Court File No.: CV-21-00668726-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

THE MANUFACTURERS LIFE INSURANCE COMPANY

Applicant

- and -

RIVERSIDE PROFESSIONAL CENTRE INC.

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

BOOK OF AUTHORITIES OF THE RESPONDENT
(application returnable October 29, 2021)

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1999 CarswellOnt 3477
Ontario Court of Appeal

Logozzo v. Toronto Dominion Bank

1999 CarswellOnt 3477, [1999] O.J. No. 4088, 126 O.A.C. 59, 181 D.L.R. (4th) 221, 28 R.P.R. (3d) 147, 45 O.R. (3d) 737, 92 A.C.W.S. (3d) 323

Rodney Logozzo, Applicant (Respondent in Appeal) and The Toronto-Dominion Bank, Respondent (Respondent in Appeal) and Leif Grann, Third Party (Appellant in Appeal)

Goudge, Borins, MacPherson JJ.A.

Heard: August 13, 1999
Judgment: November 3, 1999
Docket: CA C31306

Proceedings: reversing (1998), 22 R.P.R. (3d) 136 (Ont. Gen. Div.)

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Annotation

A reading of *Logozzo* is *not* a mini mortgage remedy 101 course. It really requires that the reader be at least familiar with the basic rule in *Mission Construction Ltd. v. Seel Investments Ltd.*, [1973] 2 O.R. 190, 33 D.L.R. (3d) 286 (Ont. H.C.). *Mission Construction* is authority for the proposition that a mortgagor loses its right to redeem its mortgage after a mortgagee has entered into an agreement of purchase and sale for the mortgaged property. Section 22(1)(a) of the *Mortgages Act* expressly expunges the right of a mortgagor to redeem its mortgage upon a "sale under the mortgage", and, according to Mr. Justice Lieff in *Mission Construction*, "sale under the mortgage" is said to take place upon the execution and delivery of the agreement of purchase and sale.

Unfortunately, the basic rule in *Mission Construction* is *not* sufficiently broad to cover all (or, indeed, most) of the typical sales under power of sale in Ontario conveyancing. Almost invariably, the agreement of purchase and sale entered into between a mortgagee and a prospective purchaser will contain a provision in the contract entitling the mortgagee to terminate the agreement of purchase and sale in the event of a redemption by the mortgagor before a given deadline (typically, but not always, the closing date) (hereinafter referred to as a "redemption-out" clause).

The basic rule in *Mission Construction* works well in circumstances where there is *no* redemption-out clause (although not specifically referred to in *Logozzo*. See the decision of Cavarzan J. in *Montreal Trust Co. of Canada v. Raptis* (1994), 42 R.P.R. (2d) 283, 21 O.R. (3d) 350 (Ont. Gen. Div.) for a clear affirmation of the basic application of the rule in *Mission Construction* when the agreement of purchase and sale does *not* contain a redemption-out clause), but the wide-spread prevalence of redemption-out clauses has given rise to a number of trial level decisions which have challenged the application of the basic rule in *Mission Construction*. The decision in *Logozzo* is the Court of Appeal's attempt at clarifying whether the rule in *Mission Construction* should still apply if the agreement of purchase and sale contains a redemption-out clause.

Curiously enough, the agreement of purchase and sale giving rise to the litigation in *Mission Construction* in fact had a crude version of a redemption-out clause. So, for instance, in *Mission Construction*, the agreement of purchase and sale provided:

Acceptance by the Vendor hereof shall be subject to the rights if any of the registered owner of the property to redemption or to put the Vendor's mortgage in good standing.

Perhaps unfortunately, the court in *Mission Construction* seems to simply bypass the redemption-out clause by concluding that the redemption-out language did *not* contemplate a redemption by the mortgagor in the ordinary course, since that right was already lost when the agreement of purchase and sale was signed. Instead, *Mission Construction* held that its version of the redemption-out clause related only to redemption on the part of the mortgagor as a result of fraud or other malfeasance on the part of the mortgagee. It is not clear what the court in *Mission Construction* meant by marginalizing the redemption-out language before it. The more common interpretation of the decision is that redemption-out clauses generally can never delay the expungement of the redemption right beyond the signing of the contract, so the redemption-out clause had to have an alternative meaning. Equally plausible, however, the court in *Mission Construction* may merely have meant that the redemption-out language before it was not sufficiently detailed to extend the redemption right (leaving open the possibility that a more carefully crafted redemption-out clause might in fact have extended the redemption right beyond the signing of the contract).

For his part, Mr. Justice Wright, in the trial decision in *Logozzo* (1998), 22 R.P.R. (3d) 136 (Ont. Gen. Div.), took a very different approach to the redemption-out clause. He held that the very existence of a redemption-out clause in the contract between the mortgagee and the prospective purchaser provided the mortgagor with an equivalent extension of the redemption period beyond the actual entering into the agreement of purchase and sale as contemplated in *Mission Construction*. That is, if the mortgagee and the purchaser both expressly contemplated in their contract that the mortgagor may be entitled to redeem the mortgage after entering into of the agreement of purchase and sale, then the mortgagor in fact got the benefit of the mutual expectation of the mortgagee and the purchaser.

As his authority, Mr. Justice Wright cites Mr. Justice Abbey's decision in *National Trust Co. v. Saad* (1997), 10 R.P.R. (3d) 145, 33 O.R. (3d) 419, 28 O.T.C. 330 (Ont. Gen. Div.) wherein Mr. Justice Abbey elaborates on what he calls the "addendum" to the basic rule in *Mission Construction*:

Subsequent authorities, however, . . . have, as it were, pronounced an addendum to the general principle [in *Mission Construction*], and this is that if the agreement of purchase and sale itself contemplates a right of redemption continuing until a date after the date of the agreement, then the mortgagor is considered to have a right of redemption consistent with the terms of the agreement.

The "subsequent authorities" referred to by Mr. Justice Abbey in support of this "addendum" to the basic rule in *Mission Construction* include a number of Ontario trial level decisions such as *Miranda v. Wong* (1986), 1986 CarswellOnt 5098, [1986] O.J. No. 231 (Ont. H.C.); *Weiss v. Standard Trust Co.* (August 13, 1993), Doc. 92-CQ-12383, Wilson J. (Ont. Gen. Div.); *Rieckenberg v. Canada Permanent Trust Co.* (December 5, 1983), Kurisko J. (Ont. Dist. Ct.), and *Nalisa Investment Ltd. v. National Bank of Canada* (1980), 28 Chitty's L.J. 187 (Ont. S.C.) (hereinafter collectively referred to as the "*Miranda* decisions"). Applying *Saad* and the *Miranda* decisions, Mr. Justice Wright concluded that the agreement of purchase and sale between the mortgagee and the purchaser in *Logozzo* contemplated a right of redemption continuing until a date after the date of the agreement of purchase and sale. Accordingly, Mr. Justice Wright felt that he had no choice but to conclude that the mortgagor in *Logozzo* had a right of redemption consistent with the terms actually contemplated by the agreement of purchase and sale.

Mr. Justice Borins delivered the decision for the majority of the panel of the Court of Appeal hearing *Logozzo*, with Mr. Justice MacPherson concurring and Mr. Justice Goudge wading in with a vigorous dissent. Greatly paraphrased, Mr. Justice Borins' rebuttal of the reasoning of Mr. Justice Wright can be summarized as follows: (i) *Saad* and the *Miranda* decisions were misinterpreted by Wright J. and do not stand for the proposition that he believed they stood for; (ii) the *Saad* and the *Miranda* decisions were wrongly decided in any event; and (iii) the mortgagors under the *Saad* and the *Miranda* decisions could not, in any event, avail themselves of the redemption rights contemplated by s. 22 of the *Mortgages Act* because neither of them had tendered the monies necessary to discharge the mortgage indebtedness as is expressly required under s. 22(1) of the *Mortgages Act*.

Mr. Justice Borins' first and seemingly principal objection to the trial decision was that Mr. Justice Wright's interpretation of *Saad* and the *Miranda* decisions was simply wrong. According to Mr. Justice Borins, *Saad* and the *Miranda* decisions stood for the proposition only that, where an agreement of purchase and sale remained subject to a condition precedent (in the case of *Saad*, a condition on financing, and in the case of the *Miranda* decisions, a condition that there be no earlier redemption by the mortgagor) then, it cannot be said that an agreement of purchase and sale has in fact been entered into, and therefore the mortgagor's rights to redeem have not yet been expunged. In other words, according to the majority of the Court of Appeal in *Logozzo*, a "conditional" agreement of purchase and sale is somehow inchoate for the purposes of s. 22 of the *Mortgages Act* and does *not*, therefore, attract the basic rule in *Mission Construction*. Accordingly, s. 22(1) of the *Mortgages Act* only expunges a mortgagor's right of redemption upon the execution of the agreement of purchase and sale *and the waiver or satisfaction of all conditions precedent* (or what are clients and their brokers are fond of referring to as "going firm"). Curiously enough, the proposition is perhaps best summarized by none other than Mr. Justice Wright in obiter at trial:

Until the agreement of purchase and sale crystallizes by the satisfaction of all conditions and the waiver of all other terms that agreement is not binding and the right of the mortgagor to redeem continues, but once the agreement crystallizes the redemption is lost.

Mr. Justice Borins concludes that the redemption-out clause in *Logozzo* was *not* in fact expressed as a condition precedent. Instead, the redemption-out clause in *Logozzo* was merely an " . . . understanding that the mortgagor had a right to redeem in certain circumstances." As there were no other conditions precedent in the contract, the agreement of purchase and sale in *Logozzo* was in fact "firm", and the "addendum" contemplated in *Saad* and the *Miranda* decisions therefore had no application, so the mortgagor did in fact lose its right to redeem forthwith upon the execution of the agreement of purchase and sale, all in accordance with the basic rule in *Mission Construction*.

With respect, we have a number of difficulties in following this primary ratio of the Court of Appeal's majority decision. First of all, it is simply unfair to hold that Mr. Justice Wright misunderstood *Saad* or the *Miranda* decisions. That is, whether or not *Saad* and the *Miranda* decisions should have been interpreted as authorities for the proposition that a mortgagor's right to redeem can be extended by the very existence of a redemption-out clause in the agreement of purchase of sale, Mr. Justice Wright certainly did *not* misinterpret these rogue decisions. While all of these cases extended the mortgagor's right to redeem beyond the execution and delivery of the agreement of purchase and sale, the rationale of the reasons is mixed at best. In fact, with the possible exception of the *Rieckenberg* case (which does mirror Mr. Justice Borins' inchoate conditional agreement reasoning quite precisely), the balance of the *Miranda* decisions are somewhat ambiguous as to why exactly the mortgagor's redemption rights continue beyond the execution of the agreement of purchase and sale. In fact, they are arguably equally consistent with the "third party beneficiary" approach adopted by Mr. Justice Abbey in his "addendum" in *Saad*.

Furthermore, even if, as the majority of the Court of Appeal in *Logozzo* would suggest, *Saad* and the *Miranda* decisions are to be interpreted as meaning that agreements of purchase and sale attract the basic rule in *Mission Construction* only after they become "firm" (or if they were never conditional in the first place), we find it very difficult to distinguish the redemption-out clause in *Logozzo* (which the majority of the Court of Appeal found to be merely "an understanding" falling short of creating a conditional agreement):

The purchaser understands and agrees that the mortgagor has the right to redeem the property up to the time of waiver or expiration of all rights of termination or fulfilment of all conditions, and this agreement is subject to that right. *In the event of a redemption by the mortgagor, this agreement shall be null and void and any deposit monies will be refunded in full without interest* . . . [emphasis added]

from the very similar sounding redemption-out clauses in some of the *Miranda* decisions (which the majority of the Court of Appeal interprets as creating conditional agreements). So, for instance, the redemption-out clause in *Nalisa* provides as follows:

It is understood that the Vendor is selling the Read Property under Power of Sale contained in the mortgage and that the required Notice has been given to the registered owner of the Property and all subsequent encumbrancers and that the time for redemption

under the Notice has expired without any redemption having been made; however, this Offer is conditional upon there being no redemption made prior to closing by the registered owner or subsequent encumbrancers under an Order of a Court of Competent Jurisdiction. *If the registered owner redeems the Property, then this Offer shall become null and void and all deposit monies shall be returned forthwith to the Purchaser without interest or deduction.* [emphasis added]

With respect, we submit that there is little, if any, legal difference between these various redemption-out clauses; although the verbiage varies between each clause, all of them appear to be conditions precedent for the benefit of the mortgagee, providing the mortgagee with the right to terminate on the happening of a future event (e.g., purported redemption by the mortgagor). However, by insisting that *Saad* and *Miranda* were distinguishable from *Logozzo* as being conditional agreements, without contemporaneously giving some criteria on just how to distinguish an "understanding" from a "condition" (in our respectful view, because there was no reasonable way of so distinguishing the two — it has to be something more sophisticated than simply the absence of the word, "condition"), the majority of the Court of Appeal leaves the practitioner in a conundrum: unless the redemption-out clause is identical to one or more of the redemption-out clauses adjudicated, which agreements of purchase and sale would follow the *Miranda* decisions (giving mortgagors an extended right to redeem) and which agreements of purchase and sale would follow *Logozzo* (crushing the redemption right on the entering into of the sale contract)?

The answer to the conundrum, curiously enough, lies in what seems to be a "secondary" or "alternative" ratio proffered by the majority of the Court of Appeal. In this secondary ratio, Mr. Justice Borins posits that, even if *Saad* was correctly interpreted by Mr. Justice Wright, the "addendum" put forth by Mr. Justice Abbey in *Saad* (i.e. that a mortgagor gets the benefit of any redemption-out clause negotiated between the mortgagee and the purchaser) was an incorrect conclusion at law. According to Mr. Justice Borins, a mortgagor, which is essentially a legal stranger to the relationship as between the mortgagee and its prospective purchaser, simply *cannot* acquire rights under the agreement of purchase and sale because it is not a party thereunder and shares no privity with the parties thereto. The concept is expressed very well by Mr. Justice Borins in his reasons:

. . . [The redemption-out clause] cannot serve to confer on *Logozzo* a right to redeem beyond the time permitted by s. 22(1)(a) . . . as between *Logozzo* and TD, it created no rights, nor did it provide *Logozzo* the foundation to prevent the completion of the Grann-TD transaction . . . In my view, although [the redemption- out clause] permits *Logozzo* to redeem if certain circumstances are met, he conuld not enforce this benefit against Grann or TD for the reason that he was not a part to the agreement of purchase and sale. As a general rule, the docutine of privity of contract provides that a contract can neither confer rights, nor impose obligations on third parties.

So, for example, if A were contracted to sell a widget to B, subject to the right on the part of A to terminate that contract in the event that it receives and elects to accept a different offer from C, it does not follow that that C has the right to force A to contract with it. While such an arrangement does make B's contractual position rather precarious (depending as it does on A's willingness to deal with C), the arrangement falls short of creating an option in favour of C enforceable against A to call for the widget to the detriment of B.

Alternatively put, consider the example of an employee that takes a maternity leave of *x* months ("*x*" being the statutory limit). The employer hires a replacement employee on a contract basis providing, *inter alia*, that if, at any time (even after *x* months), the employee on maternity leave returns to the job, the employer may then terminate the new contract position replacement employee on short notice. While the contract between the employer and the contract replacement employee gives the employer the *option* to take the maternity leave employee back, even after *x* months (and limits the employer's liability to the contract replacement employee for early termination if the employer chose to take the maternity leave employee back), it cannot be said that the contract between the employer and the contract replacement employee gaves the maternity leave employee a *right* to compel the employer to accept the employee back after the *x* months. Imagine further that the contract replacement employee proves to be the far better hire and the maternity leave employee fails to invoke her statutory right to return to her job within the *x* months. Several months after the *x* months is long past, the employee on maternity leave saunters back to the job and insists on being reinstated (at the expense of the contract replacement employee — this hypothetical requires that the job be unique). While it is obvious that the employer *may* take back the maternity leave employee, it is equally obvious to us that the employer need not take back the now late maternity leave employee. The fact that the employment contract between the employer and the replacement contract employee contemplated that the maternity leave employee may return, even belatedly,

simply cannot be used by the as a sword by the maternity leave employee to "bootstrap" additional reinstatement rights beyond the *x* months contemplated by the law.

Likewise, the mortgagee may contract for a right to unilaterally terminate the agreement of purchase and sale with the purchaser in the event that the mortgagor purports to redeem the mortgage, but that agreement cannot be said to create an option on the part of the mortgagor, enforceable against the mortgagee to redeem the mortgage beyond the time that it otherwise had at law to do so, to the detriment of the purchaser.

Although not expressly raised in Mr. Justice Goudge's dissent, Mr. Justice Borins (correctly we submit) identifies the "addendum" proposed by Mr. Justice Abbey in *Saad* as being an application of the school of thought that would extend contractual rights to third party beneficiaries that otherwise would have no privity of contract. The concept seems to be enjoying a modern resurgence in popularity after *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261, [1993] 1 W.W.R. 1, 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, 18 B.C.A.C. 1, 31 W.A.C. 1 (S.C.C.). Mr. Justice Borins did not have to consider the application of *Kuehne & Nagel* to the facts at hand, and implies that, if he had, he may very well have interpreted *Kuehne & Nagel* narrowly enough so as *not* to interfere with his holding against the mortgagor in *Logozzo*. He does not elaborate on how his analysis would have gone, but there is a significant school of thought that suggests that the world as we know it may not be ready for a widespread dismantling of the doctrine of privity of contract, and we are familiar with the arguments of those who would advocate keeping *Kuehne & Nagel* as limited as possible to its original facts.

This secondary ratio differs considerably from the majority's principal ratio. In the principal ratio, the Court of Appeal sought to reconcile *Logozzo* with *Saad* and the *Miranda* decisions. In this secondary ratio, the Court of Appeal does *not* attempt to reconcile *Logozzo* with these rogue trial level decisions and may, instead, effectively overrule them.

While making available this secondary ratio certainly resolves the original conundrum posed by the principal ratio (how to distinguish between the "conditional" redemption-out clause a la the *Miranda* decisions, and the mere "understanding" redemption-out clause a la *Logozzo*), the concurrent existence of both *ratio decidendii* creates a further conundrum: what principle actually dictated why the mortgagor in *Logozzo* was not permitted to redeem after the agreement of purchase and sale, notwithstanding the existence of a redemption-out clause in the agreement of purchase and sale? Was it because the relevant redemption-out clause did not create a conditional contract (the primary ratio), or was it because no redemption-out clause in any agreement of purchase and sale can ever confer an extended right to redeem to the mortgagor (the secondary ratio)? If it was the former, then it may still be that agreements of purchase and sale that contain genuine conditions precedent will still allow mortgagors to redeem, even long- after the agreement of purchase and sale has been entered into. We suspect that the majority of precedent redemption-out clauses look more like conditions precedent than they do like "understandings" (although we, for instance, have considered modifying our standard power of sale documents to take out the more patent conditional language in favour of "understanding" verbiage and an express rejection of the mortgagor acquiring any rights — let's hope that is enough to avoid further litigation). If it was the latter, then practitioners need not try to distinguish and categorize the various redemption-out clauses, since no such clause, whether it made the contract conditional or not, could ever extend the redemption right beyond the entering into of the agreement of purchase and sale.

The majority's reasons in *Logozzo* is not that clear on the relevant test, although, in our respectful submission, the secondary ratio should govern entirely as to redemption-out clauses. Accordingly, for all of the reasons relating to privity of contract provided by Mr. Justice Borins in *Logozzo*, the "addendum" proposed by Abbey J. in *Saad* should be expressly overturned, so that no redemption-out clause contained in an agreement of purchase and sale between a mortgagee and a mortgagor (whether an "understanding" or a "condition precedent" or something else) can ever be inferred as granting extended or supplementary redemption rights to a mortgagor enforceable by that mortgagor against the mortgagee and the purchaser.

That still leaves in question to status of otherwise conditional agreements of purchase and sale (e.g., *Saad*, which had a redemption-out clause but was conditional upon financing). According to the majority in *Logozzo*, any conditional contract (whether or not the condition related to a redemption-out) would extend the redemption rights of the mortgagor at least until the contract was no longer conditional. In other words, the true "addendum" to the rule in *Mission Construction* ought to have

been, "a 'sale under the mortgage' is said to take place when a '*firm and binding*' agreement of purchase and sale comes into existence". We have previously alluded to the possibility that the rule in *Mission Construction* would need such an addendum (see Lem, case annotation on *Raptis, supra*). In true practice conditions, solicitors can expect to see the application of *Mission Construction* modified by this revised "addendum" far more often than not.

Craig Carter of Fasken, Campbell & Godfrey had a fascinating suggestion that the law ought not recognize these conditional contracts as keeping alive redemption rights that otherwise would have expired on the execution of the contract. Instead, he suggested that perhaps mortgagors' redemption rights should be somehow suspended (as opposed to expunged forever) on the signing of a conditional agreement of purchase and sale. If the contract "goes firm", the mortgagors' redemption rights never revive and are, *ex post facto*, expunged as of the execution of the agreement of purchase and sale. If, on the other hand, the contract is terminated by operation of the condition (or otherwise), the mortgagors' redemption right is revived, unaffected by the execution and delivery of the now terminated agreement of purchase and sale. While, like most of Mr. Carter's ideas, the proposal has some merit (it certainly provides certainty to purchasers and mortgagees under power of sale), there is also a risk that extremely conditional agreements of purchase and sale (those with such vacuous and subjectve conditions so as to render the agreements of purchase and sale little more than glorified option agreements), especially with long closings, can unduly prejudice mortgagors that are otherwise ready, willing and able to redeem.

Almost as an additional nail in the coffin, Mr. Justice Borins also notes that the mortgagors in *Saad* and in *Logozzo* were not entitled, irrespective of when, if at all, their respective rights of redemption would otherwise have been expunged, to redeem their mortgages in any event, since the mortgagors in these cases were not in funds to tender the mortgage indebtedness to the mortgagee. This point is made throughout the majority's reasons in *Logozzo*, and provides an excellent segue into the vigorous and, at times clever, dissent in *Logozzo* by Mr. Justice Goudge.

Mr. Justice Goudge did not adopt the majority position of requiring the tendering of the mortgage monies as a precondition for adjudicating the entitlement to redeem. According to Mr. Justice Goudge:

The Act does not require a tender as a precondition to possession the right to redeem. Nor, as I read it, does the case law, unless the mortgagor is also seeking to enjoin the sale under power of sale or unless the mortgagor is seeking a declaration after a sale under the mortgage has occurred . . .

There cannot be any dispute that a mortgagor cannot actually redeem without tendering, but Mr. Justice Goudge has a point when he concludes that simply asking for declaratory relief in anticipation of a redemption does not require a pre-tendering of funds.

On the more fundamental issue of whether or not a mortgagor should be entitled to an extended redemption period if there exists a redemption-out clause, Mr. Justice Goudge in effect adopts Mr. Justice Abbey's "addendum" rule set forth in *Saad*, and concludes that a mortgagor should get the benefit of the redemption-out provisions in any agreement of purchase and sale. In his own words Mr. Justice Goudge concludes," . . . *Logozzo* was able to redeem the property because the Bank has a contractual right to let him to do and it is willing to exercise that right." This is not exactly what happened in *Logozzo*. While the mortgagee in *Logozzo* did enjoy a contractual privilege vis-a-vis the purchaser to accept the redemption, in fact the mortgagee in *Logozzo* did not appear ready to "exercise that right". Instead of simply accepting the redemption and terminating the agreement of purchase and sale (as both the majority and the dissent seem to agree the mortgagee could have done), the mortgagee goes before the court siding with the mortgagor in its claim that the mortgagor could force the issue on both the mortgagee and the purchaser (in effect pleading with the court to confirm that the mortgagee had no choice but to accept the redemption). With the benefit of hindsight, if the mortgagee in *Logozzo* had simply accepted the redemption and terminated the agreement of purchase and sale, we suspect that the redemption-out language in the agreement of purchase and sale (indeed virtually every redemption-out clause that we have seen to date) would have adequately protected the mortgagee against a claim by the disappointed purchaser.

Apparently in the alternative, Mr. Justice Goudge found that if *Saad* and the *Miranda* decisions are to be interpreted as per the majority's principal ratio (i.e., that the law allows mortgagors a continuing right until conditional agreements of purchases and sales are "crystallized" and "firm"), then the mortgagor in *Logozzo* still had his right of redemption up until at least the requisition date because the agreement of purchase and sale between the mortgagee and the prospective purchaser in *Logozzo*

was, by its terms, conditional until the purchaser had had an opportunity to submit its requisitions on title. If we accept Mr. Justice Goudge's proposition that an agreement of purchase and sale is always "conditional" on the mortgagee/vendor delivering good title, then it follows that *all* agreements of purchase and sale entered into by any vendor and any purchaser will always be "conditional", since every purchase contract, whether explicitly or implicitly, is conditional upon the delivery of good title and the payment of the purchase price. This simply cannot be the law. Mr. Justice Borins, again in seeming anticipation of this argument in dissent, cites the English Court of Appeal in *Property & Bloodstock Ltd. v. Emerton* (1967), [1968] Ch. 94, [1967] 3 All E.R. 321 (Eng. C.A.) as authority for the proposition that:

. . . conditions respecting title in the usual agreement of purchase and sale are just that — a mere matter of title and, therefore, one of the usual terms found in an agreement of purchase and sale — with the result that the agreement is an unconditional contract of sale.

Seemingly overlooked altogether by both the majority and the dissent in the Court of Appeal's decision in *Logozzo* is the approach to *stare decisis* adopted by Mr. Justice Wright at trial. In fairness to Mr. Justice Wright, he made clear in his decision that he favoured the majority approach by the Court of Appeal:

There is a difference between an agreement where the parties affirmatively stipulate that the mortgagor shall have the right of redemption up to the date of closing and an agreement which simply recognizes that a mortgagor has certain rights at law but does not extend those rights. If I were dealing with this clause at first instance I would have concluded that this schedule simply recognizes that until the agreement of purchase and sale crystallizes by the satisfaction of all conditions and the waiver of all other terms that agreement is not binding and the right of the mortgagor to redeem continues, but once the agreement crystallizes the right of redemption is lost. I am not dealing with this clause at first instance however. Abbey, J. has construed this clause and his construction represents the law of this province until reversed by a higher court . . .

but was required, instead, by the doctrine of *stare decisis* to follow *Saad*. Mr. Justice Borins remarked on the point, when he concludes that, "In my view, Wright J. erred when he felt bound to apply *Saad* . . . ", but did not elaborate. We have not researched the doctrine of *stare decisis* in the context of antecedent decisions of the same court, and we are hopelessly in disagreement amongst ourselves as to whether Mr. Justice Wright was correct. That is, with the possible exception of courts of ultimate appeal which need the right to overrule their own previous decisions, in theory, should common law courts, when the facts are not otherwise distinguishable, be entitled to overturn their own prior decisions? On the one hand, see *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516 (S.C.C.) and Hogg, Constitutional Law of Canada, Carswell, at s.8.7 for the proposition that, while the Supreme Court of Canada was still inferior to the Privy Council, it felt bound by its own prior decisions on point. On the other hand, see also *R. v. Phoenix Assurance Co.*, [1976] 2 F.C. 649 at 655, [1976] I.L.R. 1-787, wherein Decary J. concludes that " . . . there can be no *stare decisis* between judges of the same court". As and by way of an experiment, however, readers are asked to canvass their colleagues as to the correctness of Mr. Justice Wright's position on *stare decisis*. We suspect the discussion will be as colourful as it is divergent.

It should be noted that the Court of Appeal did *not* hold that the mortgagor could not redeem under the circumstances, but merely that the mortgagor *could not compel* the mortgagee to accept the redemption under the circumstances. Even in *Logozzo*, it was open for the mortgagee to accept the redemption funds from the mortgagor and invoke the redemption-out clause vis-à-vis the purchaser. If there is an adequately drafted redemption-out clause, the mortgagee can always accept the redemption and terminate the agreement of purchase and sale. A mortgagee with a workable redemption-out clause (and they are not that difficult to draft) and a tender of the full redemption price should *never* opt to close the agreement of purchase and sale. This is because any proceeds over and above the mortgage indebtedness realized on a sale has to be surrendered in any event, so the mortgagee can never do better financially than a full redemption. Since the mortgagee cannot profit from the sale (no matter what the purchase price), and sales under power of sale always run the risk of improvident realization claims (no matter what the purchase price), there is only greater risk and no greater reward for any mortgagee to prefer a third party purchaser to a redeemer.

As a final note on *Logozzo*, consider the following theoretical quandry. The basic rule in *Mission Construction* provides that a "sale under the mortgage" takes place at the moment an agreement of purchase and sale is entered into, presumably because the beneficial ownership of the mortgaged property is in fact "sold" as at the moment the mortgagee cum vendor agrees to sell it.

This transfer is said to have occurred because, as traditional theory would have it, equity would step in to specifically enforce the conveyance (equity doing what ought to have been done). Thus, if equity deems the beneficial title to have moved upon the entering into of the agreement of purchase and sale (as opposed to on closing when the legal title is also conveyed), the doctrine of *nemo dat qui non habet* leaves the mortgagee *cum* vendor with no title left for the mortgagor to redeem after the contract is signed, even if the mortgagor thereafter able to tender the full mortgage indebtedness. Consider whether the same paradigm applies in the post-*Semelhago* world. According to Mr. Justice Sopinka's now infamous obiter on point, specific performance is no longer *a priori*, even for real estate, and it remains a question of fact to be proven. In other words, equity might not, depending on the genuine uniqueness of the property in question, step in to specifically enforce the conveyance, leaving legal damages as the only recourse for a jilted purchaser. If a property can be said to be totally fungible within the meaning of Mr. Justice Sopinka's admonition, and specific performance would *not* be available to a purchaser thereof, it might follow that the mortgagee *cum* vendor never really transfers the beneficial title at all when it enters into even a fully binding unconditional agreement of purchase and sale. Not having really transferred the beneficial title, *nemo dat qui non habet* could not apply, so the mortgagee cum vendor might still have a title that the mortgagor could redeem (leaving the purchaser with a "slam dunk" damage claim against the mortgagee cum vendor if there is no exculpating redemption-out clause). Needless to say, *Logozzo* did not deal with this flight of esoterica, and we are not aware of any judicial treatment of this hypothesis. Furthermore, credit is owed to the LL.M in Real Estate class of Osgoode Hall for dreaming up this brain teaser for which we have no pat solution.

Jeffrey W. Lem

Andrea White

Heenan Blaikie

***Borins J.A.* (*MacPherson J.A.* concurring):**

1 This is an appeal by Leif Grann, the purchaser of a 500 acre property from The Toronto-Dominion Bank ("TD") pursuant to power of sale contained in a mortgage from Rodney Logozzo to TD, from the judgment of John deP. Wright J. declaring that Logozzo has the right to redeem the property prior to the closing of Grann's purchase from TD.

2 Subsequent to Grann and TD entering into an agreement of purchase and sale of the property, Logozzo issued an application to set aside the notice of sale issued by TD under the mortgage, to stay the sale of the property to Grann and for other relief. TD then issued a counter-application to add Grann as a respondent to the proceedings and for directions respecting the status of the sale. TD took the position, in its supporting affidavit, that it had no objection to Logozzo redeeming the mortgage, provided that if the court permits him to do so, that it would "not put the Bank at risk to any claim for damages by Mr. Grann". Consequently, TD asked the court to declare its agreement of purchase and sale with Grann to be null and void if it permitted Logozzo to redeem the mortgage. After he was added as a respondent, Grann issued a counter-application in which he sought a declaration that Logozzo was precluded from redeeming the property by virtue of s.22(1)(a) of the *Mortgages Act*, R.S.O. 1990, c.M.40, and a judgment for specific performance of the agreement of purchase and sale. On the issues raised by the parties, Wright J. ruled on only the right of Logozzo to redeem the property. However, it is implicit from his reasons that he refused to stay the sale to Grann since he permitted Logozzo to redeem the property prior to the closing of the Grann's purchase of the property.

3 One of the questions raised by this appeal is whether the time within which a mortgagor is permitted to redeem the mortgaged property under s. 22(1)(a) of the *Mortgages Act* may be extended by a provision in an agreement of purchase and sale between the mortgagee, as the vendor under power of sale, and the purchaser. If the answer to this question is in the affirmative, it must then be decided whether the mortgagor, not being a party to the agreement of purchase and sale, can derive any benefit from the provision.

4 To understand the discussion which follows, it is helpful to reproduce s. 22(1)(a) of the Act and the provision in the Grann-TD agreement of purchase and sale which is the focus of this appeal.

5 Section 22(1) of the *Mortgages Act* reads as follows:

22.-(1) Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

(a) at any time before sale under the mortgage; or

(b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

6 The agreement of purchase and sale between Grann and TD contains a schedule which forms part of the agreement. It is part of the Ontario Real Estate Association's standard form agreement of purchase and sale when a vendor is selling under power of sale. The italicized portion of paragraph 2 is relevant to the issues in this appeal. The schedule, which is signed by Grann and TD, reads, in part, as follows:

Ontario Real Estate Association
VENDOR SELLING UNDER POWER OF SALE
(TO BE USED IN CONJUNCTION WITH FORM 101 — AGREEMENT OF PURCHASE AND SALE)

Attached to and forming part of Agreement of Purchase and Sale between "**LEIF GRANN**" and "**TD BANK MORTGAGE CORPORATION**" dated the "**22 ND** " day of "**OCTOBER**", 19"**98**".

1. It is understood that the Vendor is selling as mortgagee under a Power of Sale contained in a **"FIRST MORTGAGE & FINANCING"** mortgage made to the Vendor, dated the "**29**" day of "**Nov.**". 19 "**96**" and registered as number "**8520**".

2. It is further understood that on the date of acceptance of this offer there is default under the terms of the mortgage which entitles the Vendor to exercise the Power of Sale. The only evidence of the default, which the Purchaser may require, shall be a statutory declaration by the Vendor setting forth the facts entitling the Vendor to sell under the Power of Sale, including the particulars of the notice of exercising the Power of Sale, the names of the persons upon whom service of the notice has been effected, and declaring that default under the mortgage entitling the Vendor to exercise the Power of Sale has continued up to and including the date of acceptance of this offer and to the time of closing. *The Purchaser understands and agrees that the mortgagor has the right to redeem the property up to the time of waiver or expiration of all rights of termination or fulfillment of all conditions, and this Agreement is subject to that right. In the event of redemption, by the mortgagor, this agreement shall be null and void and only deposit monies paid will be refunded without interest*. [Emphasis added.]

Facts

7 The land in issue is a 500 acre unoccupied water access wilderness tract on Lake Superior in the District of Thunder Bay. It consists of a small island and lakeshore property on which there are no buildings. Logozzo purchased the land in 1994 for $75,000. On November 29, 1996, he mortgaged the land to TD to secure an indebtedness of $50,000.

8 Default occurred in the payment of the debts secured by the mortgage in September 1997, following which TD made a number of demands for payment which Logozzo ignored. Consequently, on April 17, 1998, TD served Logozzo with a notice of sale under the power of sale in the mortgage requesting payment of the principal amount of the mortgage, together with the interest unpaid and owing. The notice warned Logozzo that "unless the said sums are paid on or before the 25 th day of

May, 1998, I shall sell the property covered by the said mortgage under the provisions contained in it". The mortgagor made no efforts to redeem the property by May 25, 1998.

9 In October, 1998, TD listed the land for sale with a realtor at $79,900, which was the asking price recommended by the realtor with whom it was listed. Grann submitted an offer to purchase the land for $80,000 on October 22, 1998. The offer was accepted by TD on October 23, 1998. It contained a closing date of December 21, 1998 and allowed Grann until December 1, 1998 to examine the title. On October 27, 1998, the agreement was amended to change these dates to November 16, 1998 and November 13, 1998, respectively.

10 On November 5, 1998, Logozzo received an offer from Lloyd Purnell to purchase the land for $211,000, with a closing date of November 20, 1998, four days after the closing date in the Grann-TD agreement of purchase and sale. Logozzo accepted the offer and brought it to TD's attention. This offer was conditional on Purnell obtaining the necessary funds to purchase the land by November 8, 1998. There was no evidence before Wright J. that the condition was fulfilled, extended or waived. Indeed, there was no evidence that Logozzo would be able to redeem the property prior to the scheduled closing date of the Grann-TD agreement, either as a result of the proposed Purnell purchase, or by any other means. Purnell was not a party to the proceedings. Nor did Logozzo supply any evidence that Purnell was financially able to complete the transaction. The absence of such evidence, in my view, is not without significance.

11 On November 6, 1998, Logozzo issued his application to prevent TD's sale to Grann on November 16, 1998. His intention in bringing the application was to permit him to sell the land to Purnell, which would enable him to apparently "redeem the mortgage". The application was made returnable on November 12, 1998, as was TD's counter-application. At Grann's request, the applications were adjourned, on consent, on terms that the rights of the parties were preserved, as in the interim the closing dates of the two offers would occur. Following the conclusion of the proceedings on November 23, 1998, Wright J. reserved judgment until December 13, 1998 and endorsed the record: "All rights and remedies suspended in the meantime." It is common ground among the parties that their rights remain in suspension pending the determination of this appeal.

12 It should be noted that on the date fixed for closing by the agreement of purchase and sale — November 16, 1998 — Grann tendered on TD the amount due on closing, which it rejected on the ground that Logozzo wished to redeem the property. It was explained by counsel that Grann, who considers the property to be unique, did so out of an abundance of caution, not wishing to lose the opportunity to acquire it.

Reasons of Wright J.

13 Wright J. considered, and rejected, the following grounds advanced by Logozzo in support of his position that he had the right to redeem the property: defects in the notice of sale; the sale of the property to Grann for an improvident price; and defects in the Grann-TD agreement of purchase and sale. In the course of considering these grounds, Wright J. observed, correctly in my view, that a "sale" occurs within the meaning of s.22(1)(a) of the *Mortgages Act* when the vendor and the purchaser have entered into an agreement of purchase and sale with the result, generally speaking, that the mortgagor's right to redeem is put to an end.

14 Wright J. then considered the issue that has given rise to this appeal. He quoted the italicized portion of paragraph 2 of the schedule to the agreement of purchase and sale which I have quoted in paragraph [6]. For the sake of convenience, I will repeat that part of paragraph 2:

> The purchaser understands and agrees that the mortgagor has the right to redeem the property up to the time of waiver or expiration of all rights of termination or fulfillment of all conditions, and this agreement is subject to that right. In the event of redemption by the mortgagor, this agreement shall be null and void and any deposit monies paid will be refunded without interest.

15 Both Logozzo and TD take the position that the effect of this language is to extend the mortgagor's right to redeem the property from the statutory time permitted by s. 22(1)(a) of the *Mortgages Act* to the date fixed by the agreement of purchase and sale for the closing of the sale by TD to Grann.

16 As I understand Logozzo's position before Wright J. and this court, it is that the language of paragraph 2 creates, as a condition precedent to the closing of the Grann purchase, the expiry of the right of the mortgagor to redeem the property at any time prior to the closing date of the Grann-TD transaction. In other words, the closing of the transaction is conditional on Logozzo not redeeming the property prior to the time to which Grann and TD agreed for closing.

17 In addition to adopting Logozzo's position, TD advanced another reason why, at the date Logozzo commenced his application, the language of paragraph 2 of the schedule permitted him to redeem the property. Paragraphs 8 and 10 of the agreement of purchase and sale concern the right of the purchaser to examine the title to the property and to raise any objection to title. In reliance on these paragraphs, TD submitted that Grann's right to terminate the agreement arising from any objection to title he might have had not been waived, nor had it expired. Grann had until November 13, 1998 to examine the title — which was seven days after Logozzo issued his notice of application.

18 After reciting the relevant part of paragraph 2 of the schedule, Wright J. concluded his reasons as follows:

> The courts have held that where the subsequent agreement of purchase and sale preserves the right of a mortgagor to redeem right up to closing, then this is a right which may be exercised by the mortgagor.
>
> In *National Trust v. Saad*, 10 R.P.R. (3d) 145 Abbey J. held that a similar clause gave a mortgagor a continuing right of redemption.
>
> I have some difficulty with this conclusion.
>
> The law should strive for certainty. This is so particularly where title to land is involved. There is a difference between an agreement where the parties affirmatively stipulate that the mortgagor shall have the right of redemption up to the date of closing and an agreement which simply recognizes that a mortgagor has certain rights at law but does not extend those rights. If I were dealing with this clause at first instance I would have concluded that this schedule simply recognizes that until the agreement of purchase and sale crystallizes by the satisfaction of all conditions and the waiver of all other terms that agreement is not binding and the right of the mortgagor to redeem continues, but once the agreement crystallizes the right of redemption is lost.
>
> I am not dealing with this clause at first instance however. Abbey, J. has construed this clause and his construction represents the law of this province until reversed by a higher court.
>
> Under the circumstances the mortgagor has a right to redeem prior to closing.

Analysis

19 In my view, on the facts before Wright J. at the time Logozzo issued his notice of application, there are a number of reasons why he was not entitled to redeem the land secured by the mortgage.

I

20 The first reason raises the issue of whether, under s. 22(1)(a) of the *Mortgages Act*, Logozzo was entitled to redeem the property after TD had entered into a binding agreement of purchase and sale with Grann.

21 It is common ground that absent paragraph 2 of the schedule, s.22(1)(a) permitted Logozzo to redeem the property "at any time before sale under the mortgage". The effect of this provision is to extend the time to redeem from the time in the notice of sale — May 25, 1998 — to the time of the sale of the property pursuant to the power of sale in the Logozzo — TD mortgage.

22 Section 22 of the present Act originally formed part of s. 19a of the *Mortgages Act*, R.S.O. 1950, c. 239, having been enacted in 1953: S.O. 1953, c. 66, s. 1. Section 19a was divided into two sections in R.S.O. 1970, c. 279, with s. 21 of the 1970

Act being s. 22 of the present Act. It has remained unchanged since 1970. The purpose of s. 21(1), of the 1970 Act, and its application, are outlined in Rayner & McLaren, *Falconbridge on Mortgages*, 4th ed., (1977) at 721-22:

> ... [I]t permits the mortgagor to put the mortgage in good standing at any time before sale upon payment of any money due, 'exclusive of the money not payable by reason merely of lapse of time' together with payments of costs. Payment must, however, be made or tendered *before an agreement for sale has been entered into by the mortgagee with a third party even where the agreement is said to be subject to the right of the mortgagor to redeem or put the mortgage into good standing. Before a mortgagor can obtain the benefit of s. 21 he must pay all arrears for such payment is a condition precedent to relief.* A vague hope of the mortgagor to find further financing, even where the security is ample is not sufficient reason to stay the sale proceedings. [Emphasis added.]

23 As authority for the proposition that the right to redeem must be exercised *before* the mortgagee has entered into an agreement of purchase and sale with a third party, "even where the agreement is said to be subject to the right of the mortgagor to redeem or put the mortgage into good standing", the authors rely on, inter alia, *Mission Construction Ltd. v. Seel Investments Ltd.*, [1973] 2 O.R. 190 (Ont. H.C.).

24 In *Mission Construction*, a mortgagor applied for an order to stay the sale of his property under power of sale to enable him to put the mortgage in good standing. At the time the application was commenced, the mortgagee had accepted an offer to purchase the property. In dismissing the application, Lieff J. stated at 191-92:

> Section 21(1)(a) provides that a mortgagor may put a mortgage in good standing "at any time before sale under the mortgage". The acceptance of an offer to purchase constitutes a "sale", so that the applicant lost its rights under this section on February 28, 1973. It was argued, however, that this right has remained in existence to the present date due to the following clause in the offer to purchase:
>
> > Acceptance by the Vendor hereof shall be subject to the rights if any of the registered owner of the property to redemption or to put the Vendor's mortgage in good standing.
>
> I cannot accept this argument. The right of the applicant under s. 21(1)(a) to put the mortgage in good standing ended on the acceptance of the offer to purchase. The "rights if any" referred to in the above clause include only those rights whose existence was not terminated by the acceptance of the offer, such as the right to redemption upon proof that the sale was fraudulent or improper.

25 This court agreed with this interpretation of former s. 21(1)(a) of the Act in *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316 (Ont. C.A.). On behalf of the court, Lacourcière J.A. stated at 319:

> The relief granted to the mortgagor may be obtained pursuant to s. 21(1)(a) at any time before sale under the mortgage. Thus the mortgagor may perform the covenant or pay the arrears, etc., before any action is commenced, after a notice of exercising power of sale has been served but before the actual sale. Sale in this context has been interpreted as meaning acceptance of an offer. See *Re Mission Construction Ltd. and Seel Investments Ltd.*, [1973] 2 O.R. 190 at 191, 33 D.L.R. (3d) 286.

Thus, a contract of sale entered into by the mortgagor after the mortgagee has entered into a contract of sale to a third party in the exercise of his or her power of sale, can have no effect on the mortgagee's exercise of the power of sale.

26 Almost 90 years ago, before there was legislation on the subject, the court considered whether a mortgagor could redeem the property after the mortgagee had accepted an offer to purchase the property which was being sold under power of sale: *Standard Realty Co. v. Nicholson* (1911), 24 O.L.R. 46 (Ont. H.C.). In this case, the mortgagor presented the mortgagee with a certified cheque for the sum due on the mortgage, which the mortgagee rejected as the land was subject to an agreement of purchase and sale, which was later completed.

27 Riddell J. allowed the purchaser's action against the mortgagor, Nicholson, for possession of the property. It was significant to him that the purchaser had acquired rights under the contract it had entered into with the mortgagee. At p. 55 he stated:

> A binding contract for sale being entered into by the mortgagee, before any notice of any intention to redeem, I think that Mrs. Nicholson lost any right she previously had so to redeem.
>
> In *Kenney v. Barnard* (1910), 17 O.W.R. 889, 2 O.W.N. 470, the second mortgagee, on the day of a sale under the first mortgage, called on the purchaser and offered him the amount of his deposit and $25 for his trouble — he also made a legal tender to the first mortgagee of the amount due, etc. Mr. Justice Sutherland says (17 O.W.R. p. 900): "The tender made after the sale was so made at a time when both vendor and purchaser were bound by the agreement that had been made. ... The vendor would have been willing to cancel the sale and permit the plaintiff to redeem. The purchaser ... was unwilling to forgo his bargain. ... He declined, and could not, I think, be compelled to do so." An action brought by the second mortgagee was dismissed with costs. I follow this decision, and wholly agree in my learned brother's conclusion.

28 In addition, Riddell J. discussed the distinction between a mortgagor's right to redeem after a final order of foreclosure, and the right to do so after a sale under power of sale. He pointed out, at pp. 55-6, that the authorities permit a final order of foreclosure to be opened up in appropriate circumstances to allow a mortgagor to redeem. This right, however, depends on the exercise of a discretion by the court depending upon the circumstances of each particular case. On the other hand, to permit a mortgagor to redeem after the property has been sold upon power of sale, as in this appeal, would require the court to interfere with rights accruing to the purchaser and the mortgagee under their contract of purchase and sale. In other words, it would interfere with the mortgagee's contractual right to sell under power of sale contained in the mortgage entered into with the mortgagor, as well as the contractual rights of the mortgagee and the purchaser arising from the contract of sale under power of sale.

29 A similar approach was taken by Crossman J. in *Waring v. London & Manchester Assurance Co.* (1934), [1935] Ch. 310 (Eng. Ch. Div.). In that case, a mortgagee, exercising a power of sale pursuant to s. 101 of the *Law of Property Act*, 15 Geo. 5, c. 20, had entered into a contract to sell the mortgaged property. Subsequently, the mortgagor tendered the monies due under the mortgage and sought an injunction to prevent the completion of the sale on the ground that it had not been completed.

30 In refusing to issue an injunction on this ground, Crossman J. had this to say at pp. 317-18:

> The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court in proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgment, perfectly clear (subject to what has been said to me to-day) *that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside*. ... In my judgment, s. 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; *and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor*. [Emphasis added]

31 In *Waring*, the mortgagor had also supported his request for an injunction on the ground that the pending sale could not be allowed to stand because it was made at a gross under-value. This was a ground which Logozzo advanced before Wright

J., which he rejected. He raised it again before this court, submitting that the price for which TD agreed to sell the property to Grann is so low as to amount to fraud.

32 In *Waring*, Crossman J. found no evidence showing anything like a lack of good faith in the mortgagee's conduct of the sale. In a passage which has particular relevance to this appeal, he sated at 319:

> The law, as stated by Kay J. in *Warner v. Jacob (I)* [20 Ch.D. 220 at 224] is perfectly clear. The learned judge there says:
>
> > .... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud." In my judgment it is impossible on the facts of this case to conclude that the price is so low as in itself to be evidence of fraud.

I am satisfied that Wright J. was correct in rejecting this ground.

33 *Van Minnen Construction Ltd. v. Murphy* (1977), 19 O.R. (2d) 125 (Ont. H.C.) is another case in which it was held that it was too late for a mortgagor to redeem after the property had been sold at auction under power of sale by the mortgagee. The mortgagor, who had tendered sufficient funds to discharge the mortgage after the mortgagee had sold the property, but before the transaction was completed, sought a declaration that it was entitled to redeem the property.

34 Krever J. rejected the mortgagor's submission that on the date when the tender was made a sale had not occurred because the transaction had not been completed. Applying *Mission Construction*, he stated that the closing of the transaction need not occur before it can be said that a sale within the meaning of former s. 21 of the *Mortgages Act* has occurred. Krever J. went on to say at 131:

> See also the judgment of Vannini, D.C.J., in *Re Hal Wright Motor Sales Ltd. and Industrial Development Bank* (1975), 8 O.R. (2d) 76, 57 D.L.R. (3d) 172, to the same effect. References may also be made to *Arnold v. Bronstein et al.*, [1971] 1 O.R. 467, 15 D.L.R. (3d) 649, in which Lacourcière, J., refused to restrain a mortgagee from selling under a power of sale where the mortgagor had not tendered the principal, interest and costs payable. *He held that postponement of the sale on the mortgagor's indefinite hope of finding new financial backing would constitute an unwarranted interference with the mortgagee's contractual rights*. At p. 468 O.R., p. 650 D.L.R., Lacourcière, J., said (with reference to the equitable remedy of an injunction, which is not in issue in the instant case):
>
> > The general rule developed from numerous cases is that a mortgagee, acting in good faith and without fraud, will not be restrained from a proper exercise of his power of sale, except upon tender by the mortgagor of the principal moneys due, interest and costs.
>
> In my view, in the absence of bad faith or fraud on the part of the mortgagee, *the mortgagor is not entitled to relief unless he has tendered the arrears and costs before the mortgagee has entered into a binding commitment to convey the property to a purchaser*. [Emphasis added.]

35 Mr. Justice Lacourcière's statement that a mortgagor is not entitled to relief under s. 22(1)(a) of the present Act unless he has tendered the arrears before the mortgagee has entered into a binding contract to sell the property is in conformity with the interpretation placed on s. 19a(1) of the 1950 Act (ss.22 and 23 of the 1990 Act) by Schroeder J.A. on behalf of this court in *Scarborough (Township) v. Greater Toronto Investment Corp.* (1956), 4 D.L.R. (2d) 396 (Ont. C.A.) at 404-5. In my view, *Scarborough* makes it clear that payment, or tender, of the amount due under the mortgage and of "any expenses necessarily incurred by the mortgagee" before the mortgagee accepts an offer to purchase the land is a condition precedent to the mortgagor being able to utilize s. 22(1)(a) to preclude a mortgagee from selling the property by power of sale. At p. 405, Schroeder J.A. made reference to the well-established principle "that a mere statement of readiness to pay is not a tender".

36 Applying the above principles, at the time Logozzo commenced his application to prevent Grann from completing the purchase of the property, it was too late for him to redeem the property. Within the meaning of s. 22(1)(a), TD had already sold the property to Grann. Moreover, Logozzo had not fulfilled the necessary condition precedent to engage s. 22 (1)(a) as he had failed to pay, or tender, the amount due to discharge the mortgage. At best, it can be said that he hoped to acquire the funds required to repay the mortgage debt by selling the property to Purnell.

II

37 Therefore, it comes down to whether paragraph 2 of the schedule to the Grann-TD agreement of purchase and sale makes any difference. Wright J. felt compelled by precedent to find that it did. He felt bound to follow the decision of Abbey J. in *National Trust Co. v. Saad* (1997), 33 O.R. (3d) 419 (Ont. Gen. Div.). In my view, Wright J. erred when he felt bound to apply *Saad*, which I seriously doubt was decided correctly.

38 In *Saad*, the mortgagee, which was selling the property under power of sale, had entered into an agreement to sell the property which was conditional for ten days upon the purchaser obtaining a new first mortgage. The ten-day period ended on January 10, 1997. The agreement contained a term, in language identical to that in the Grann-TD agreement of purchase and sale, stating that the mortgagor had the right to redeem up to the time of the waiver or expiry of the condition. On January 9, 1997, the mortgagor's solicitor requested a statement of the mortgage from the mortgagee and indicated that the mortgagor was in a position to redeem. Relying on s. 22(1) of the *Mortgages Act*, the mortgagor succeeded in obtaining a declaration that he was entitled to redeem the property.

39 In granting the declaration, Abbey J. stated at pp. 421-22:

> It does not seem to me that the law pertaining to the interpretation of what is now s. 22(1)(*a*) is in any real doubt. The general principle which is set out in *Mission Construction Ltd. v. Seel Investments Ltd.*, [1973] 2 O.R. 190, 33 D.L.R. (3d) 286 (H.C.J.), is that the acceptance of an offer constitutes a sale within the meaning of the section. Subsequent authorities, however, and in particular the decisions in *Miranda v. Wong* (Ont. H.C.J., April 4, 1986) an unreported decision of Steele J., *Weiss v. Standard Trust Co.* (Ont. Gen. Div., August 5, 1993) an unreported decision of Wilson J., and *Canada Permanent Trust Co. v. Rieckenberg* (Ont. Dist. Ct., December 5, 1983), an unreported decision of Kurisko J., *have, as it were, pronounced an addendum to the general principle, and that is that if the agreement of purchase and sale itself contemplates a right of redemption continuing until a date after the date of the agreement, then the mortgagor is considered to have a right of redemption consistent with the terms of the agreement*.
>
> The clause to which I earlier referred and which is contained in the subject agreement of purchase and sale specifically provides that it is understood between the purchaser and the vendor mortgagee that the mortgagor has a right to redeem the property up to the date of waiver or fulfillment of the financing conditions set out in the agreement. The clause also provides that in the event of redemption the agreement is null and void.
>
> I am satisfied, because of the inclusion of that particular clause in the subject agreement of purchase and sale, and based upon the authorities to which I have referred, that the applicants are to be considered as having a continuing right of redemption as of January 10, 1997. [Emphasis added.]

40 Although the mortgagor had neither paid, nor tendered, the amount required to discharge the mortgage as required by the authorities, this did not prevent Abbey J. from granting the mortgagor the opportunity to redeem the property prior to the date fixed for the closing of its sale under power of sale. In this regard, at p. 423 he stated:

> I am satisfied, in this case, that the applicant should be taken to have complied with the provisions of s. 22(1)(*a*) of the *Mortgages Act*. The steps taken by the applicants on January 9, prior to the expiration of the right of redemption, having regard to the terms of the agreement of purchase and sale are sufficient, in my view, to activate the section and cause the court, in the determination of the equities between the parties, to find the applicants entitled to a right of redemption.

41 Apart from the question of whether Abbey J. was correct in declaring that the mortgagor had the right to redeem in the absence of payment, or tender, of the amount required to discharge the mortgage, in my view, *Saad*, and the authorities relied on by Abbey J., are distinguishable on their facts from this appeal.

42 In *Saad*, *Miranda v. Wong* [1986 CarswellOnt 5098 (Ont. H.C.)], *Weiss* [*Weiss v. Standard Trust Co.* (August 13, 1993), Doc. 92-CQ-12383 (Ont. Gen. Div.)] and *Rieckenberg* [*Rieckenberg v. Canada Permanent Trust Co.* (December 5, 1983), Kurisko J. (Ont. Dist. Ct.)], as well as in *Nalisa Investment Ltd. v. National Bank of Canada* (1980), 28 Chitty's L.J. 187 (Ont. S.C.), the agreement of purchase and sale entered into between the mortgagee selling under power of sale and the purchaser was subject to a condition. In *Saad*, the condition was the ability of the purchaser to obtain financing. In *Miranda*, *Rieckenberg* and *Nalisa* the agreement was conditional upon the mortgage not being redeemed up to the date of closing. In *Weiss* there is a condition which appears to have a similar effect. As I will explain, in this appeal, the agreement of purchase and sale, like the agreement of purchase and sale in *Mission Construction*, was not a conditional agreement, but contained an understanding that the mortgagor had the right to redeem in certain circumstances.

43 The effect of the financing condition in *Saad*, and the conditions in the cases which it followed, was to defer the coming into force of a sale within the meaning of s. 22(1)(a) of the *Mortgages Act* until the condition was fulfilled or waived. In *Saad*, a sale would occur upon the fulfillment or waiver of the financing condition. In the event that the purchaser was unable to obtain financing, obviously there would be no agreement as the condition had not been fulfilled. However, in reaching his decision, Abbey J. did not do so on the basis of *Miranda*, and the other cases, but on the basis of the provision in the agreement of purchase and sale, to which the mortgagor was not a party. In my view, therefore, Abbey J. was incorrect in his observation that the authorities on which he relied "pronounced an addendum to the general principle" that acceptance of an offer constitutes a sale within the meaning of s. 22(1)(a), "and that if the agreement of purchase and sale itself contemplates a right of redemption continuing until a date after the agreement, then the mortgagor is considered to have a right of redemption consistent with the terms of the agreement." Those authorities, in my view, do not support this proposition. Nor does *Saad*. In each of the cases followed by Abbey J. the agreement of purchase and sale entered into under the power of sale was a conditional agreement. It appears to have been the opinion of the judges deciding those cases that a conditional agreement of purchase and sale entered into under power of sale does not constitute a "sale under the mortgage" within the meaning of s. 22(1)(a) of the *Mortgages Act*. The correctness of this proposition need not be decided on this appeal.

44 Moreover, in my view, the provision of paragraph 2 of the schedule to the Grann-TD agreement of purchase and sale does not render it a conditional agreement. Once again, I repeat it for convenience:

> The purchaser understands and agrees that the mortgagor has the right to redeem the property *up to the time of waiver or expiration of all rights of termination or fulfillment of all conditions* and this agreement is subject to that right. In the event of redemption by the mortgagor, this agreement shall be null and void and any deposit monies will be refunded in full without interest. [Emphasis added.]

On its face, this clause represents an understanding and agreement between Grann and TD that there are circumstances in which TD may permit the mortgagor to redeem the property. As such, it has a similar effect to the similar clause in *Mission Construction*. However, this cannot serve to confer on Logozzo a right to redeem beyond the time permitted by s. 22(1)(a). This provision is likely for the benefit of TD. It gives TD the opportunity to make the best deal possible in realizing on its security notwithstanding the effect of s.22(1)(a), and without incurring any liability to the purchaser. For example, if the amount for which it sold the property to Grann was insufficient to retire the mortgage debt, it reserved for TD the right to permit Logozzo to redeem on the payment, or tender, of a sufficient amount "up to the time of waiver or expiration of all rights of termination or fulfillment of all conditions". However, as between Logozzo and TD, it created no rights, nor did it provide Logozzo the foundation to prevent the completion of the Grann - TD transaction. As I have pointed out, in any event, at the time he brought his application, Logozzo had not effected a redemption as he had neither paid, nor tendered, the amount due on the mortgage.

45 In my view, although paragraph 2 permits Logozzo to redeem if certain circumstances are met, he could not enforce this benefit against Grann or TD for the reason that he was not a party to the agreement of purchase and sale. As a general rule,

the doctrine of privity of contract provides that a contract can neither confer rights, nor impose obligations, on third parties. Paragraph 2 may permit the mortgagee to allow the mortgagor to redeem subsequent to the time of a binding agreement of purchase and sale. Indeed, as I stated earlier, TD has no objection to the court permitting Logozzo to redeem provided the court protects it from liability should Grann decide to enforce its contractual rights, as paragraph 2, in effect, provides. However, it is primarily the mortgagor, whose right to redeem is governed by s. 22(1)(a), who is seeking to enforce a term in a contract to which he is not a party.

46 As for the purchaser, if he or she is content to enter into an agreement of purchase and sale that contains such a provision, he or she is taken to have assumed the risk that the transaction may not close. The provision leaves the vendor free to accept a proper redemption within the time frame contained in the provision and return the purchaser's deposit, without incurring liability to the purchaser. Thus, although it is apparent that Grann acted in good faith in submitting his offer, he did so knowing that TD could terminate the agreement by permitting Logozzo to redeem the property within the time frame contained in the provision, in which event the agreement becomes null and void and TD must return his deposit. Grann is not prepared to relinquish the rights which he acquired under the agreement of purchase and sale and to go along with TD's willingness to permit Logozzo to redeem. TD's willingness to do so, as stated earlier, is conditional upon the court protecting it from any liability it may have to Grann if the court declares the agreement of purchase and sale null and void. However, had Logozzo effected a proper redemption in compliance with the provision in paragraph 2, Grann's rights under the agreement of purchase and sale would have been at an end.

47 It is helpful to examine the language of paragraph 2 which, in my view, is needlessly convoluted. As I read the penultimate sentence of that paragraph, it is similar, in effect, to the provision in the agreement of purchase and sale in *Mission Construction*, which Leiff J. found did not preserve the mortgagor's right to redeem. The clause in that case provided that the mortgagee's acceptance of the offer was "subject to the rights" of the mortgagor to redeem the property or to put the mortgage in good standing. In this appeal, the agreement of purchase and sale is "subject to [the] right" of the mortgagor to redeem the property "*up to the time* of waiver or expiration of all rights of termination or fulfillment of all conditions". The only difference between the two clauses is that in this appeal the mortgagor's right to redeem terminates on the occurrence of certain events, while in *Mission Construction* the right to redeem is not subject to termination.

48 As I have indicated, the clause in paragraph 2 does not render the TD-Grann agreement of purchase and sale a conditional agreement. It does not make the right of Grann to complete the purchase of the property dependent on the happening of a future event, such as the purchaser obtaining the funds to complete the purchase, as in *Saad*, or the mortgage not being redeemed prior to closing, as in *Miranda*. The clause simply contains an acknowledgement that the mortgagor has the right to redeem the property up to a particular time. There are no conditions in the agreement to be fulfilled.

49 This analysis takes me back to *Saad*. As I have indicated, the agreement of purchase and sale in that case was conditional for ten days on the purchaser obtaining financing. It was before the ten-day period had elapsed that there was an indication that the mortgagor was in a position to redeem. The agreement of purchase and sale contained the same clause found in paragraph 2 of the agreement of purchase and sale in this appeal. It is somewhat unclear from Abbey J's reasons whether he felt the mortgagor was entitled to redeem because the agreement of purchase and sale was conditional as decided in the *Miranda* line of cases, or because he found the mortgagor had the right to do so by virtue of the clause in the agreement of purchase and sale. In either event, it is my view that *Saad* was not decided correctly. If the decision rests on the ground that there was not a sale within the meaning of s. 22(1)(b) of the *Mortgages Act* because the agreement was conditional, assuming the correctness of the *Miranda* line of cases, the mortgagor was unable to rely on s. 22(1)(b) and redeem the property because he had neither paid, nor tendered, the redemption funds. If the decision rests on a right to redeem found in the clause of the agreement of purchase and sale, in addition to the absence of payment or tender, this was not a right which the mortgagor could enforce as he was not a party to that agreement. In addition, a decision based on this ground is contrary to *Mission Construction*.

50 As I stated earlier, it is TD's position that it remains open to the court to permit Logozzo to redeem as the time had not been reached for Grann to complete his examination of title when Logozzo commenced his application. TD submitted, therefore, that it could agree to a redemption of the property as the time for the "waiver or expiration of all rights of termination" of the agreement, as contained in paragraph 2, had not expired.

51 In making this submission, TD relied on the following language in paragraph 10 of the agreement of purchase and sale: "If within the specified times referred to in paragraph 8 any valid objection to title ... is made in writing to Vendor and which Vendor is unable or unwilling to remove, remedy or satisfy and which purchaser will not waive this agreement ... shall be at an end ..." In my view, this language does not create a right of termination. In any event, as the period in which Grann was permitted to examine the title had not expired when the application was commenced, it was premature for TD, or Logozzo, to place any reliance on this aspect of the clause in paragraph 2.

52 My interpretation of paragraph 10 is based on the reasons for judgment of Danckwerts L.J. in *Property & Bloodstock Ltd. v. Emerton* (1967), [1968] Ch. 94 (Eng. C.A.), a power of sale and redemption case, in which it was held that conditions respecting title in the usual agreement of purchase and sale are just that — a mere matter of title and, therefore, one of the usual terms found in an agreement of purchase and sale - with the result that the agreement is an unconditional contract of sale. It is also noteworthy that the Court of Appeal in *Emerton* approved Crossman J.'s decision in *Waring*, observing, at p. 115, that it "was plainly correct".

53 In summary, notwithstanding that the doctrine of privity of contract precluded Logozzo from enforcing the apparent benefit which was conferred on him by the language of paragraph 2, as between Grann and TD, paragraph 2 entitled TD to accept a proper redemption by Logozzo "up to the time of waiver or expiration of all rights of termination or fulfillment of all conditions" contained in their agreement, and to walk away from the agreement without incurring any liability to Grann. However, as I have explained, in the circumstances of this appeal TD cannot rely on, and enforce, paragraph 2 for three reasons. Logozzo had not effected a proper redemption at the time his application was brought, as he had neither paid, nor tendered, the appropriate amount of money owing on the mortgage. Paragraphs 8 and 10 of the agreement did not, as TD contended, give Grann a right to terminate it which he had not waived and which had not expired. Finally, the agreement was not conditional.

54 Before leaving this analysis, it should be acknowledged that in certain circumstances the courts have permitted a third party to enforce a benefit or right established in its favour pursuant to the terms of a contract. For example, in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), the Supreme Court of Canada introduced what was intended as a principled exception to the doctrine of privity of contract in the context of a limitation of liability clause in a standard form contract for the storage of a transformer. See, also, *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, a judgment of the Supreme Court of Canada, released September 10, 1999, [1999] 9 W.W.R. 380 (S.C.C.). It was not argued in this appeal that the principle established in *London Drugs* should be applied to permit Logozzo to enforce the right to redeem contained in paragraph 2. However, were I inclined to apply *London Drugs*, it is my view that Logozzo would have failed for the reasons which I have summarized in the preceding paragraph.

Conclusion

55 As stated earlier, TD and Grann both regard their agreement of purchase and sale to be in force awaiting the release of this judgment. For all of the above reasons, they may now proceed to complete their contract, freed from the unhappy interference by Logozzo at the eleventh hour.

56 In the result, I would allow the appeal and set aside the order of Wright J. Grann is entitled to the costs of the application, the cross-applications and the appeal from Logozzo and TD.

***Goudge J.A.* (dissenting):**

57 I have had the benefit of reading the thorough and comprehensive reasons for judgment of Borins J.A. allowing the appeal. With respect, however, I approach this matter rather differently and have reached a different result. My reasons for doing so are as follows.

58 There were three applications heard together by Wright J.: one by Mr. Logozzo, the mortgagor; one by the Toronto-Dominion Bank, the mortgagee; and one by Mr. Grann, the purchaser from the Bank pursuant to its power of sale.

59 By agreement, the rights of all three parties were preserved as of November 12, 1998. Those rights remain in suspension pending the determination of this appeal.

60 In my view, the fundamental question before Wright J. was whether on November 12, 1998, Logozzo was able to redeem the mortgaged property or whether to do so would violate Grann's rights as purchaser from the Bank.

61 Logozzo argued that because of s.22(1)(a) of the *Mortgages Act*, R.S.O. 1990, c.M.40, he was entitled to redeem as of that date. The Bank supported him, indicating that it wished to have him redeem provided that to do so would not violate Grann's rights. Grann took the opposite position, arguing that because of his purchase from the Bank, there was no legal basis upon which Logozzo could redeem.

62 In my opinion, the resolution of this appeal depends on the contract between the Bank and Grann. The critical term of that contract is paragraph 2 of Schedule A which forms part of the contract of purchase and sale. That paragraph reads as follows:

> 2. It is further understood that on the date of acceptance of this offer there is default under the terms of the mortgage which entitles the Vendor to exercise the Power of Sale. The only evidence of the default, which the Purchaser may require, shall be a statutory declaration by the Vendor setting forth the facts entitling the Vendor to sell under the Power of Sale, including the particulars of the notice of exercising the Power of Sale, the names of the persons upon whom service of the notice has been effected, and declaring that default under the mortgage entitling the Vendor to exercise the Power of Sale has continued up to and including the date of acceptance of this offer and to the time of closing. The Purchaser understands and agrees that the mortgagor has the right to redeem the property up to the time of waiver or expiration of all rights of termination or fulfilment of all conditions, and this Agreement is subject to that right. In the event of redemption, by the mortgagor, this agreement shall be null and void and only deposit monies paid will be refunded without interest.

63 This paragraph constitutes the agreement of these two parties that the Bank can permit Logozzo to redeem the property "up to the time of waiver or expiration of all rights of termination or fulfilment of all conditions" and further, that if that happens, Grann's agreement with the Bank is rendered null and void.

64 This paragraph is designed to preserve for the Bank its right to be repaid in full by the redeeming mortgagor right up to the point at which the purchaser to whom the Bank is selling no longer has a legal escape hatch from the transaction. That is the point at which the Bank can look with certainty to the sale to be repaid. The purchaser contracts with full knowledge that until that point the Bank is entitled to be repaid by permitting the mortgagor to redeem, thereby voiding the contract of purchase and sale.

65 The question then is whether as of November 12, 1998, the deadline had passed for the Bank to permit Logozzo to redeem. I do not think that it had.

66 Paragraph 10, together with paragraph 8 as amended of the agreement of purchase and sale, provides that the purchaser has until November 13, 1998 to make any valid objection to title or to any outstanding work order or to the unlawfulness of the present use or to the lack of fire insurance. If the vendor does not satisfy the objection the purchaser may waive it. Otherwise the agreement is terminated. This provision gives Grann the right to terminate the contract up to November 13, 1998 if he refuses to waive an unsatisfied and valid requisition. Since Grann had not waived this right, until it expired on November 13, the Bank could not be certain that Grann was lawfully obliged to complete the transaction. Until then the Bank could not look with certainty to the sale to be repaid.

67 This, I think, is precisely the kind of provision contemplated by paragraph 2 of Schedule A. As I have said, its purpose is to entitle the Bank to be repaid by a redeeming mortgagor up to the point at which the purchaser under power of sale ceased to have a legal escape route from the transaction. At that point, the Bank can look with certainty to the sale as the basis for repayment and the justification for permitting redemption vanishes.

68 As of November 12, 1998, Grann's right under paragraph 10 had neither been waived, nor had it expired. The Bank could not yet be certain that it could look to the sale to Grann as the basis upon which it would be repaid. Hence, as of that date the

contract of purchase and sale entitled the Bank to allow Logozzo to redeem. It could do so with no infringement of Grann's rights since the redemption would render the contract between Grann and the Bank null and void.

69 In summary, therefore, I conclude that as of the crucial date, November 12, 1998, Logozzo was able to redeem the property because the Bank has a contractual right to let him do so and it is willing to exercise that right.

70 While my conclusion differs from that of my colleague, it also differs from that reached by Wright J. He found that Logozzo had a right to redeem, which existed not only on November 12, 1998, but ran to the date for closing. In my view, Logozzo could redeem because the Bank had the contractual right to let him do so, but only up to the deadline provided in paragraph 10 of its contract with Grann, namely, November 13, 1998.

71 However, in fashioning the necessary declaration I think account should be taken of the fact that all rights have been in suspension since November 12, 1998. Some allowance should be made for start up time when the clock is restarted. Hence, I would declare that as of November 12, 1998, the Bank had the right to allow Logozzo to redeem the property. I would further provide that the deadline for satisfying requisitions in the contract of purchase and sale be extended for one week from the date of release of this judgment.

72 The conclusion I have reached is contractually founded. It does not depend at all on s. 22(1)(a) of the *Mortgages Act*. It is, therefore, unnecessary to address the rights accorded to Logozzo by that section in these circumstances. Nonetheless, there are three points that might usefully be made in this connection.

73 First, I would be inclined to the view that if no sale has transpired under the mortgage, the mortgagor has the statutory right to redeem and the court can so declare even if the mortgagor has not tendered the amount owing on the mortgage. The Act does not require a tender as a precondition to possessing the right to redeem. Nor, as I read it, does the case law, unless the mortgagor is also seeking to enjoin the sale under power of sale or unless the mortgagor is seeking a declaration after a sale under the mortgage has occurred where, absent the prior tender, the mortgagor's rights, if any, have vanished.

74 Where there has not yet been such a sale and the mortgagor seeks no more than a declaration that he has the right to redeem, I find it difficult to see the rationale for requiring as a precondition to that relief that the mortgagor tender what is owed. Indeed, if the mortgagor had tendered what is owed, he would be entitled to an order that he has redeemed, not just a declaration that he has the right to do so.

75 Secondly, assuming the correctness of the *Miranda v. Wong* [1986 CarswellOnt 5098 (Ont. H.C.)] line of cases, which my colleague Borins J.A. correctly says we need not decide, I would be inclined to find the contract between the Bank and Grann to be conditional and therefore not a "sale under the mortgage" within s. 22(1)(a) of the *Mortgages Act*.

76 It seems to me that as of November 12, 1998, this contract was conditional in the same sense as that, for example, in *National Trust Co. v. Saad* (1997), 10 R.P.R. (3d) 145 (Ont. Gen. Div.). In *Saad*, if satisfactory financing did not materialize by the required date the purchaser could either waive this condition or terminate the contract. In this case, if an unsatisfied and valid objection to title materialized by the required date the purchaser could waive this condition or terminate the contract.

77 While Danckwerts L.J. in *Property & Bloodstock Ltd. v. Emerton* (1967), [1968] Ch. 94 (Eng. C.A.) defined as unconditional a contract containing a condition as to title, this case can be distinguished on the basis that it was decided in the context of the interpretation of a statute defining the mortgagee's power to sell, not the circumstances under which a mortgagor may redeem.

78 In principle it would seem to make sense that a sale that was conditional, as this one was as of November 12, 1998, should not terminate the mortgagor's right to redeem. At that point the sale remains contingent. It may never happen. Until the contingency is removed and the sale becomes a certain basis for repayment of the mortgage debt, the mortgagor ought not to be deprived of the right to serve as the basis for repayment by redeeming the property. Otherwise, the mortgagee may be left with no sale and a mortgagor with no right to redeem.

79 In summary I would vary the order below as I have indicated. Since this represents material success for Logozzo and the Bank they should each have their costs of this appeal.

Appeal allowed.

CITATION: 2027707 Ont. Ltd. v. Richard Burnside & Associates et al., 2017 ONSC 4022
COURT FILE NO.: CV-13-489058
MOTION HEARD: 21042017

SUPERIOR COURT OF JUSTICE - ONTARIO

RE:	2027707 Ontario Ltd.	Plaintiff
	AND:	
	Richard Burnside & Associates Ltd. and John Schnurr	Defendants

BEFORE: Master P. T. Sugunasiri

COUNSEL: P. Cozzi, Counsel, for the Plaintiff/Moving Party

S. Dewart, Counsel, for Allen Wilford/Responding Party

HEARD: April 21, 2017

REASONS FOR DECISION

[1] This action arises from the receivership of the Plaintiff's lodge business. John Kraner is the principal of the Plaintiff. He and his former wife operated a motel in Tobermory called the Tobermory Lodge. Mr. Kraner was the registered owner of the property and the business was operated through the Plaintiff. In the course of matrimonial litigation, Mrs. Kraner alleged that Mr. Kraner was dissipating assets. Accordingly, Mr. Allen Wilford ("Wilford") who acted for Mrs. Kraner moved successfully for the appointment of a receiver to operate the business.

[2] On May 16, 2012, Justice Corbett appointed the Defendant Richard Burnside & Associates Limited (the "Receiver") as receiver and manager of Tobermory Lodge. In or around March 2013, Mr. Kraner agreed to sell the Lodge. After the sale was complete, Mr. Kraner alleged that kitchen equipment and other valuable fixtures had been removed from the property prior to closing. The Plaintiff commenced this action in September of 2013 seeking damages for conversion of property in the amount of $316,245.17 and punitive damages.

[3] On February 19, 2017, Master Dash added Mr. Kraner as a plaintiff to the action and Mr. Wilford as a defendant. He also permitted some, but not all of the proposed claims against Mr. Wilford. He granted the Plaintiff's proposed conversion claim against Mr. Wilford but not the claim for "damages for the devaluation of the value of the Tobermory Lodge in the amount of $600,000." Master Dash did not permit the addition of this form of relief on the basis that it was not supported by any tenable causes of action. Master

Dash granted the Plaintiff "one further opportunity" to draft amendments to support that claim for relief.

[4] The Plaintiff therefore brings the within motion seeking leave to further amend the Statement of Claim ("Claim"). The proposed amendments continue to seek "Damages for the devaluation of the value of the Tobermory Lodge in the amount of $600,000.00" (the "devaluation claim") and adds an additional claim for "Damages for the torts of inducing breach of fiduciary duty, civil conspiracy to injure, and trespass to property in the amount of $250,000.00."

[5] For the reasons set out below, the Plaintiff is permitted to amend the Claim to include the devaluation claim, the claim for inducing breach of fiduciary duty and the claim for trespass as against Wilford. The conspiracy claim and material facts supporting the conspiracy claim are struck.

The Law

[6] There is no issue between the parties as to the applicable test to be met in amending the Claim. Amendments are governed by Rules 26.01 and 5.04. In short, amendments ought to be granted unless prejudice arising from the amendments cannot be compensated by costs or an adjournment. As Master Dash notes in his related decision at 2016 ONSC 530, in a motion to amend a pleading, the court is required to scrutinize the proposed claim to ensure it raises a tenable plea.[1] No amendment should be permitted which, if originally plead, would have been struck. To strike on the basis of tenability, the court is to assume the facts as plead to be true, and examine if it is plain and obvious that the pleading, or a particular allegation in the pleading, fails to disclose a reasonable cause of action.[2] Finally, in determining the tenability of a claim, the proposed amendments are to be read generously with allowances for deficiencies in drafting.[3]

[7] The issue in the current motion is tenability of the proposed causes of action against Wilford.

Tenability Analysis

[8] In the Claim that was before Master Dash, the Plaintiffs had failed to set out the cause of action underlying the devaluation claim. In oral and supplementary written submissions, the Plaintiffs argued that the relief was grounded in the torts of intentional interference with economic relations and conspiracy. In the proposed Claim before me, there is no claim for intentional interference with contractual relations and I need not consider if that cause of action could be gleaned from the Claim if read generously. Master Dash

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[1] See the *2027707 Ont. Ltd. v. Richard Burnside & Associates Ltd.*, 2016 ONSC 530 at para. 14 (Master Dash) and *Plante v. Industrial Alliance Life Insurance Company*, [2003] OJ No 3034, 66 OR (3d) 74 at para. 19 (Master).
[2] See for example *Brookfield Financial Real Estate Group Ltd. v. Azorim Canada (Adelaide Street) Inc.*, 2012 ONSC 3406, 111 OR (3d) 580 at paras. 23, 24, 27-28, 30 (SCJ).
[3] *Brookfield, supra* at para. 23.

permitted the Plaintiff to seek further amendment of the Claim with the benefit of his comments and concerns raised about that cause of action. If it is not expressly in the Claim now, I consider it to be abandoned.

[9] Despite this final opportunity to amend with the benefit of guidance from Master Dash, the devaluation claim against Wilford still has no cause of action overtly affiliated with it. Instead, the Plaintiffs (Mr. Kraner having been added by Master Dash) has added a new and separate head of relief against Wilford at paragraph 1.1(d) for "Damages for the torts of inducing breach of fiduciary duty, civil conspiracy to injure and trespass to property in the amount of $250,000.00". On a strict reading of the proposed Claim, This alone is a reason to strike the devaluation claim, or rather, disallow its inclusion. This view is reinforced by the fact that in their plea relating to the devaluation claim, the Plaintiffs say: "As a result of the implementation by the Defendant John Allen Wilford of the scheme referred to in paragraph 7.1 above, the sale price of the Tobermory Lodge was reduced from a Pre-Receivership value of 1,700,000.00 to an actual sale value of 1,100,000.00 for a net loss to the Plaintiff of $600,000.00." The substance of paragraph 7.1 is exactly what Master Dash considered in the motion before him and found the relief to be wanting of a cause of action.

[10] The Plaintiffs nevertheless seek to tie conspiracy and inducing breach of fiduciary duty to the devaluation claim in their factum and oral submissions. To give the Plaintiffs the benefit of the most generous reading of the proposed Claim possible, I will consider the sufficiency of the causes of action in paragraph 1.1(d) for the purposes of both the devaluation claim and the claim for $250,000.

Civil Conspiracy

[11] Since the pleading that was presented to Master Dash, the Plaintiffs have added paragraphs 8-36 and paragraph 45 to support their claims for trespass, civil conspiracy and inducing breach of fiduciary duty. Paragraphs 7.1(a) and (d), 17-22, 24-27, 29-32, 34 and 35 appear to address the tort of civil conspiracy though I agree with Wilford that the pleading for civil conspiracy is interspersed with trespass and inducing breach of fiduciary duty. For the reasons set out below, I am not persuaded that there is a tenable cause of action in civil conspiracy and it, and any supporting material facts, should be struck from the proposed Claim.

[12] The constituent elements of the tort of civil conspiracy are uncontroversial. Whether the claim is for "unlawful conspiracy" or "conspiracy to injure", the Plaintiff's proposed Claim must set out:

a. The parties to the agreement to conspire;

b. The relationship of the parties;

c. The particulars of the agreement;

d. The purpose or object of the conspiracy;

e. The overt acts done in pursuance of the conspiracy; and

f. The injury and damages suffered by the plaintiff from those acts.

[13] For "unlawful conspiracy", the defendant's conduct must be unlawful, directed against the plaintiff and the defendant ought to know that the conduct is likely to injure the plaintiff. For 'conspiracy to injure", regardless of the means used by the defendant, causing harm to the plaintiff must be the predominant purpose.[4]

[14] The proposed Claim satisfies some, but not all of the requirements in the list above. It identifies the parties to the alleged agreement to conspire as being Wilford and the Receiver (para. 19). The proposed Claim goes on to describe the relationship between Wilford and the Receiver. It states, for example, that Wilford and the Receiver had prior business relationships that caused Wilford to nominate the Receiver to manage Tobermory Lodge (para. 18). At this pleadings stage, those allegations meet a) and b) above.

[15] The difficulty with the proposed Claim starts to appear for criterion c) which requires particulars of the agreement. In that regard, the Plaintiffs allege that Wilford and the Receiver entered into an oral agreement to cause financial injury to the Plaintiff (para. 19) In my view, the allegation of this oral agreement is a baldly asserted after thought which is internally inconsistent with the rest of the proposed Claim. I note that paragraph 19 was added to the proposed Claim only after Plaintiffs' counsel had the benefit of the Defendants' factum.

[16] If one reviews the proposed Claim in its entirety, there are no material facts that support the allegation that the Receiver acted in concert with Wilford beyond the statement made in paragraph 19 and the use of the words "in concert" or "conspiratorial" in a smattering of other paragraphs (paragraphs 25,26, 34, 35 for example). I set out the some of the proposed paragraphs below:

> 20. In particular, within two hours of the receivership having been granted to Richard Burnside and Associates by the court, the Defendant Wilford advised the Plaintiffs that the receiver would be employing the Defendant Wilford's client, the Plaintiff Kraner's ex-wife, to manage and operate the Plaintiff's Tobermory Lodge during the receivership.
>
> 21. The Plaintiffs state that one week after the Court granted the receivership order, on May 2012 Victoria Day long weekend the Defendant Wilford, his family and his legal staff spent the entire long weekend at the Tobermory Lodge. On May 22, 2012, which was the next business day following that long weekend, the Defendant Wilford drafted the receiver's affidavit in support of an order seeking the Plaintiff Kraner's removal from the Lodge.

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[4] *Agribrands Purina Canada Inc. v. Kasamekas*, 201 ONCA 460 at para. 24; *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 SCR 452 at p. 47; *Normart Management Ltd. v. West Hill Redevelopment Co.*, (1998), 37 OR (3d) 97 (CA).

22. The Plaintiffs state that the Defendant Wilford directed the receiver's affidavit to falsely claim that the Defendant Wilford's client, the plaintiff Kraner's ex-wife, was the most knowledgeable person to assist in operating the Lodge…

23. The Plaintiff's plead that the Defendant Wilford's submission to the court of that affidavit from the receiver was Wilford's over act of directly inducing a breach of the receiver's fiduciary duty owed to the Plaintiffs.

24. The Plaintiffs plead that the receiver's May 22, 2012 affidavit is evidence which was directed by Wilford to be manufactured in order to evict the Plaintiff Kraner from his property of the Tobermory Lodge and with the common and predominant intent of harming the Plaintiff's economic interests.

25. The Plaintiffs state that further to the oral conspiratorial agreement between the Defendant Wilford and the receiver, Wilford was at the Tobermory Lodge on a number of occasions during the receivership.

26. The Plaintiffs state the receiver and the Defendant Wilford acted in concert to manage the motel business of the Tobermory Lodge.

27. In particular, the Defendant Wilford improperly hired employees at the Lodge, hired tradespeople to work at the Lodge, and directed both of those groups of people as to how to do their work.

28. The Plaintiffs state that the Defendant Wilford induced the receiver to breach his fiduciary duty to the Plaintiffs by directing the receiver not to make full and frank disclosure to the Plaintiffs of the financial and business operations of the Tobermory Lodge during its receivership.

29. During the one year term of the receivership, the spending and hiring decisions made by the receiver and the Defendant Wilford caused the Plaintiff owners of the Lodge to be responsible for expenditure of almost $300,000.00 on gross business revenues of $211,243.00.

30. The Plaintiffs plead that it was the object of the collusion between the Defendant Wilford and the receiver to seek to bankrupt the Tobermory Lodge business so that the Defendant Wilford could obtain ownership upon a distress sale.

[17] The majority of these assertions and the remaining allegations made in paragraphs 31-36 in the proposed Claim allege that Wilford was essentially the mastermind of a scheme that induced the Receiver to act improperly and/or breach his fiduciary obligations to the Plaintiffs in managing the Lodge. If the Receiver was "induced" to breach his duties, then he cannot have been in a conspiracy with Wilford. If the Receiver was a co-conspirator, no inducing would be necessary. Further, there is no allegation that the Receiver agreed with Wilford's alleged directions such that he was a co-conspirator. For example, in paragraph 28 quoted above, it states that Wilford directed the receiver not to make full and frank disclosure. However, there is no plea that the Receiver in fact listened to Wilford or followed through with that alleged plan. Given that the Receiver is the only

other identified party to the alleged conspiracy, a shortfall in the plea against the Receiver leads to a shortfall in the plea of conspiracy as a whole.

[18] If I am wrong in my analysis above, I agree with Wilford that there are other defects in the conspiracy plea that causes it to be untenable. Taken as a whole, the conspiracy plea is for the subcategory of "conspiracy to injure", rather than "unlawful conspiracy". The proposed Claim says as much in paragraph 1.1(d). There is only one reference to unlawfulness in the proposed Claim, at paragraph 34. This means that the Plaintiffs must plead and provide material facts that the predominant purpose of the alleged conspiracy was to harm the Plaintiffs.

[19] Read as a whole, the predominant purpose of the conspiracy as alleged in the proposed Claim was not to injure the Plaintiffs. That injury is collateral to the predominant purpose of allowing Wilford to secure the Lodge at a distressed price (paragraphs 30,33, 34,36). The test is not met if the harm to the Plaintiff is collateral: "The defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if the harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendant and not the consequences that the defendant either realized or should have realized would result."[5] The plea of predominant harm to the Plaintiffs at paragraphs 19 and 24 are in my view bald assertions that are inconsistent with the rest of the proposed Claim.

[20] Given the foregoing, it is plain and obvious that the Plaintiffs' claim for civil conspiracy to injure is untenable and cannot succeed. The Plaintiffs are not permitted to amend their Claim to include it. Further, civil conspiracy cannot be the underlying cause of action for either the devaluation claim, or the separate damages claim for $250,000.00.

Inducing Breach of Fiduciary Duty

[21] As in the case of civil conspiracy, I will accept that this cause of action is plead not only to support the claim for general damages but also the devaluation claim. The Plaintiffs have not provided any jurisprudence to support their proposition that this is a cause of action recognized by our courts. However, the novelty of an action does not necessarily render it untenable, especially at the pleadings stage. While some courts have touched on the topic, I am not aware of any Court that has conducted an analysis of its viability.[6] For the purposes of the present motion, however, there is sufficient acceptance from the Court of Appeal and our court of its possible existence that I am not prepared to strike it from the proposed Claim at this point. I do not agree with Wilford's assertion that if there is such a tort as inducing breach of a fiduciary duty, the Plaintiffs should be required to meet the test for inducing breach of contract in their proposed Claim. The Court of

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[5] *Ontario Consumers' Home Services v. Enercare Inc.*, 2014 ONSC 4154 at para. 23.

[6] See *Algonquin Mercantile Corp. v. Cockwell*, [1997] OJ No 4616 (OCJ)(QL); *City of Toronto v. MFP Financial Services Ltd.*, [2003] OJ No 2523 (SC)(QL); *ADGA Systems International Ltd. v. Valcom Ltd. et al.*, 1999 CanLII 1527; [1999] OJ No 27 (CA)(QL); *Ontario Public Service Employees Union v. Ontario*, [2005] OJ No 1841 (SC)(QL); *Ali Arc Industries v. S&V Manufacturing Ltd.*, 2011 MBQB 95 (Master).

Appeal in *ADGA Systems International v. Valcom Ltd.et al.*[7] mentions that the two causes of action may be similar but the appropriate test to apply is to be decided on another day with the benefit of a full record and proper argument.

[22] The onus is still on the Plaintiffs, however, to plead the material facts to support this novel claim. In particular, the Plaintiffs must plead the fact of and the nature of the fiduciary relationship between the Receiver and the Plaintiffs. Having reviewed the new paragraphs of the proposed Claim, I find that they have done so (see for example paragraphs 8, 10-14, 23, 28, and 33). The fact that the Court or Wilford might have drafted the proposed Claim differently is not the test. The test is whether or not it is plain and obvious that this particular claim would not succeed. I cannot so conclude. It is well established that a court appointed receiver such as the one in this case owes a fiduciary duty to all of the stakeholders in the receivership.[8] The question raised by the proposed Claim is whether or not the Receiver had a particular duty to the Plaintiffs and whether such a duty was breached due to Wilford's directions. In my view, these and other questions are for a trier of fact. The Plaintiffs have met the threshold to allow the pleading to be added at this stage.

[23] The Plaintiffs shall therefore be permitted to proceed with their proposed Claim for inducing breach of a fiduciary duty, including the material facts in support of that potential cause of action and the devaluation claim.

Trespass to Property

[24] The Plaintiffs seek to add this cause of action as against Wilford. It is unclear what type of trespass the Plaintiffs allege. In the context of the proposed Claim, however, it could be for trespass to chattels. This is a traditional cause of action seeking to protect a person in possession of property. It is sometimes considered the "cousin" or "little brother" of conversion and requires that there be an unauthorized taking or moving of personal property. I was not presented with any significant argument on this potential cause of action by either party. Given that a primary complaint of the Plaintiffs is the removal of kitchen equipment and other chattels from the Lodge and that conversion is already plead, this cause of action should proceed as one of the bases for the $250,000 damages claim against Wilford. It cannot, however, possibly underlie the devaluation claim.

Adding 7887035 Canada Inc. c.o.b. as Cedar Creek Remediation

[25] The Plaintiffs wish to add this company as a defendant. The Receiver John Schnurr is a director and employee of Cedar Creek. This amendment proceeds on the consent of all parties except Wilford, who takes no position.

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[7] *ADGA, supra* at p. 6.
[8] *Turbo Logistics Canada Inc. v. HSBC Bank Canada*, 2009 CanLII 55292 at para. 13 (SC).

Disposition

[26] I order as follows:

a. The Plaintiffs are permitted to amend the Statement of Claim in the form set out at Tab 4 of the "Plaintiff's Oral Submissions" save and except for the allegation of conspiracy and any material facts pleaded solely to support conspiracy, which are struck;

b. If the parties cannot agree on what paragraphs are to be excised, they may arrange for a case conference with me through the Masters' Administration to resolve the dispute;

c. The Plaintiffs are permitted to add 788 Canada Inc. c.o.b. as Cedar Creek Remediation as a named Defendant as indicated at Tab 4 of the "Plaintiff's Oral Submissions";

d. If the parties cannot agree on costs, any party seeking costs may serve and file with the Masters' Administration, a costs outline and no more than two pages (double spaced) of submissions.

"Master P. Tamara Sugunasiri"

Date: July 11, 2017

Court File No. CV-21-00658033-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THURSDAY, THE 4TH
	)	
JUSTICE KOEHNEN	)	DAY OF MARCH, 2021

BANK OF MONTREAL

Applicant

- and -

2592931 ONTARIO INC., W.G.K. FITNESS INC., 2039675 ONTARIO INC., WGWINDSOR 2 FITNESS INC., WG BRAMPTON FITNESS INC., WGH FITNESS INC., CFC WELLAND INC., W.G.C. FITNESS INC., 2014595 ONTARIO INC., CFC BRANTFORD INC., CFC WATERDOWN INC., CFC LONDON SOUTH INC., W.G.G. FITNESS INC., WGWINDSOR FITNESS INC., W.G.W FITNESS INC., WGLONDON FITNESS INC., and WG ORILLIA INC.

Respondents

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. c-43, as amended

ORDER
(Adjournment, Appointing Monitor)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. c-43, as amended (the "*CJA*") appointing Richter Advisory Group Inc. ("Richter") as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of W.G.K. Fitness Inc., 2039675 Ontario Inc., WGWindsor 2 Fitness Inc., WG Brampton Fitness Inc., WGH Fitness Inc., CFC Welland Inc., W.G.C. Fitness Inc., 2014595 Ontario Inc., CFC Brantford Inc. CFC Waterdown Inc., CFC London South Inc., W.G.G. Fitness Inc., WGWindsor Fitness Inc., W.G.W Fitness Inc., WGLondon Fitness Inc., and WG Orillia Inc. (the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, was heard this day via judicial videoconference at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Tina Scalia sworn March 1, 2021 and the Exhibits thereto and on hearing the submissions of counsel for the Applicant, no one appearing for any other party on the service list although duly served as appears from the affidavits of service of Margaret Henderson sworn March 1, 2021 and Laurie Marshall sworn March 2, 2021 and on reading the consent of Richter to act as the Monitor (as defined below).

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and service validated, as necessary, so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that the Applicant's Application to appoint a Receiver is hereby adjourned *sine die*, returnable on three days' notice, on the terms contained in this Order.

3. THIS COURT ORDERS that Richter is hereby appointed as monitor (in such capacity, the "Monitor"), without security, and with only the powers granted below, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a businesses carried on by the Debtors, including all proceeds thereof (the "Property").

MONITOR NOT IN POSSESSION OF ASSETS

4. THIS COURT ORDERS that the Monitor shall not operate the Debtors' businesses or take possession or control of the Property without further Order of the Court.

5. THIS COURT ORDERS that the Debtors' shall remain in possession of the Property and shall carry on business in the ordinary course and shall not take steps outside of the ordinary course of business to dissipate the Property.

MONITOR'S POWERS

6. THIS COURT ORDERS that the Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and the Monitor is hereby expressly empowered and authorized to do any of the following where the Monitor considers it necessary or desirable:

a) to monitor, but not control, the receipts and disbursements arising out of or from the Property;

b) as agent for the Applicant, to undertake a sale and investment solicitation process (the “SISP”) for the Property;

c) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including without limitation those conferred by this Order;

d) to report to, meet with and discuss with such affected Persons (as defined below) as the Monitor deems appropriate on all matters relating to the Property and the exercise of its powers and duties hereunder, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable; and

e) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

7. THIS COURT ORDERS that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control and shall grant immediate and continued access to the Property to the Monitor.

8. THIS COURT ORDERS that all Persons shall forthwith advise the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the businesses or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Monitor or permit the Monitor to

make, retain and take away copies thereof and grant to the Monitor unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 8 or in paragraph 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

9. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Monitor for the purpose of allowing the Monitor to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Monitor in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Monitor. Further, for the purposes of this paragraph, all Persons shall provide the Monitor with all such assistance in gaining immediate access to the information in the Records as the Monitor may in its discretion require including providing the Monitor with instructions on the use of any computer or other system and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the information.

10. THIS COURT ORDERS that the Debtors all of the Debtors' directors, officers, employees, agents, and shareholders shall cooperate with the Monitor in carrying out the SISP.

11. THIS COURT ORDERS that the Monitor shall have access to the Debtors' premises and the Debtors' books and records at any time or times, including evenings, weekends and holidays, and the Debtors' shall take all reasonable steps to ensure that the Monitor will have such access, provided however that the Monitor shall exercise its right to such access in such a manner to minimally interfere with the Debtors' business.

12. THIS COURT ORDERS that the Monitor shall be permitted to disclose any information which it obtains with respect to the Debtors or the Property (i) to the Applicant, and (ii) for the purpose of undertaking the SISP, but only provided to third parties in the SISP after said parties have entered into a suitable non-disclosure agreement, but otherwise shall not disclose such information, except with leave of this Court or as permitted by this Order.

NO PROCEEDINGS AGAINST THE MONITOR

13. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Monitor except with the written consent of the Monitor or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

14. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. THIS COURT ORDERS that all rights and remedies against the Debtors, the Monitor, or affecting the Property, are hereby stayed and suspended except with leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

CONTINUATION OF SERVICES

16. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without leave of this Court.

17. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtors in accordance with normal payment practices of the Debtors or such

other practices as may be agreed upon by the supplier or service provider and the Debtors, or as may be ordered by this Court.

PIPEDA

18. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Monitor shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to undertake the SISP. Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of a transaction, and if it does not complete a t, shall return all such information to the Monitor, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Monitor, or ensure that all other personal information is destroyed.

LIMITATION ON THE MONITOR'S LIABILITY

19. THIS COURT ORDERS that the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

MONITOR'S ACCOUNTS

20. THIS COURT ORDERS that the Monitor and counsel to the Monitor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Monitor and counsel to the Monitor shall be entitled to and are hereby granted a charge (the "Monitor's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Monitor's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

SERVICE AND NOTICE

22. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission.

23. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Monitor is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

24. THIS COURT ORDERS that the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

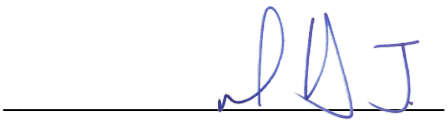
25. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors, or any of them.

26. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

27. THIS COURT ORDERS that the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

28. THIS COURT ORDERS that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis.

29. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



BANK OF MONTREAL	and	2592931 ONTARIO INC. et al
Applicant		Respondents

Court File No.: CV-21-00658033-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

ORDER
(Adjournment, Appointing Monitor)

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Bank of Montreal

THE MANUFACTURERS LIFE INSURANCE COMPANY Applicant	and	RIVERSIDE PROFESSIONAL CENTRE INC. Respondent	Court File No.: CV-21-00668726-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at **TORONTO**

BOOK OF AUTHORITIES OF THE RESPONDENT
(application returnable October 29, 2021)

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