldip. They knew him to be a property developer in and around the Greater Vancouver area and were aware that Tarsem had been accused of fraudulent activities in the past. They understood that the allegations against Tarsem had not been proven in the court, and Tarsem told them that he was committed to being entirely honest since those allegations had been made against him.

[13] Gurdev and Kuldip decided to accept an assignment of the purchase and sale agreement, and then Tarsem suggested that they complete the purchase through a corporate entity that he could incorporate for them.

[14] Gurdev accepted this offer, and the Mortgagor was incorporated on September 9, 2020. Through this process, it appears that Tarsem became aware of the private login details for the online profile by which the Mortgagor could make filings in the corporate registry.

[15] Gurdev was the sole director of the Mortgagor when it was incorporated and has always been its sole shareholder. On or about September 21, 2020, the Mortgagor completed the transaction for the purchase of the Property, paying the outstanding balance at closing in the amount of $1,500,000.

[16] It appears that at some point between September 21, 2020 and October 16, 2020, Tarsem or Surinder unlawfully accessed the Mortgagor's online portal to make changes to the corporate registry. Tarsem or Surinder proceeded to file a notice of change of directors so that the corporate registry listed Surinder as the sole director of the Mortgagor.

[17] Subsequently, apparently without Gurdev's knowledge or consent, Surinder fraudulently presented herself to representatives of the Mortgagee and Ms. Herawati as an authorized signatory of the Mortgagor. She caused the Mortgagor to enter into the two mortgages and an assignment of rents against title to the Property.

[18] On July 19, 2021, Gurdev's lawyer provided a title search to her showing that the two mortgages and an assignment of rents had been registered against title.

[19] Gurdev's lawyer also conducted a corporate records search for the Mortgagor which showed that as of May 17, 2021, Surinder was the sole listed director.

[20] Gurdev's son Harvinder called Tarsem and confronted him about the unauthorized activities. As a result of their conversation, Tarsem or Surinder filed documents with the corporate registry restoring Gurdev as the sole director of the Mortgagor.

[21] Gurdev deposes that she and her family did not receive and have never received any money associated with the First Mortgage or Second Mortgage, and that she is not familiar with the Mortgagee nor with Ms. Herawati.

THE MORTGAGEE'S EVIDENCE

[22] The Mortgagee's principal is Paramjit Singh Grewal. Mr. Grewal owned and operated a company called Surrey Tool and Farm Rental between 1996 and 2004.

He has known Tarsem since 1996. Tarsem was one of his regular customers and he understood that Tarsem was building a number of houses. As Mr. Grewal became more successful, he became a real estate developer and a private equity lender.

[23] Mr. Grewal deposes that his lending relationship with Tarsem and members of his family began in or around 2001. At that time, Mr. Grewal assigned an agreement on a property to one of Tarsem's companies for $200,000 and took out a second mortgage on the property to secure the amount. In or around 2004, he was paid by the trustee for Tarsem after he sold the property. At Tarsem's request he also made mortgage loans to Tarsem's children and to a company owned by one of those children. Between May 2008 and October 2020, Mr. Grewal made no further loans to Tarsem or his family.

[24] In early October 2020, Tarsem and Surinder contacted Mr. Grewal and asked him to borrow money to commence construction of a duplex on the Property, which Surinder said was owned by her numbered company.

[25] Surinder advised Mr. Grewal that as soon as the duplex was at lockup stage, she could get a bank mortgage and pay him out. She advised that she thought it would take about six months for the construction to reach that stage. ("Lock-up" is the stage of residential construction at which point the walls, windows, and doors are in place so that the structure may be secured.)

[26] Mr. Grewal deposes that he conducted due diligence, including checking the property's assessed value, prices of properties for sale in the area, speaking with architects and other builders in the area, and confirming that a duplex could be built on the Property. He agreed to lend Surinder $1,200,000 for the six-month period at a rate of 12% per annum.

[27] On October 16, 2020, an opinion letter was prepared for the Mortgagee by solicitors. The opinion letter states that the Mortgagor is a British Columbia company in good standing and that it has the corporate power to grant security. Further, the

opinion letter confirms that the identities of the authorized signatories of the Mortgagor were verified.

[28] Also, on October 16, 2020, the Mortgagee provided its lawyers with two bank drafts in the amount of the loan, less an interest reserve and lender's fee. The same day, the lawyers advanced the appropriate sum, being the net proceeds of the loan less legal fees, to the Mortgagor's notary by way of trust cheque.

[29] On May 16, 2021, the loan expired. Mr. Grewal deposes that in or around mid-May 2021, he called Surinder and Tarsem about getting paid. They told Mr. Grewal that they were working on it and that he would get his money.

[30] On November 9, 2021, counsel for the Mortgagee sent a demand letter to the Mortgagor for all monies due and owing. On February 24, 2022, the Mortgagee filed the Foreclosure Petition.

[31] Mr. Grewal deposes that prior to this proceeding, he had no personal knowledge of Gurdev or her involvement in the Mortgagor.

THRESHOLD QUESTION

[32] On these applications, there is a threshold question: whether this Court can decide this issue based solely on the affidavit evidence filed by the parties, or whether there is a triable issue that cannot be decided on those materials.

[33] Rule 22-1(7)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that on a hearing in chambers, the court may "order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding." Rule 21-7(5)(k) specifically allows for such an order in foreclosure proceedings.

[34] In the recent case of *Cepuran v. Carlton*, 2022 BCCA 76, the Court of Appeal of British Columbia clarified that where a triable issue is raised in a petition proceeding, a judge is not obliged to refer the matter to the trial list under R. 22-1(7),

but has a discretion to do so or to employ other pretrial procedures for the resolution of the issues:

> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

(See also *The Owners, Strata Plan NW 499 v. Louis*, 2022 BCCA 231 at paras. 40–42).

[35] The Mortgagor cited a decision pronounced prior to *Cepuran* in which this Court has suggested that the threshold for converting a foreclosure petition into a trial ought to be a low one. In *Griffin v. 0904713 B.C. Ltd.*, 2013 BCSC 273, Justice Fitzpatrick held:

> [33] This test has been described in slightly different terms in the context of foreclosure proceedings, by stating that an order *nisi* will not be granted in summary chambers proceedings unless it is "manifestly clear" that there is no *bona fide* triable issue as to the entitlement to the remedy the petitioner seeks: *HGE Administrative Services Ltd. v. Perrick*, 2011 BCCA 308 at paras. 17-18; *Firstar Investment v. Ridgewood Development*, 2003 BCCA 660 at para. 2.

[36] On the other hand, the Court in *Cepuran* remarked that in those matters which are properly advanced by petition, the starting point is that a summary procedure ought to be appropriate:

> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29–30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

[37] For the purposes of R. 22-1(7), a triable issue is an issue of fact or law that is not bound to fail: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 80.

[38] In order to raise a triable issue, a party must do more than make bare assertions in response to the claims advanced by the other. In *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1494, this Court held:

> [30] A party will not succeed in responding to such an application by simply relying on bald assertions. He must "put [his] best foot forward" with respect to the existence of material issues to be tried: *McLean* at paras. 36-38. See also *Trowbridge v. Connelly*, 2017 BCSC 2336 at para. 5; *Richter v. Stoeckli Stucco Ltd.*, 2016 BCSC 1294 at para. 11.

ANALYSIS

[39] It is the task of this Court to determine first whether each issue can be determined on the materials before the Court, such that one party or the other is bound to fail. In the event that there are triable issues, the next question is whether the petitions need to be referred to the trial list or whether the triable issues can be determined by a hybrid process within the petition proceeding as described in *Cepuran.*

Sections 25 and 26 of the *Land Title Act*

[40] The Mortgagor argues that a fraudulent mortgage is void. In this respect, it cites ss. 25.1(1) and 26(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, which provide as follows:

> **Void instruments — interest acquired or not acquired**
>
> **25.1** (1) Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.
>
> …
>
> **Registration of a charge**
>
> **26** …
>
> (2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

[41] The Mortgagor relies on the decision of the Court of Appeal of British Columbia in *Gill v. Bucholtz*, 2009 BCCA 137. In *Gill*, Amritpal Gill was the registered

owner of the subject property. In November 2005, a fraudster forged his signature on a transfer of the property to Gurjeet Gill, who was working in concert with the fraudster. Gurjeet Gill then purported to grant mortgages to the defendants Mr. and Mrs. Bucholtz, who in reliance on the register advanced approximately $40,000 to Gurjeet Gill, and to a corporate defendant who advanced $55,000. The Court held:

> [26] Returning to the case at bar, it seems to me that the chambers judge's conclusion that the Act gives any registered owner - even a fraudster - an "indefeasible right to deal with the property" rests on a misapprehension of s. 23(2)(i) and fails to give effect to the Act as it now reads. The chambers judge himself recognized that a registered charge does not obtain the same quality of indefeasibility as the registered fee simple, but he failed to apply this principle. On its plain meaning, the exception in s. 23(2)(i) to the indefeasibility of title applies and the phrase "void instrument" in s. 25.1(1) includes a mortgage taken from a person who obtained her title by fraud or forgery, as occurred in this case. The Act preserves the *nemo dat* rule with respect to charges - even where the holder has relied on the register and dealt *bona fide* with a non-fictitious registered owner. The mortgagees in this case did not acquire any estate or interest in Lot 4 on registration of their instruments because having been granted by a person who had no interest to give, those instruments were void, both at common law and under s. 25.1(1).
> …

[42] It is my view that *Gill* and ss. 25–26 of the *Land Title Act* are inapplicable to the case at bar because they are concerned with title to land.

[43] The fraudster in *Gill* forged his signature on a transfer of the property to Gurjeet Gill, who then purported to grant a mortgage to the mortgagees.

[44] In the passage above, the Court states that a "void instrument" in s. 25.1(1) includes a mortgage taken from a person who obtained her title by fraud or forgery [emphasis added], meaning title to the land. When the Court of Appeal states that “the Act preserves the *nemo dat* rule with respect to charges - even where the holder has relied on the register and dealt *bona fide* with a non-fictitious registered owner” [emphasis added], it is clearly referring in this context to the land registry and an owner whose name appears in that registry.

[45] In the present case, there is no question about who owned the Property: it was owned by the Mortgagor. Rather, the issue was the identity of the director of the Mortgagor. The *Land Title Act* has nothing to say about that issue. That issue is dealt with in s. 146(1)(b) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[46] The Mortgagor also relies on the decisions in *Bentley v. Hooton*, 2018 ABQB 109, aff'd 2019 ABQB 231, and *Homewood Mortgage Investments Ltd. v. Lee*, 2008 BCSC 512 [*Homewood*].

[47] In *Bentley*, a mortgage was obtained by use of a forged signature on a power of attorney. The forged power of attorney was employed by the husband to sign a mortgage on behalf of his wife. The Court reviewed the arguments advanced by the parties under the Alberta *Land Titles Act*, R.S.A. 2000, c. L-4, and concluded at para. 42 that "none of [its] provisions specifically speak to the circumstance where a mortgage was given by fraud as against the interest of the existing innocent owner". In that context, the Court based its decision on the common law principle that a mortgage having been obtained by fraud is a nullity. However, no reference was made in the decision to the indoor management rule, which is described below. *Bentley* is distinguishable from the present case for that reason.

[48] In *Homewood,* the mortgage itself was forged. As in *Bentley*, there was no issue of the identity of directors and no reference to the indoor management rule. For that reason, *Homewood* is also distinguishable from the present case.

[49] As a result of the foregoing, no triable issue arises in respect of the Mortgagor's arguments that a fraudulent mortgage is void. It is my view that those arguments are bound to fail.

The Indoor Management Rule

[50] The Mortgagee relies on the indoor management rule which is codified in s. 146 of the *BCA*. That section provides as follows:

> **146** (1) Subject to subsection (2), a company, a guarantor of an obligation of a company or a person claiming through a company may not assert against a

> person dealing with the company, or dealing with any person who has acquired rights from the company, that
>
> (a) the company's memorandum or notice of articles, as the case may be, or articles have not been complied with,
>
> (b) the individuals who are shown as directors in the corporate register are not the directors of the company,
>
> (c) a person held out by the company as a director, officer or agent
>
> (i) is not, in fact, a director, officer or agent of the company, as the case may be, or
>
> (ii) has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,
>
> (d) a record issued by any director, officer or agent of the company with actual or usual authority to issue the record is not valid or genuine, or
>
> (e) a record kept by or for the company under section 42 is not accurate or complete.
>
> (2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

Does s. 146(1) of the BCA apply?

[51] At the time the First Mortgage was made, the register of directors stated that Surinder was the Mortgagor's director. Therefore, s. 146(1)(b) is applicable and supports the Mortgagee's position. Subject to the constructive knowledge exception in s. 146(2), it precludes the Mortgagor from asserting against the Mortgagee that Surinder was not its director at the time the First Mortgage was granted.

[52] The Mortgagee also relies on s. 146(1)(c) of the *BCA*. I do not agree that sub-section (c) applies, as there is no evidence before me that Surinder was held out by the company as a director.

[53] On this issue, the Mortgagee argues that the loan agreement between the parties was signed by Surinder on behalf of the Mortgagor in the presence of a notary public. A certificate was signed by the notary public attaching a copy of the register of directors showing Surinder to be the director together with the certificates of incorporation, notice of articles, and central securities register. It certifies that the

attachments remained in full force and effect as of October 16, 2020. However, the fact that a notary public signed documents stating that Surinder was a director, in circumstances wherein the notary public appears to have been retained and directed by Surinder, does not assist the Mortgagee on this issue.

[54] On the issue of the applicability of s. 146(1), the Mortgagor cites *Lee v. Kassam,* 2020 ABQB 608, a Master's decision from the Court of Queen's Bench of Alberta. That case deals with s. 19 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, which states in part:

> 19 A corporation, a guarantor of an obligation of the corporation or a person claiming through the corporation may not assert against a person dealing with the corporation or dealing with any person who has acquired rights from the corporation
>
> (a) that the articles, bylaws or any unanimous shareholder agreement have not been complied with,
>
> (b) that the persons named in the most recent notice filed by the Registrar under section 106 or 113 are not the directors of the corporation,
>
> …

[55] In *Lee*, at para. 13, the Court found that the notice referred to in s. 19(b) was not filed by the Registrar and so the section was inapplicable for that reason in the circumstances of that case. As no similar notice requirement exists in the case at bar, *Lee* is distinguishable from the case at bar.

The constructive knowledge exception in s. 146(2) of the BCA

[56] There is no evidence that, and at the hearing of the petitions the Mortgagor did not take the position that, the Mortgagee had actual knowledge that Surinder was not a lawful director.

[57] Rather, the Mortgagor takes the position that the Mortgagee is not entitled to rely upon s. 146(1)(b) because of the constructive knowledge exception in s. 146(2). If the Mortgagee had the constructive knowledge set out in that subsection, the First Mortgage will be set aside. If it did not, the Mortgagee was entitled to rely on the indoor management rule and the First Mortgage will be valid and enforceable.

[58] The grounds for the Mortgagor's argument that the constructive knowledge exception in s. 146(2) applies are set out in the Mortgagor's Response to the Foreclosure Petition at para. 12. The Mortgagor asserts that the Mortgagee knew or ought to have known that the charges arose as a result of fraud. It submits:

> 12 The Charges have characteristics and terms that are suspicious and indicative of fraud. The Property was purchased free and clear; there were no prior mortgages on title. The Property is worth indisputably more than the alleged principal loan secured by [the First Mortgage]. If [the Mortgagor] had needed capital, it could have readily obtained a standard mortgage from an institutional lender, on terms that would have been drastically more advantageous. *Inter alia*:
>
> a. The interest rate prescribed under [the First Mortgage] is substantially higher than market (24% per annum, compounding);
>
> b. The short, seven-month term of [the First Mortgage] is suspicious, aggravated by the further clause specifying that [the First Mortgage] could not be paid down for six months until $72,000 in total interest is due and payable;
>
> c. The above suspicious characteristics are exacerbated by other absurd and one-sided mortgage terms, including:
>
> i. a $24,000 "lender fee"; and
>
> ii. that the mortgagor would pay the mortgagee $500 for each demand letter the mortgagee "deem[s] it necessary to forward".

[59] In my view, the Mortgagor's position on the constructive knowledge exception is bound to fail because its allegations, even if true, do not bring it within the words of s. 146(2). Subsection (2) states that subsection (1) does not apply in respect of a person who "by virtue of the person's relationship to the company, ought to have knowledge of a situation described in paragraphs (a) to (e) of that subsection".

[60] Paragraphs (a) to (e) specifically deal with compliance with a company's memorandum or notice of articles, the authority of directors, officers or agents, and the records issued by directors, officers or agents, or kept by the company – not with circumstances that might lead one to suspect fraud.

[61] In the other words, the question under s. 146(2) is not whether the Mortgagee ought to have known, in general terms, that there were suspicious circumstances.

The question in this case is whether the Mortgagee knew, or ought to have known by virtue of the person's relationship to the company, that

> **146**(1) …
>
> (b) the individuals who are shown as directors in the corporate register are not the directors of the company, …

[62] There is no evidence that Mr. Grewal had any relationship to the company – that is, the Mortgagor. Therefore, there is no basis for asserting that he ought to have known that Surinder was not the company's director by virtue of Mr. Grewal's relationship to the Mortgagor.

[63] In any event, the allegations set out above which form the basis of the Mortgagor's argument under s. 146(2) are not supported by the evidence.

[64] In particular, there is no evidence regarding whether the Mortgagor "could have readily obtained a standard mortgage from an institutional lender, on terms that would have been drastically more advantageous". I observe that the loan amount of $1,200,000 was more than 78% of the purchase price. Mr. Grewal deposed that Surinder asked him to increase the loan amount to $1.4 million, which he refused.

[65] Regarding the short-term nature of the loan at 12% interest, Mr. Grewal deposed that he was told by Surinder that "as soon as the duplex was at the lock-up stage, she could get a bank mortgage and pay me out."

[66] There is no evidence before this Court that the other financial terms of the loan agreement were "absurd", "one-sided" or higher than market in the context of a six-month loan from a private lender at 78% of the purchase price.

[67] The Mortgagee also argued that suspicions ought to have been raised by the Mortgagor based on the facts that the company was incorporated by Gurdev on September 9, 2020, that she was the sole director at the outset, and that the directorship was changed to Surinder approximately five weeks later. However, I do not agree that these submissions are sufficient to raise a triable issue that

Mr. Grewal or the Mortgagee fall within the constructive knowledge exception in s. 146(2).

[68] Finally, there was some suggestion during the course of the hearing that the Mortgagee's solicitors ought to have known about Surinder's conduct. However, even if there were any evidence to that effect, this suggestion was dealt with in *Smith v. 0878841 B.C. Ltd.*, 2013 BCSC 775, wherein the Court held:

> [25] ... 087 says that Mr. Cairns [the solicitor] ought to have known that Mr. Henderson had no authority and that Mr. Cairns' constructive knowledge of that defect must be imputed to Mr. Smith because Mr. Cairns was acting as Ms. Smith's lawyer and agent for the purposes of the transaction. Thus, according to 087, what Mr. Cairns ought to have known becomes what was actually known to Mr. Smith.
>
> [26] 087 cited numerous cases in support of the proposition that the knowledge of an agent may be imputed to his principal and that the knowledge of a lawyer may be imputed to his client. These decisions are all no doubt correct. These cases do not, however, assist 087.
>
> [27] The fatal flaw in 087's position is this: the knowledge that can be imputed to a principal is limited to the quality and degree of knowledge that is held by the principal's agent. Constructive knowledge of the agent can, by imputation, become no more than constructive knowledge of the principal. Imputation from agent to principal cannot magically transform the agent's constructive knowledge - i.e.: what he ought to have known - into the principal's actual subjective knowledge.
>
> [28] It follows from this proposition that if Mr. Cairns ought to have known that Mr. Henderson lacked authority to bind the company and if Mr. Cairns' knowledge is imputed to Mr. Smith, then Mr. Smith ought to have known that as well. In that scenario Mr. Smith cannot be said to have actual knowledge, and so the "knowledge" exception of s. 146(2) cannot apply. Further, in that scenario Mr. Smith came into constructive knowledge by virtue of his relationship with Mr. Cairns and not by virtue of his relationship with 087, and so the "ought to have known" exception of s. 146(2) cannot apply either.

[69] For the foregoing reasons, I find that the Mortgagor's case in respect of the constructive knowledge exception in s. 146(2) is bound to fail. The Mortgagee is entitled to the protection of the indoor management rule codified in s. 146(1).

SPECIAL COSTS

[70] The Mortgagee claims special costs of this proceeding on the basis that the Mortgagor has made and maintained allegations of fraud without foundation.

[71] It is my view that Gurdev and Kuldip had reasonable grounds to allege that the First Mortgage was fraudulent: in particular, in its pleadings, the Mortgagor repeatedly alleges that Surinder behaved fraudulently.

[72] However, I do not read the Declaration Petition or the Response to the Foreclosure Petition to contain allegations of fraud against Mr. Grewal. Rather, the Mortgagor took the position that the Mortgagee knew or ought to have known that the First Mortgage arose as a result of fraud, because “the Charges have characteristics and terms that are suspicious and indicative of fraud”.

[73] In these circumstances, I decline to award special costs.

ORDERS

[74] In conclusion, I find that the Mortgagor has not raised a triable issue or defence in relation to the First Mortgage.

[75] As a result of the foregoing, I grant the foreclosure orders (A), (B), (D), (F), (G), and (H) set out at Part 1 of the Foreclosure Petition, as modified by the updated statement of relief sought filed November 25, 2022.

[76] I order that the redemption period be set for 30 days from the date of these reasons. Although the loan balance appears to exceed the equity in the Property, I am not aware of all of the facts that may be relevant to the determination of a longer redemption period and this Order is intended to provide the Mortgagor with an opportunity to seek an extension if one is warranted. I will not be seized of that application, in the event that the Mortgagor seeks to advance it.

[77] The applications for the orders sought at paras. 1–4 of Part 1 of the Declaration Petition are dismissed.

[78] I decline at this time to address the applications for the orders set out at paras. 5–6 of Part 1 of the Declaration Petition, which deal with the Second Mortgage advanced by Emi Herawati. As stated above, it appears that there will be no equity in the property after the Mortgagee’s realization on the First Mortgage in

any event, but if any party to the Declaration Petition wishes to seek any further relief concerning those orders, they have liberty to apply to me.

[79] Costs of the petitions shall be payable at scale B by the respondents to the petitioner in the Foreclosure Proceeding, and by the petitioners to the Mortgagee in the Declaration Proceeding.

"Loo J."