

COURT OF APPEAL FOR ONTARIO

CITATION: Peedham v. 1000516033 Ontario Ltd., 2025 ONCA 109

DATE: 20250218

DOCKET: COA-24-CV-0232

Rouleau, Roberts and Favreau JJ.A.

BETWEEN

Sri Sabari Peedham, Mithili Murugesu, and Sivasubramaniam Ganesham

Applicants (Respondents)

and

1000516033 Ontario Ltd.

Respondent (Appellant)

Samir Chhina, for the appellant

Arlindo Aragao, for the respondents

Heard: October 29, 2024

On appeal from the order of Justice Michael T. Doi of the Superior Court of Justice, dated February 15, 2024.

Favreau J.A.:

A. INTRODUCTION

[1] The appellant, 1000516033 Ontario Ltd. (“100”), appeals an order granting the respondents the right to exercise an option to purchase a commercial unit under terms set out in a lease agreement and to continue occupying the unit until the purchase is completed.

[2] As set out below, I would allow the appeal. The appellant was a subsequent purchaser. The option to purchase was not registered on title. There was no evidence regarding whether the appellant was aware of the option to purchase at the time it bought the property, or whether its purchase of the property was an arm's length transaction. In the absence of evidence on these issues, there was an insufficient evidentiary record for enforcing the option to purchase against a subsequent purchaser. I would remit the matter back to the court below to be decided on a proper evidentiary record.

B. BACKGROUND

(1) The tenancy and option to purchase

[3] The option to purchase involves a rental property used as a Hindu temple.

[4] The Canada Sri Sabari Peedam Hindu temple (the "Temple") is located at 470 Chrysler Drive in Brampton, Ontario. The individual respondents are devotees who assist with the administration of the Temple and support the broader religious institution. The Temple operates out of two adjacent commercial condominium units. Each unit is approximately 1,300 square feet.

[5] The first is Unit #10, which the Temple has occupied since 2010. Unit #10 is owned by a Temple member who is the brother of one of the individual respondents. The tenancy of Unit #10 is not at issue in these proceedings. After

the Temple started occupying Unit #10, the number of worshippers grew and more space was required.

[6] In 2014, the Temple started renting a second unit, Unit #9. The Temple did renovation work on both units, including taking down the separating wall and removing the washroom in Unit #9 to create more activity space. The owners of both units were aware of the renovations.

[7] Initially, the principal of the corporation that owned Unit #9 was a Hindu adherent who supported the Temple's activities. There was no formal lease between the owner of Unit #9 and the respondents. The rent was \$3,000 per month, which the respondents understood exceeded the owner's interest payments for the mortgage on Unit #9 and served to reduce the principal owing on the mortgage. The parties to the tenancy discussed the tenants (the respondents) eventually buying Unit #9 from its owner.

[8] Around January 2016, Unit #9 was subject to power of sale proceedings. At that time, Tony Fernandes became the mortgagee in possession. Mr. Fernandes asked the respondents to enter into a formal lease agreement. The respondents advised Mr. Fernandes that they were interested in eventually buying Unit #9.

[9] On February 14, 2017, Mr. Fernandes and the respondents entered into a written lease. The lease had an initial term of six months. The lease also included

an option to purchase Unit #9 for \$350,000 at any time during the tenancy, including during any extension of the lease:

The Tenant/Buyer, as part of the consideration herein, is hereby granted the exclusive right, option and privilege of purchasing property for a purchase price of \$350,000.00 at any time during the term of this Lease or any extension thereof. The Tenant/Buyer shall notify the Landlord/Seller in writing of the exercise of this option at least ten (10) days prior to the expiration of the initial term of Lease or the expiration of any extension thereof or upon written notice from the Landlord that they plan to sell premises.

[10] Sometime later in 2017, the respondents tried to exercise their option to buy Unit #9, but the closing did not occur because they had insufficient funds.

[11] In October 2018, Mr. Fernandes assigned the charge under power of sale to 11037315 Canada Inc. ("110"), which then became the mortgagee in possession of Unit #9. 110 increased the monthly rent to \$3,600 per month and the respondents paid the rent from July 2019 to June 15, 2023.

[12] On June 27, 2023, 110 transferred its interest in Unit #9 to the appellant, 100, by power of sale. The sale price was \$750,000, and the transfer is registered on title. At that time, 110 did not give the respondents notice of the sale. There is no evidence in the record regarding whether the appellant was aware of the respondents' lease or of its terms, including the option to purchase. There is also no evidence in the record regarding whether the sale from 110 to 100 was an arm's length transaction.

[13] Starting in mid-July 2023, the appellant took steps to terminate the tenancy. In his reasons, the motion judge reviewed in detail the parties' conduct in relation to the appellant's efforts to terminate the tenancy and evict the Temple from Unit #9. For the purpose of addressing the issues on appeal, it is not necessary to review this history. I refer to it as necessary in the analysis below.

(2) Procedural history

[14] In response to the appellant's efforts to terminate the tenancy and evict the Temple, including a notice requiring that Unit #9 be vacated by November 14, 2023, the respondents brought an urgent motion to stay the eviction on October 30, 2023.

[15] In an endorsement dated November 3, 2023, Trimble J. adjourned the motion to December 4, 2023. Amongst the terms of the adjournment, Trimble J. directed that the appellant was not to interfere with the tenancy, the eviction was stayed, the Temple was to continue paying rent and the Temple was to deliver an offer to purchase Unit #9 by November 29, 2023.

[16] On November 28, 2023, the respondents sought to exercise their option under the lease and served an offer to purchase Unit #9 for \$350,000 on the appellant. The appellant did not accept this offer.

[17] The respondents' motion then proceeded before Kumaranayake J. on December 4 and 8, 2023. On December 8, 2023, she granted a consent order,

which provided that the lease would be terminated on February 15, 2024, but that the Temple could remain in Unit #9 until that date. The order also dealt with the respondents' obligations to pay rent pending the termination. Finally, the order included the following term permitting the respondents to make an offer to purchase the property at fair market value:

The Tenants (Applicants) shall be entitled to make an additional offer to purchase at fair market value, to be determined by a professional appraisal.

[18] Following this consent order, the respondents never made an offer to purchase Unit #9 at fair market value. Instead, they brought a motion for an order allowing them to exercise the option to purchase Unit #9 for \$350,000 contained in the lease.

(3) The motion judge's decision

[19] The only issue before the motion judge was whether the respondents were entitled to exercise their option to purchase the property under the lease. The motion judge granted the motion and made an order for specific performance, directing the appellant to sell the property to the respondents for a purchase price of \$350,000.

[20] In reaching the conclusion that the respondents were entitled to exercise the option to purchase, the motion judge found that nothing in the lease suggested that the option to purchase was to come to an end at any point during the tenancy.

The option to purchase therefore persisted even after the tenancy continued on a month-to-month basis.

[21] The motion judge stated that the transfer of Unit #9 from 110 to the appellant should not prejudice the respondents' ability to exercise their option to purchase in part because the respondents "received no prior notice of this sale as required by the option clause under the Lease which removed an opportunity for them to exercise the option before the property was assigned to the [appellant]".

[22] The motion judge further held that "no unfairness" would arise from the respondents exercising the option to purchase. This was clearly anticipated in the lease and the "monthly rent payments exceeded the interest payable under the mortgage and would pay down the principal over time to a figure well below the \$350,000.00 purchase price under the option." On this basis, the motion judge stated that he was "satisfied that the option price was commercially reasonable and made good business sense".

[23] In addition, the motion judge held that the option to purchase amounted to an equitable interest in land, and the respondents were not precluded from exercising their option within the 21-year perpetuity period.

[24] The motion judge rejected an argument made by the appellant that the respondents were out of time to exercise their option to purchase, which was based on correspondence dated July 25, 2023 from the appellant to the

respondents, advising of its intention to sell Unit #9. The motion judge held that the letter was subject to settlement privilege because it was sent “without prejudice”. The motion judge held that, in any event, the option to purchase could be exercised at any time and would therefore not expire following notice of a potential sale.

[25] On the basis of these findings, the motion judge concluded that the respondents’ option to purchase had not expired. He further concluded that this was an appropriate case for specific performance because of the property’s unique features, namely those achieved by putting “substantial funds” toward the renovations for the Temple, and because the respondents were already occupying Unit #9.

[26] Finally, the motion judge held that the respondents had strictly complied with the terms of the lease such that the option could be enforced, but, even if they had not, this was an appropriate case to grant relief from forfeiture. In this context, the motion judge stated that the equities favored the respondents and that, if the appellant was not aware of the option to purchase, it may have recourse against other parties:

On balance, I find that the Applicants have not engaged in any inappropriate conduct, notwithstanding the Respondent’s various complaints. As noted earlier, parties to a contract have an obligation of good faith to honestly conclude a bargain honestly made, and a reluctant vendor cannot renege by relying on minor technical breaches: *McLaughlin* at para 49. I accept that the Lease was prepared by a former mortgagee in

possession who included the option to purchase knowing that its mortgage would be paid down monthly leaving its principal well below the \$350,000.00 purchase price by the time the option was exercised. Although the Respondent notes that Unit #9 now has significant encumbrances on title, I accept that the Applicants honestly entered into the Lease on commercially reasonable terms. To the extent that the Respondent may not have been aware of the option to purchase due to a lack of proper disclosure in the power of sale proceedings, it may have recourse against other parties. In any event, and regardless of any improvidence to the Respondent from its acquisition of the property, I conclude that it would be unconscionable on the facts of this case for the Applicants to lose their clear option to purchase the property under the Lease. [Emphasis added.]

C. ISSUES AND ANALYSIS

[27] The appellant makes two arguments on appeal:

- a. the motion judge erred in failing to find that the option to purchase for \$350,000 was superseded by the consent order permitting the respondents to make an offer to purchase Unit #9 at fair market value; and
- b. the motion judge erred in finding that the option to purchase was valid and enforceable against the appellant given that the option to purchase was not registered on title, and that there is otherwise no evidence that the appellant was aware of the option to purchase when it bought Unit #9.

Issue 1: The motion judge did not err in failing to find that the option to purchase in the lease was superseded by the December 8, 2023 consent order

[28] As reviewed above, on December 8, 2023, Kumaranayake J. granted a consent order that included a term stating that the respondents “shall be entitled to make an additional offer to purchase at fair market value, to be determined by a professional appraisal.” The appellant argues that this provision reflected an agreement between the parties that the option to purchase Unit #9 for \$350,000 in the lease was no longer operative and was superseded by a right to make an offer to purchase the property at fair market value. There is no merit to this argument.

[29] First, this is a new argument that was not made before the motion judge. The general rule is that an appellate court will not entertain entirely new arguments on appeal. The rationale for this rule is that it is unfair to raise a new argument on appeal in circumstances in which evidence might have been led before the court below if it had been known that the matter would be an issue on appeal: *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18; *York Condominium Corporation No. 221 v. Mazur*, 2024 ONCA 5, at para. 12. In this case, there is no evidence regarding the surrounding circumstances under which the pertinent clause of the consent order was included in the consent order.

[30] Second, even if this argument had been properly made before this court, the appellant's interpretation of the December 8, 2023 consent order is not supported by the language of the order. The consent order does not state that the option to purchase is no longer operative. The relevant provision in the consent order simply states that the respondents are entitled to make an additional offer to purchase at fair market value; it does not say that the appellant would be required to accept such an offer. In the absence of any clear language stating that this provision was meant to supersede the option to purchase in the lease and without any further evidence regarding the surrounding circumstances under which this provision was negotiated, there is no basis for finding that this provision was meant to supersede the option to purchase for \$350,000 in the lease.

Issue 2: The motion judge erred in finding that the option to purchase was enforceable on the record before the court

[31] The appellant submits that it would be inequitable to require it to sell Unit #9 to the respondents for \$350,000 since it purchased the unit for \$750,000. The appellant further submits that the motion judge erred in finding that the option to purchase could be enforced against it, given that the option to purchase was not registered on title pursuant to the *Land Titles Act*, R.S.O. 1990, c. L.5. I agree that the motion judge erred in his analysis of this issue. Specifically, he erred in failing to consider whether the respondents were entitled to exercise the option to

purchase given that the appellant was a subsequent purchaser and the option to purchase was not registered on title.

[32] In fairness to the motion judge, it appears that this argument was not explicitly raised before him. However, the issue of the parties' respective property interests in Unit #9 was squarely at the centre of their dispute. The motion judge even made a finding, as referred to above, that the option to purchase was an equitable interest in the land. It was therefore evident that the parties had competing property interests in a property that the appellant had acquired through power of sale proceedings, and it was therefore necessary to ascertain, based on the applicable statutory provisions in the *Land Titles Act* and the *Mortgages Act*, R.S.O. 1990, c. M.40, and the common law, which of the parties' interest in the land took precedence.

[33] The fundamental question in this case was whether the option to purchase should be enforced against a subsequent purchaser of the property. The respondents' position is that they bargained for the option to purchase in the lease and were not given notice of the sale to the appellant; they should therefore be allowed to exercise the purchase option regardless of the transfer to the appellant. The appellant's position is that the option to purchase was not registered on title and therefore cannot be exercised to invalidate the appellant's registered ownership interest, which benefits from the protection of the *Land Titles Act* and the *Mortgages Act*.

[34] Below, I start with the legal principles that apply to the enforceability of an option to purchase against a subsequent purchaser, followed by an analysis of how those principles apply in this case.

Applicable legal principles

[35] The land titles system creates a distinction between interests in property that are registered on title or arise out of instruments registered on title and unregistered interests. As Epstein J. (as she then was) explained in *Durrani v. Augier* (2000), 50 O.R. (3d) 353, at para. 42, the land titles system is meant to promote the indefeasibility of title:

The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and [are] the essence of the land titles system [Reference omitted.]

[36] Pursuant to s. 71 of the *Land Titles Act*, “any person ‘entitled to’ or ‘interested in’, among other things, any unregistered equity in registered land can be protected by registration” (s. 71(1)), and registration of an instrument “serves to fix with notice anyone acquiring title from the registered owner” (s. 71(2)): *Benzie v. Kunin*, 2012 ONCA 766, 112 O.R. (3d) 481, at paras. 76, 79.

[37] An option to purchase is an interest in property and can be registered on title pursuant to s. 71 of the *Land Titles Act*: see e.g., *Pelham (Town) v. Fonthill Gardens Inc.*, 2019 ONSC 567, 99 R.P.R. (5th) 281, at para. 22.

[38] In contrast with the effect of registering an interest in property under s. 71 of the *Land Titles Act*, s. 72(1) provides that only the parties to an unregistered instrument are deemed to have notice of it:

72 (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the records of the office kept for the entry of instruments received or are in course of entry.

[39] This gives effect to the primary purpose of the land titles system, “which is intended to provide ‘certainty of title’ by ensuring that notice of all interests that may impact on ownership of property are registered on title”: *Benzie*, at para. 82, citing *Turta v. Canadian Pacific Railway*, [1954] S.C.R. 427, at p. 443.

[40] The land titles system also protects subsequent purchasers from the effects of interests in the land that were not registered at the time of purchase. Absent fraud, s. 78(4) of the *Land Titles Act* guarantees the effectiveness of registered instruments in the land titles system by protecting subsequent purchasers who are *bona fide* purchasers for value, meaning those “who take title without notice of an interest or claim that differs from what is shown on the register”: *Sapusak v. 9706151 Canada Ltd.*, 2024 ONCA 774, at para. 17, citing

Martin v. 11037315 Canada Inc., 2022 ONCA 322, 469 D.L.R. (4th) 123 (“*Martin (ONCA)*”), at para. 66. That section reads as follows:

78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[41] Actual notice of an unregistered interest in land may compromise a subsequent purchaser’s registered interest in the land. In *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915, a majority of the Supreme Court held that the doctrine of actual notice applied to unregistered interests in land governed by the version of the *Land Titles Act* then in force.

[42] Two notes of caution apply to this exception. First, “actual notice” means that a subsequent purchaser actually knew about the unregistered interest; “it is not sufficient that the party has become aware of facts that suggest it should make inquiries”: *Stanbarr Services Limited v. Metropolis Properties Inc.*, 2018 ONCA 244, 141 O.R. (3d) 102, at para. 26.

[43] Second, this court has stated that this exception may no longer be applicable following the 2006 amendments to the *Land Titles Act*, suggesting that the explicit reference to fraud in ss. 78(4.1) and (4.2) may mean that other exceptions, such as the actual notice exception recognized by the Supreme Court in *United Trust*, may no longer apply: *Stanbarr*, at paras. 22-24; *Martin (ONCA)*, at paras. 64-65; *Airport Business Park Inc. v. Huszti Holdings Inc.*, 2023 ONCA 391, 481 D.L.R.

(4th) 696, at para. 46, leave to appeal refused, [2023] S.C.C.A. No. 347. However, this court has not resolved the issue and courts below have proceeded on the basis that the exception still applies: see e.g., *Martin v. 2670082 Ontario Corp*, 2024 ONSC 3982, 61 R.P.R. (6th) 96, at para. 47, appeal as of right to Ont. C.A. filed, COA-24-CV-0864; *FirstOntario Credit Union Limited v. Nagra et al.*, 2024 ONSC 3398, 60 R.P.R. (6th) 115, at para. 37; *Parkland Corporation v. 16408117 Canada Inc. et al.*, 2025 ONSC 201, at para. 44.

[44] In the circumstances of this case, provisions of the *Mortgages Act* may also be relevant, as they “provide complementary methods of protecting *bona fide* purchasers for value without notice of a defect in a power of sale proceeding”: *Stanbarr*, at para. 47. Pursuant to ss. 99(1) and (1.1) of the *Land Titles Act*, and ss. 35 and 36 of the *Mortgages Act*, a *bona fide* purchaser for value has a valid charge against pre-sale encumbrancers despite a defect in the power of sale proceedings so long as the purchaser did not have actual notice of the defect: *Stanbarr*, at paras. 26-27. Section 36 further provides that when the transfer is valid, those who should have been but were not served with proper notice retain a claim in damages against the party who exercised the power of sale: *Glassworkers Social Club v. Forestgate Leasing Inc.* (1998), 40 O.R. (3d) 606 (C.A.), at p. 610.

[45] These principles raise two issues relevant in this case. First, absent fraud, subsequent purchasers for value take land free and clear of unregistered claims

that they did not know about. Second, assuming the doctrine of actual notice continues to apply following the 2006 amendments to the *Land Titles Act*, actual notice of an unregistered option to purchase could make a subsequent purchaser's registered interest bound by that option to purchase.

Discussion

[46] In his analysis, the motion judge erred in failing to consider that the appellant was a subsequent purchaser. He treated the appellant as though it was in the same position as the party who negotiated the option to purchase with the respondents. In considering the equities in this case, the motion judge focused on the respondents' interests. He found that it would be unfair to the respondents not to allow them to exercise their option to purchase. However, he gave no consideration to the appellant's position, or to the statutory protections that presumptively apply to subsequent purchasers for value under the *Land Titles Act* and the *Mortgages Act*. At most, he stated that it would be open to the appellant to bring a claim against the seller, 110.

[47] Before finding that the option to purchase could be enforced against the appellant, and that the necessary findings could be made from the record as filed, it was incumbent on the motion judge to identify the determinative legal and factual issues. A court order entitling the respondents to exercise their option to purchase Unit #9 could only be effective if the appellant did not benefit from the statutory

protections guaranteeing security of title: see *Martin (ONCA)*, at para. 59; *Durrani*, at paras. 49-51. As a prerequisite to granting such an order, it was therefore necessary for the motion judge to determine whether the appellant's title was guaranteed under the *Land Titles Act*.

[48] The motion judge did not make the legal determinations and findings required to resolve these issues. Instead, he simply stated that “the [appellant] may not have been aware of the option to purchase due to a lack of proper disclosure in the power of sale proceedings”. In fact, there is no evidence in the record of what the appellant did or did not know about the option (or the lease). A connected question is whether the sale from 110 to 100 was an arm's length transaction; in other words, even if 110 did not inform the appellant about the option to purchase, is this information that the appellant had or had access to through a common ownership or interest: see *Belende v. Patel*, 2009 CanLII 74 (Ont. S.C.), at para. 17. Going further in the inquiry, if this was not an arm's length transfer, was it meant to defeat the option to purchase? There was no evidence on these issues in the record, and the motion judge proceeded on the basis that such inquiries were irrelevant when in fact they were crucial to determining the rights of the parties in this case.

[49] Given the absence of evidence in the record on these key issues, it is not possible for the court to decide the matter. In the absence of submissions from the parties on the issue, it would also not be appropriate for this court to finally

determine the issue raised in *Stanbarr* of whether the actual notice exception recognized in *United Trust* still applies.

[50] I would therefore set aside the order declaring the respondents to have legally exercised their option to purchase Unit #9 and directing the appellant to cause the property to be sold to the respondents for \$350,000. I would also remit this matter back to the motion judge or another judge for a trial of the issue of whether the appellant was a *bona fide* purchaser for value without notice that Unit #9 was subject to a lease that included an option to purchase the property for \$350,000, and, if so, whether the appellant is entitled to the protection of s. 78(4) of the *Land Titles Act* or other provisions of that Act or the *Mortgages Act*, such that the respondents are precluded from exercising their option to purchase the property.

D. DISPOSITION

[51] I would allow the appeal, set aside the order of Doi J. dated February 15, 2024, and make the following order:

1. There shall be a trial of the issue of whether the appellant was a *bona fide* purchaser for value without notice that the property known as Unit #9, 470 Chrysler Drive, Brampton, Ontario L6S 0C1, was subject to a lease that included an option to purchase the property for \$350,000, and, if so, whether the appellant is entitled to the protection of s. 78(4)

of the *Land Titles Act* or other provisions of that Act or the *Mortgages Act*, such that the respondents are precluded from exercising their option to purchase the property.

2. Pending the outcome of the trial, the respondents shall continue to pay the appellant rent at a rate of \$3,600 per month or as reasonably agreed. Any issues relating to the respondents' continued occupation of the premises pending the outcome of the trial, including any issues as to reasonable rent, are to be raised in the continuing proceedings below.

[52] As the successful party, as agreed between the parties, the appellant is entitled to \$10,000 all-inclusive in costs for the appeal. I would leave the issue of the costs below to the trial judge to be decided based on the outcome of the new hearing.

Released: February 18, 2025 "P.R."

"L. Favreau J.A."
"I agree. Paul Rouleau J.A."
"I agree. L.B. Roberts J.A."