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LAND FRAUD

The fraudulent transfer of property is becoming somewhat of an epidemic. Notwithstanding this, very few real estate fraud cases have resulted in court decisions. We think that the paucity of cases arises from the reluctance of financial institutions to be the cause, even indirectly, of innocent homeowners either losing their home or being saddled with a mortgage of which they knew nothing. The few reported decisions, however, were relatively consistent: the original transfer based on fraud was invalid, but a subsequent transfer or mortgage to an innocent party, relying on the register, was valid. Then, along comes Household Realty Corp. v. Liu and Chan and CIBC Mortgages Inc. v. Liu and Chan, both decided at [2005] O.J. No. 5001 (C.A.).

Indefeasibility

The propositions that we set out above result from the application of the principle of deferred indefeasibility. The indefeasibility of title is deferred to the second transfer of title, not the first fraudulent transfer. Immediate indefeasibility allows for the transfer of title to be indefeasible as soon as it is registered against title, regardless of fraud. In each case, of course, the transfer must be for valuable consideration, in good faith, and without notice of the fraud.

Compensation

Even with deferred indefeasibility, innocent homeowners can lose their land to fraud. However, they are not completely out of luck. There is

always the Land Titles Assurance Fund to ride to the rescue. It allows people defrauded of their interest in land to apply to the Fund for compensation. This process, however, is not an easy one. The Fund is not a pot of insurance; it is a fund of last resort and the applicants must demonstrate that they have done everything in their power to assert their rights and, ultimately, collect against the fraudster, title insurer, or any other persons, including lawyers, who might be negligent or responsible.

Gamble

It seems that the wife had a bad gambling habit. Actually, the fact that she gambled was not so bad; the fact that she lost, was. Worse, she succumbed to her addiction while her husband was out of the country for long periods. She was in debt and sought legal advice from the best sort of person, someone she met in a casino.

The wife arranged a power of attorney in her husband's name and forged his signature. She registered the power of attorney against title to their jointly owned house. She used the power of attorney to obtain a \$150,000 mortgage from the TD Bank. She paid down her debts with the mortgage funds and built them back up with her unsuccessful gambling. She went to CIBC, obtained a mortgage for \$260,000 with the fraudulent power of attorney, and discharged the TD mortgage. She needed more money and obtained a \$96,000 second mortgage from Household Realty.

Five months later, the wife defaulted, the first and second mortgagees commenced proceedings, and the husband came home to a nasty surprise. The husband and wife defended the actions, arguing that the mortgages were fraudulent and of no effect. The mortgagees brought a summary judgment motion.

We Say

We would have analysed the matter using deferred indefeasibility. The mortgages to CIBC and Household were each a nullity under common law and the Land Titles Act because each mortgage arose out of a fraudulent instrument. Rather than allow the wife to obtain a windfall, we would have held the mortgage on the wife's interest to be valid; she did not mortgage her own interest fraudulently. To carry our analysis further, assume that CIBC assigned its mortgage to another party. That party would receive a valid charge because it relied on the register to take title from the non-fraudulent, registered assignor.

Of course, the motions judge and the Court of Appeal differed from us. As they put it, they simply interpreted the Act. Section 155 of The Land Titles Act states, "*Subject to the provisions of this Act, ... any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.*" Section 78(4) of the Act states, "*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, ... the land or estate therein men-*

tioned in the register."

The Court of Appeal correctly noted that the registration of the power of attorney gave no more rights than had it not been registered. The power of attorney was simply the means by which the mortgagees were induced to accept the fraudulent mortgages.

However, the Court held that section 155 of the Act stated, "*Subject to the provisions of the Act*"; section 78(4) stated that once on the register, title passes; and, therefore, section 78(4) trumped the fraud provisions. Accordingly, both mortgages were valid and the husband lost his interest in the house to the mortgagees.

This particular interpretation makes no sense to us. If section 78(4) means that the transferor's fraud is irrelevant when an instrument is registered for value and without the transferee's notice of the fraud, then why is there any necessity for section 155? It adds nothing.

Further, the interpretation ignores sections 45, 66, 68(1), 86(1), and 93(1) of the Act, all of which refer to title passing from a registered owner or chargor. The person signing the mortgages was not the registered owner or chargor. She was a fraudster. This reasoning was used to invalidate a mortgage in CIBC Mortgages Inc. v. Saskatchewan (Registrar of Land Titles) [2005] S.J. No. 675 (C.A.), notwithstanding that Saskatchewan espouses the concept of immediate indefeasibility.

The Court went to great pains to say that it was not deciding whether deferred or immediate indefeasibility applies to land in Ontario. This, of course, is absurd. For land in the Land Titles system, the Court's interpretation of the Act means that we now

use the principle of immediate indefeasibility.

Negligence

The motions judge held that there was no evidence that the mortgagees were negligent in advancing the mortgage money and the husband did not appeal this finding. We assume that the mortgages were title insured and that no lawyers were involved in quarterbacking the mortgages. Had there been lawyers involved, then the lawyers may well have been liable to the husband.

Given all that has been going on, when we receive a power of attorney from someone we do not know extremely well, we will call the donor, call the witnesses, or call the lawyer involved. We will no longer accept the power of attorney at face value. By not using lawyers, the banks were

able to rely on a lower standard of care. This, in itself, does not seem to be equitable.

Upshot

The husband should still be able to apply to the Land Titles Assurance Fund for compensation. However, unless he can show that he has made all efforts to collect from his wife, he will have difficulties in doing so. Since there was no indication that the family unit had dissolved, we can appreciate why the husband should have difficulties. The problem with this case was that, on the facts, it is easy to see why the family should lose and the mortgagees should win. However, what if the husband was the sole owner and the fraudster was not his wife, but instead your ordinary, run-of-the-mill white collar, non-related, crook? Unfortunately, sometimes hard cases make bad law.

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