Lawrence v. Maple Trust Co. et al.

[Indexed as: Lawrence v. Maple Trust Co.]

84 O.R. (3d) 94

Court of Appeal for Ontario,
McMurtry C.J.O., Doherty, Goudge, MacPherson and
Gillese JJ.A.
January 6, 2007

2007 ONCA 74 (CanLII)

Real property -- Land titles -- Fraud -- Land Titles Act to be interpreted in accordance with theory of deferred indefeasibility of title -- Ownership of homeowner's home being fraudulently transferred and fraudster mortgaging property -- Transfer and charge being registered -- Mortgagee being vulnerable to claim from true owner but any subsequent purchaser or encumbrancer of property would acquire interest in property that was good as against entire world -- In contest with mortgagee, true owner being entitled to have mortgage set aside -- Land Titles Act, R.S.O. 1990, c. L.5, ss. 78(4), 155.

The applicant's home was fraudulently transferred, the property was mortgaged, and the transfer and mortgage were registered. When the applicant discovered the fraud, she brought an application to have the fraudulent transfer and the mortgage set aside. The application judge declared that the transfer of the property to the fraudster was void and of no effect, but upheld the validity of the mortgage. In refusing to set aside the mortgage, the application judge considered himself bound by the decision of the Ontario Court of Appeal in Household Realty Corp. Ltd. v. Liu. In that case, the court held that s. 78(4) of the Land Titles Act (which deems a registered instrument to be effective according to its nature and intent) overrides s. 155 of the Act, which states, "Subject to the provisions of this Act, with respect to registered

dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner". The applicant appealed. [page95]

Held, the appeal should be allowed.

Household Realty was incorrectly decided. However, the applicant's argument that fraudulent documents are void for all time and all purposes, regardless of registration, was contrary to the notion of a land titles system and the provisions of the Act. If accepted, that view would serve to bring back the registry system of land holding. The Land Titles Act is to be interpreted in accordance with the theory of deferred indefeasibility of title. Under this theory, the party acquiring an interest in land from the party responsible for the fraud (the "intermediate owner") is vulnerable to a claim from the true owner because the intermediate owner had an opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such opportunity. Therefore, in accord with s. 78(4) and the theory of deferred indefeasibility, the deferred owner acquires an interest in the property that is good as against all the world. In this case, the fraudster never took valid title to the property because he obtained it by fraud. In accordance with s. 68(1) of the Act, only a registered owner may give valid charges on land. The respondent mortgagee was the intermediate owner of an interest in the property. It had an opportunity to avoid the fraud. It did not take from a registered owner. Therefore, despite registering its charge, the respondent lost in a contest with the true registered owner, the applicant. The charge in favour of the respondent should be set aside.

Cases referred to

United Trust Co. v. Dominion Stores Ltd., [1977] 2 S.C.R. 915, [1976] S.C.J. No. 99, 71 D.L.R. (3d) 72, consd

Household Realty Corp. Ltd. v. Liu, [2005] O.J. No. 5001, 205

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O.A.C. 141, 261 D.L.R. (4th) 679, 26 R.F.L. (5th) 278, 43 R.P.R. (4th) 1 (C.A.) (sub nom. CIBC Mortgages Inc. v. Chan), ovruld

Other cases referred to

Durrani v. Augier (2000), 50 O.R. (3d) 353, [2000] O.J. No. 2960, 190 D.L.R. (4th) 183, 36 R.P.R. (3d) 261 (S.C.J.); Frazer v. Walker, [1967] 1 A.C. 569, [1967] 1 All E.R. 649 (P.C.); Gibbs v. Messer, [1891] A.C. 248 (P.C.); In re Skill and Thompson, [1908] O.J. No. 41, 17 O.L.R. 186 (C.A.); Lawrence v. Wright, [2007] O.J. No. 381, 154 A.C.W.S. (3d) 1208, 2007 ONCA 74, varg, [2006] O.J. No. 2907, 150 A.C.W.S. (3d) 223 (S.C.J.); R.A. & J. Family Investment Corp. v. Orzech (1999), 44 O.R. (3d) 385, [1999] O.J. No. 2249, 27 R.P.R. (3d) 230 (C.A.); Rabi v. Rosu, [2006] O.J. No. 4348, 48 R.P.R. (4th) 1 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418n, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 C.L.L.C. 210-006

Statutes referred to

Bill 21, An Act to Amend the Land Titles Act, 1st Sess., 26th Leg., Ontario, 1960
Bill 152, Affecting the Ministry of Government Services, 2nd Sess., 38th Leg., Ontario, 2006
Land Registration Reform Act, R.S.O. 1990, c. L.4
Land Titles Act, R.S.O. 1950, c. 197, s. 54
Land Titles Act, R.S.O. 1970, c. 234, s. 85
Land Titles Act, R.S.O. 1990, c. L.5, ss. 68(1), 78(2), (3), (4), 155 [as am.]
Land Titles and Transfer Act, 1875 (U.K.), 38 and 39 Vict., c. 87

Authorities referred to

Neave, Marcia, "Indefeasibility of Title in the Canadian Context" (1976) 26 U.T.L.J. 173 [page96]
Ontario, Legislative Assembly, Legislature of Ontario Debates, No. 4 (January 29, 1960)(Hon. Roberts)

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Sullivan, Ruth, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002)
Troister, Sidney H., "Fraud in Real Estate Transactions: The Effects and the Remedies", The Law Society of Upper Canada, ed., Special Lectures 2002: Real Property Law: Conquering the Complexities (Toronto: Irwin Law, 2003)

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APPEAL from the judgment of Belobaba J., [2006] O.J. No. 2907, 150 A.C.W.S. (3d) 223 (S.C.J.), upholding the validity of a mortgage.

Morris Cooper and Douglas Christie, for appellant.

David M. Golden, for respondent Maple Trust Company.

Ronald E. Carr and Amy Leamen, for intervenor Her Majesty the Queen in Right of the Province of Ontario.

The judgment of the court was delivered by

GILLESE J.A.: --

[1] Ownership of a person's home is fraudulently transferred. The property is then mortgaged. In a contest between the two innocent parties -- the homeowner and the lender of mortgage moneys -- who wins? This appeal answers that question in favour of the homeowner.

Background

[2] Susan Lawrence lives in her home in Toronto (the "Property"). The Property was encumbered by a mortgage in favour of TD/Canada Trust (the "TD Bank mortgage") in the approximate amount of $120,000.

[3] In October 2005, an impostor posing as Susan Lawrence retained a lawyer to sell Ms. Lawrence's home. The impostor

gave the lawyer a forged agreement of purchase and sale (the "Agreement") under the terms of which the Property was to be sold for $318,000 to another impostor, Thomas Wright.

[4] Thomas Wright made an application to the Maple Trust Company for the alleged purpose of funding the purchase of the Property. After following its usual due diligence procedures, Maple Trust approved the mortgage application. It had no knowledge of the fraud being perpetrated against Ms. Lawrence. At the oral hearing of the appeal, Ms. Lawrence abandoned her contention that Maple Trust failed to act with due diligence in entering into the mortgage agreement with Thomas Wright. [page97]

[5] On November 21, 2005, pursuant to the Agreement, a fraudulent transfer of the Property in favour of Thomas Wright was registered. On that same day, Maple Trust advanced money pursuant to the mortgage and the TD Bank mortgage on the Property was discharged. The Maple Trust charge was registered against the Property for $291,924 on November 21, 2005, after the transfer from Lawrence to Wright had been registered.

[6] On January 27, 2006, while Ms. Lawrence was at her local branch of the TD/Canada Trust bank to discuss the actual sale of her home, she discovered the fraudulent transfer and mortgage.

[7] In March 2006, Maple Trust commenced an action for possession of the Property. That action was discontinued on June 14, 2006, shortly before Ms. Lawrence brought an application to have the fraudulent transfer and the mortgage set aside.

[8] On June 27, 2006, Belobaba J. disposed of Ms. Lawrence's application in a judgment [Lawrence v. Wright, [2006] O.J. No. 2907, 150 A.C.W.S. (3d) 223 (S.C.J.)] (the "Judgment") that:

(1) declared the transfer of the Property to the impostor, Thomas Wright, to be void and of no effect; and

(2) upheld the validity of the Maple Trust mortgage.

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[9] The application judge set aside the transfer to Wright because it had been procured by fraud.

[10] He refused to set aside the mortgage because of this court's decision in Household Realty Corp. Ltd. v. Liu, [2005] O.J. No. 5001, 261 D.L.R. (4th) 679 (C.A.), [See Note 1 below] which he viewed as dispositive. In Household Realty, which is discussed more fully below, s. 78(4) of the Land Titles Act, R.S.O. 1990, c. L.5 (the "Act"), [See Note 2 below] was held to override s. 155 of the Act. Section 78(4) deems a registered instrument to be effective according to its nature and intent; s. 155 provides that, subject to the provisions of the Act, registration does not validate an otherwise fraudulent and void disposition of an interest in land.

[11] Ms. Lawrence appeals from the dismissal of her application to set aside the Maple Trust mortgage. Her Majesty the [page98]Queen in Right of the Province of Ontario ("Ontario") intervened in support of Ms. Lawrence.

[12] For the reasons that follow, I would allow the appeal.

The Issue

[13] The issue in this case is simply enough stated. Maple Trust innocently acquired its interest in the Property in good faith, for valuable consideration and without notice of any fraud. In those circumstances, is the charge against the Property in favour of Maple Trust valid and enforceable as against the true owner of the property, despite having been acquired from a fraudster?

The Positions of the Parties and the Intervenor

Ms. Lawrence's position (the common law or registry theory)

[14] Ms. Lawrence maintains that only the true owner of land can grant an interest in, or charge on, the land and that all transactions arising from fraud are void. On this line of argument, since Wright became the registered owner of the

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Property through fraud, he could not grant an enforceable mortgage to Maple Trust, regardless of the fact that the transfer of the Property to him was registered. As Ms. Lawrence, the true owner, did not grant the charge in favour of Maple Trust, the charge is not valid.

[15] This position reflects the common law principle that a person could not pass better title than he or she had. Accordingly, if title to an interest in land was obtained through fraud, that title could never form the root of a good and valid claim to the land.

Maple Trust's position (the immediate indefeasibility theory)

[16] Maple Trust acknowledges that Ms. Lawrence is the victim of fraud. However, based on the theory of "immediate indefeasibility", it maintains that its charge is valid. On this theory, the Act -- like other land titles systems -- creates a system of title by registration, not a system of registration of title. A system of title by registration is designed to protect the interests of innocent parties who rely on the register. So, once an instrument is registered, it is effective even if procured by fraud. This view reflects the notion that the fundamental purpose of the Act is not to protect "true owners" but to protect parties who rely on title, as effected by registration.

[17] Consequently, Maple Trust maintains that a fraudulent transferee who is a registered owner can grant a valid mortgage to a mortgagee who is acting in good faith without notice of the fraud. Thus, once the transfer to Wright was registered, the transfer was deemed to be effective and, as a bona fide purchaser [page99](encumbrancer) who gave value for the charge and acted without notice of the fraud, Maple Trust says it was entitled to rely on Wright's title and its charge is valid.

[18] That is, Maple Trust says its charge was immediately indefeasible on registration because it took from Wright, the person that the register showed to be the registered owner. Wright's fraud is irrelevant, insofar as the validity of Maple Trust's charge is concerned.

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[19] Maple Trust relies on this court's decision in Household Realty. It argues that Household Realty is correctly decided and reflects the only rational interpretation of the Act that is consistent with the essential purpose of a land titles system for land registration.

[20] Maple Trust acknowledges that its view results in some innocent parties being deprived of legitimate interests in land but argues that the Act provides for the establishment and maintenance of the Land Titles Assurance Fund (the "Fund") as a means for compensating persons whose interests have been wrongfully affected. Ms. Lawrence, it maintains, can attempt to recover her losses from the Fund.

Ontario's position (the deferred indefeasibility theory)

[21] Ontario advances a view of the legislation based on the theory of "deferred indefeasibility". On this theory, there are three classes of parties: the original owner; the intermediate owner, who is the person who dealt with the party responsible for the fraud; and, the deferred owner, a bona fide purchaser or encumbrancer for value without notice who takes from the intermediate owner. Only a deferred owner would defeat the original owner's title. This is because the intermediate owner, as the party who acquired an interest in title from the fraudster, had an opportunity to investigate the transaction and avoid the fraud whereas the deferred owner did not. On the theory of deferred indefeasibility, registration of a void instrument does not cure its defect, thus neither the instrument nor its registration gives good title. However, good title can be obtained by a deferred owner from an intermediate owner.

[22] In the instant case, Ms. Lawrence is the original owner and Maple Trust, having dealt with the fraudster, Thomas Wright, is the intermediate owner. There is no deferred owner.

[23] Ontario maintains that because Maple Trust, the intermediate owner, had an opportunity to investigate the transaction and avoid the fraud, its charge is invalid in

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respect of Ms. Lawrence. Had an innocent deferred owner been involved, however, Ontario maintains that the innocent deferred owner would have obtained good title as against the original owner. [page100]

[24] Ontario makes a second argument against the validity of the Maple Trust charge. This argument is based on the following chain of reasoning. When a document is tendered for receipt, date-stamped and numbered, pursuant to s. 78(2) of the Act, the Registrar has a period of 21 days to object. If no objection is made, registration of the instrument is complete and, pursuant to s. 78(3), the time of registration reverts back to the date of receipt. However, s. 78(3) does not give retroactive effect to events that occurred in the period between the time of receipt of the instrument and the completion of registration. Maple Trust advanced money immediately after the transfer was received for registration. As the 21-day period had not expired at the time that it advanced funds and s. 78(3) does not give retroactive effect to events occurring within the 21-day period, Maple Trust is not entitled to rely on s. 78(4) to claim a valid interest.

The Key Legislative Provisions and the Act in Brief

[25] The resolution of this difficult matter revolves around the effect to be given to ss. 78(4) and 155 of the Act. Those sections read as follows:

> 78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.
>
> . . . . .
>
> 155. Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.

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[26] Section 155 of the Act derives from s. 98 of the Land Titles and Transfer Act, 1875 (U.K.), 38 & 39 Vict., c. 87.

[27] Section 78(4), on the other hand, came into existence in 1960 through the passage of Bill 21, An Act to Amend the Land Titles Act, 1st Sess., 26th Leg., Ontario, 1960, which amended what was then s. 54 of the Land Titles Act, R.S.O. 1950, c. 197. The explanatory note to that section of Bill 21 reads as follows:

> This section is re-enacted to clarify registration procedures and to establish priorities.

[28] At the first reading of Bill 21 in the legislature, [See Note 3 below] the Minister said: [page101]

> Mr. Speaker, while there are a number of changes, this again is in relation to the 1960 revision and the clarification and improvement in the wording, and there is no change in major principles involved.

[29] At the second reading of Bill 21, [See Note 4 below] the Minister reiterated:

> Basically these changes are simply to get the Act in tidier form for revision of the 1960 statutes. Changes clarify the intent and improve the nomenclature of the existing Act.

[30] To place ss. 78(4) and 155 in context, it is useful to consider the overall purposes of the Act and the principles underlying it. In Durrani v. Augier (2000), 50 O.R. (3d) 353, [2000] O.J. No. 2960 (S.C.J.), at paras. 40-42, Epstein J. gave this helpful summary:

> The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.
>
> The essential purpose of land titles legislation is to

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> provide the public with security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and [are] the essence of the land titles system: . . .

Analysis

[31] While a consideration of the two theories of indefeasibility is inevitable in this case, it is the relevant legislative provisions that must drive the analysis; thus I begin there.

[32] In large measure, the issue posed by this appeal flows from the introductory clause to s. 155, namely, "Subject to the provisions of this Act". It will be recalled that s. 155 reads as follows:

> 155. Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner. [page102]

[33] Put to one side, for the moment, the introductory clause in s. 155. Without that clause, s. 155 provides that a charge on land that would be fraudulent and void if unregistered,

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remains fraudulent and void despite registration. The challenge is to interpret s. 155 in light of the clause. What does it mean that a registered charge remains fraudulent and void "subject to the provisions of this Act"? In particular, how is s. 155 to be interpreted subject to s. 78(4), which provides that an instrument is deemed effective on registration?

[34] Section 78(4), it will be recalled, reads as follows:

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

[35] At common law, Maple Trust's charge was void. Why? Because it took from Wright and Wright could not give better title than he had. He had nothing because he obtained title by fraud.

[36] On the theory of immediate indefeasibility, the fact that the transfer to Wright is void by virtue of having been obtained by fraud is irrelevant. The register showed Wright as the registered owner. Maple Trust was not party to the fraud so it was entitled to rely on the register; it did not need to go behind it. Title is deemed effective by virtue of registration of the transfer and Maple Trust was entitled to rely on it.

[37] This argument, in terms of the Act, runs like this. Although s. 155 provides that Maple Trust's charge remains void despite having been registered, it is to be read subject to the other provisions in the Act, including s. 78(4). Maple Trust relies on s. 78(4) to treat the transfer to Wright as effective. The combined effect of ss. 78(4) and 155 results in its charge being immediately indefeasible.

[38] Ontario, relying on the theory of deferred indefeasibility, argues that the Maple Trust charge is not valid as against Ms. Lawrence because it was obtained from a fraudster. As Wright did not hold a valid title, he could not validly charge the Property. However, as Maple Trust acted

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without fraud and registered its charge, a deferred owner could take from Maple Trust and obtain an indefeasible title.

[39] Put in terms of the Act, the deferred indefeasibility argument runs like this. As Wright obtained title to the Property by means of a fraudulent transfer, the transfer was void. As the transfer was void, it was of no effect and Wright never became the registered owner. Section 68(1) of the Act provides that only the [page103] registered owner may dispose of an interest in land. [See Note 5 below] Maple Trust never took from the registered owner and therefore cannot rely on s. 78(4) vis--vis Ms. Lawrence, the true owner. However, Maple Trust was a bona fide purchaser for value without notice. It registered its charge. The fact of registration enables Maple Trust to pass a valid title to a third party, so long as the third party is also a bona fide purchaser for value without notice. This third party (i.e., the deferred owner) relies on both ss. 68(1) and 78(4). Unlike Wright, Maple Trust did not take by way of fraud so it is a registered owner for the purposes of s. 68(1). And, the deferred owner is, therefore, entitled to rely on the charge pursuant to s. 78(4). On this view, all of ss. 68(1), 78(4) and 155 are given effect. [See Note 6 below]

[40] Having found that the interpretations urged by both Maple Trust and Ontario are available on the wording of the Act, it becomes necessary to consider the vexed question of whether the Act is predicated on the theory of immediate indefeasibility or deferred indefeasibility. Before doing so, I will briefly explain why I do not accept the appellant's submission on how the relevant provisions should be construed.

Rejection of the appellant's theory of the Act

[41] In my view, the appellant's argument that fraudulent documents are void for all time and all purposes, regardless of registration, is contrary to the notion of a land titles system and the provisions of the Act. If accepted, this view would serve to bring back the registry system of land holding. It would negate the mirror and curtain principles and those provisions in the Act [See Note 7 below] that reflect those principles as, notwithstanding the registration of a series of

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transfers and/ or charges, a person could never rely on the register since title would depend on the validity of all past transactions in the chain of ownership. The chain of title would be forever broken by any fraudulent link. [page104]

[42] Clearly, the Act is not intended to establish a land registry system. Even if the relevant provisions, narrowly construed, were capable of supporting the interpretation urged by the appellant, I would reject such an interpretation as it would defeat the entire purpose of the Act, which is to establish a land titles system, simplify conveyancing and overcome the insecurity of title inherent in a registry system.

Immediate or deferred indefeasibility

[43] In her seminal article, "Indefeasibility of Title in the Canadian Context" (1976) 26 U.T.L.J. 173, Professor Marcia Neave explains that while the land titles legislation in other Canadian provinces followed the Australian true Torrens model, the Ontario Act was modeled on English legislation. She foreshadowed the difficulties that the courts would face in grappling with the notion of indefeasibility, saying at p. 174:

> One of the more difficult decisions facing courts interpreting Torrens legislation has been the choice between the opposing theories of immediate and deferred indefeasibility of title. Proponents of immediate indefeasibility take the view that an innocent purchaser of land, who registers an instrument which is void through forgery or breach of some statutory or common law requirement, should attain an indefeasible title by registration. It is argued that the policy of a system of title registration is to protect a person who registers without fraud. The fact that the instrument registered was void before registration is regarded as irrelevant. On the other hand, proponents of deferred indefeasibility argue that Torrens legislation was not intended to override the fundamental common law rules governing void instruments. The registration of a void instrument cannot cure its defect. Nevertheless the Torrens system ensures that the void instrument, when registered, can form the root of a good

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> title. A person who registers an instrument executed by the innocent registered proprietor attains indefeasibility on the registration of his own dealing. Thus indefeasibility is aedeferred' to the second purchaser.

(Footnote omitted)

[44] Professor Neave then noted that the theory of deferred indefeasibility prevailed, in Ontario and elsewhere in Canada, following the decision of the Privy Council on appeal from the Supreme Court of Victoria in Gibbs v. Messer, [1891] A.C. 248 (P.C.). [See Note 8 below] She ended the article with this description of the Act which, although unflattering, does much to explain the difficulties [page105] faced by the courts when attempting to decide matters such as that presented by this appeal:

> In conclusion, I believe that the provisions of the Ontario Land Titles Act relating to indefeasibility, rectification of the register, and compensation from the Assurance Fund are an unfortunate hotch-potch of ill-matching sections drawn from widely different sources.

[45] With that backdrop, I turn to consider which of the two theories best accords with the provisions of the Act. In my view, the answer to that question lies in the decision of the Supreme Court of Canada in United Trust Co. v. Dominion Stores Ltd., [1977] 2 S.C.R. 915, [1976] S.C.J. No. 99, viewed within the context of policy considerations.

[46] In United Trust, Dominion Stores was a tenant in a property purchased by United Trust. United Trust had actual notice of Dominion's unregistered lease at the time that it bought the property. It had attempted, unsuccessfully, to negotiate a surrender of the Dominion lease prior to the purchase. After the purchase, United Trust locked Dominion out of the premises and took the position that its registered transfer had priority over all unregistered interests, including Dominion's unregistered lease. Dominion applied for an order granting relief from forfeiture and reinstatement in the premises.

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[47] At first instance, the trial judge held in favour of Dominion. An appeal to this court was dismissed. A further appeal to the Supreme Court of Canada was dismissed with the result that United Trust took title subject to Dominion's unregistered lease. When considering which of the two theories underpins the Act, it is instructive to consider the reasoning of the majority, by way of contrast to that of Laskin C.J.C., in dissent.

[48] Chief Justice Laskin would have found in favour of United Trust: actual notice of an unregistered interest in the land did not matter because United Trust was a bona fide purchaser for value who obtained its transfer from the registered owner. He saw fraud as the only exception to the integrity of the register.

[49] Chief Justice Laskin's reasoning, in my view, is based on the theory of immediate indefeasibility. At pp. 919 and 926 S.C.R., he wrote:

> We face here another instance of a temptation to construe a statute in the light of the common law, to qualify a statute by an equitable doctrine alien to the purpose (a clear purpose in the circumstances underlying its enactment) which the statute sought to achieve. Because notice of unregistered interests was not expressly excluded as a qualifying consideration, the integrity of the land titles register is shaken by the judgment in appeal, although the scheme and language of The Land Titles Act are, in my opinion, adequate enough to show the irrelevancy of such notice. ... [page106]
>
> . . . . .
>
> If fairness from a common law standpoint was the dominant consideration, irrespective of legislative policy, irrespective of the circumstances which brought title registration systems into being, there could be less quarrel with the decision of the Courts below. We are not, however, concerned with the common law, but rather with a complete break from it through a choice of legislative policy

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reflected in some countries and in some Canadian Provinces by adoption of the Torrens system, and in England and Ontario by the adoption of a related system of title registration.

. . . . .

To repeat myself, I am unable to appreciate how there can be any escape from the force of ss. 52 and 91 of the present Act which constitute a code as to the title that is acquired upon first registration and upon a transfer on the register. The supporting provisions, especially ss. 75, 78 and s. 79(1), show that registration is the method of obtaining protection of claimed interests in registered land and that only fraud is an external qualifying consideration.

[50] Chief Justice Laskin concludes, at p. 936 S.C.R.:

To import actual notice in a title registration system without its express preservation is to change the basic character of the system. It is impossible, in my view, to adhere to the principle of the primacy of the register and at the same time to make it yield to a doctrine of notice.

[51] The majority rejects the view that registered title is absolute, save and except for fraud. It held that s. 85 of the Land Titles Act, R.S.O. 1970, c. 234, (now s. 78 of the Act) did not abrogate or displace the common law as it relates to land law in Ontario. In doing so, it quoted with approval the following passage by Meredith J.A. in In re Skill and Thompson, [1908] O.J. No. 41, 17 O.L.R. 186 (C.A.), at pp. 194-95 O.L.R. [paras. 39-40]:

The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.

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> Its main purpose is to assure the title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect a registered owner against his own obligations, much less against his own fraud:
> (Citation omitted)

[52] At pp. 950 to 952 of United Trust, Spence J., for the majority, explains why United Trust could not rely on the register to take free of Dominion's interest and emphasizes that common law principles are not to be assumed to have been abrogated by the Act.

> It is the appellant's argument that the enactment of the Torrens land titles system in the Province of Ontario made applicable in that province the main [page107] theory of a Torrens title registration system, to wit, the absolute authority of the register, and that it is the effect of such a principle that actual notice, no matter how clearly proved so long as encumbrances do not appear on the register, does not affect the clear title of the purchaser for value. I am ready to agree that this is a prime principle of the Torrens system and that it has been referred to as such by various text writers which I need not cite in support thereof.
>
> The Torrens Registration System was the brainchild of a Mr. Robert Torrens of South Australia and, due to his perseverance, a statute embodying the principles of his land titles system was enacted in South Australia in 1857. Similar statutes based on the same principles and using the same technique were enacted in rapid succession in Queensland in 1861, in Tasmania, Victoria and New South Wales in 1862, in New Zealand in 1870, and in Western Australia in 1874. Use of the system spread to Canada and a like statute was enacted in the Colony of Vancouver Island in 1861, and then in the Province of British Columbia in 1869. The Land Titles Act was enacted in Ontario in 1885. At that time, the Legislature in Ontario had before it as models all these previous enactments which I have listed. In every case, those enactments contained an express provision making actual notice ineffective to encumber the registered title.

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. . . .

> However, in Ontario, only a few years after the enactment of The Land Titles Act, the courts have expressed a disinclination to imply such an extinction of the doctrine of actual notice. There is no doubt that such doctrine as to all contractual relations and particularly the law of real property has been firmly based in our law since the beginning of equity. It was the view of those courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms. Such a provision, as I have said, does appear in all the other statutes cited by the appellant.

[53] In my view, United Trust cannot be read as simply a decision that registered interests in land are subject to the doctrine of actual notice. The notion of "absolute" title -- that is, immediate indefeasibility -- cannot be reconciled with the result or the reasoning of the majority. The theory of immediate indefeasibility would have led, as Laskin C.J.C. wrote, to United Trust taking title to the property free of Dominion's claim because, when United Trust took title, the register did not reflect Dominion's interest and fraud was not involved.

[54] The theory of deferred indefeasibility, on the other hand, is consistent with both the result and the reasoning of the majority. United Trust took its title from the registered owner. There is no suggestion of fraud on the part of United Trust. Nonetheless, the majority held that United Trust's title was subject to Dominion's unregistered lease. The majority recognizes that the Act creates a land titles system but rejects the notion of immediate indefeasibility. Thus, although not couched in those terms, it appears that the majority subscribes to the theory of deferred indefeasibility, a [page108] theory which permits the common law to remain a part of the law of Ontario, unless expressly abrogated. Indeed, the majority explicitly states that the common law principles of real property are not abrogated absent clear and unequivocal language to that effect in the Act.

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[55] Deferred indefeasibility is consistent with s. 155, a statutory enshrinement of the common law albeit "subject to the provisions of [the] Act". As previously explained, it is consistent also with an interpretation of s. 68(1) that recognizes the common law principle that a fraudster can never take good title so as to become the owner but also enables Maple Trust to be recognized as the registered owner for the purposes of the deferred owner. As Maple Trust registered its charge and its charge was not obtained by fraud, a bona fide purchaser for value without notice (i.e., a deferred owner) could rely on a combination of ss. 68(1) and 78(4) to take an indefeasible interest from Maple Trust.

[56] Deferred indefeasibility is consistent also with an historical analysis of what is now s. 78. Section 78 came into existence as part of minor administrative changes in the Act made in 1960. Such changes were not intended to make or change substantive law. Rather, the changes were aimed at facilitating registration procedures. [See Note 9 below] An interpretation of s. 78(4) that would lead to immediate indefeasibility is far from a minor administrative change.

[57] Further and most importantly, in my view, deferred indefeasibility is also preferable for policy reasons. Under the theory of immediate indefeasibility, the innocent homeowner has no defence to a mortgagee's action for possession. The homeowner is exposed to the loss of her home through eviction with the only available remedy being to make a claim for loss of value of the property from the Fund. The idea that a person who buys a specific parcel of land with a specific house on it should be compensated in damages runs contrary to the notion that real property, in such circumstances, is not fungible. To see a lender compensated in damages does not offend that same notion.

[58] Moreover, unlike the intermediate owner, the homeowner has no opportunity to avoid the fraud. Ms. Lawrence had no ability to discover that her home was being fraudulently sold and mortgaged. By contrast, Maple Trust made the decision to advance [page109] money and had the opportunity to avoid the

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fraud. By interpreting the Act in accordance with the theory of deferred indefeasibility, the law encourages lenders to be vigilant when making mortgages and places the burden of the fraud on the party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud.

Household Realty considered

[59] I think it fair to say that until recently, to the limited extent that this issue has been considered by Ontario courts, the courts have followed the deferred indefeasibility approach. See Rabi v. Rosu, [2006] O.J. No. 4348, 48 R.P.R. (4th) 1 (S.C.J.), at paras. 43-46, where Echlin J. sets out the case law showing that the doctrine of deferred indefeasibility historically has been applied.

[60] Household Realty casts doubt on the validity of that approach. [See Note 10 below]

[61] In Household Realty, a husband and wife owned their matrimonial home as joint tenants. The wife forged her husband's signature on a power of attorney, naming her as his attorney. She then registered the power of attorney on title. She obtained a line of credit for $150,000 from the TD Bank, who registered a charge on the property. She then obtained a mortgage for $260,000 from the CIBC and a further mortgage from Household Realty for approximately $96,250. Those mortgages were registered on title as well.

[62] When the wife defaulted on the mortgage payments, the mortgagees sued both the husband and wife. The husband defended on the basis that he was the innocent victim of a fraud and that since he had not signed the two mortgages, the mortgagees did not receive valid mortgages that could bind the property. It was accepted that the mortgagees were unaware that the registered power of attorney was fraudulent.

[63] At first instance, the mortgagees obtained an order declaring the mortgages valid. This court affirmed the trial decision, holding that once the charges were registered, as

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they had been given for valuable consideration and without notice of the fraud, pursuant to s. 78(4) they were immediately effective according to their nature and intent. By reason of the introductory clause in s. 155, s. 78(4) was held to override the general provision in s. 155 regarding the effect of fraud on registered land titles documents. The court [page110] stated that an instrument, once registered, can be immediately relied on as valid and effective by reason of the wording of s. 78(4).

[64] At paras. 41 to 42 of the reasons, the court explicitly stated that it did not find it necessary to decide whether, in Ontario, the Act provides for deferred or immediate indefeasibility.

[65] The mortgagees in Household Realty relied on the register which showed the parties as the registered owners. In fact, the wife was one of the registered owners and her title was valid -- it had not been obtained by fraud. Even if an argument can be made that, in respect of the wife's interest, the mortgagees took from a registered owner, the same cannot be said in respect of the husband's interest. [See Note 11 below] The result in Household Realty, at least in respect of the husband's interest in the property, is inconsistent with the theory of deferred indefeasibility.

[66] Further, the language in Household Realty fails to recognize that the Act gives statutory effect to the theory of deferred indefeasibility. For the reasons already given, I consider both the result and that reasoning to be incorrect. I note that it appears that the United Trust decision was not considered by this court when it decided Household Realty.

Conclusion

[67] The theory of deferred indefeasibility accords with the Act and must be taken into consideration in an analysis of s. 155 and its relationship with other provisions in the Act. Under this theory, the party acquiring an interest in land from the party responsible for the fraud (the "intermediate owner") is vulnerable to a claim from the true owner because the

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intermediate owner had an opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such opportunity. Therefore, in accord with s. 78(4) and the theory of deferred indefeasibility, the deferred owner acquires an interest in the property that is good as against all the world.

[68] Wright never took valid title to the Property because he obtained it by fraud. He was, therefore, not a registered owner. In accordance with s. 68(1) of the Act, only a registered owner may give valid charges on land. Maple Trust is the intermediate owner of an interest in the Property. It had an opportunity to avoid the fraud. It did not take from a registered owner. Therefore, despite registering its charge, Maple Trust loses in a contest [page111] with the true registered owner, Ms. Lawrence. Accordingly, the charge against the Property in favour of Maple Trust should be set aside.

Some Additional Comments

[69] This appeal raised two other matters that warrant comment.

[70] The first relates to Ontario's alternative argument, summarized earlier when setting out its position, that Maple Trust could not rely on s. 78(4) to claim that its charge was valid because it advanced the mortgage funds less than 21 days after the transfer to Wright was tendered for registration.

[71] In light of the conclusion reached above, it is unnecessary to deal with this argument. Having said that, I wish to emphasize that nothing in these reasons is to be taken as acceptance of that argument. Adopting such a proposition would turn modern-day conveyancing on its head, given the current practice of closing purchases and mortgages on the same day. Were it necessary to decide this issue, I would be loathe to interpret the Act in a fashion that would undermine its essential purpose of facilitating transactions in respect of land.

[72] The second relates to the suggestion that Maple Trust, an

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innocent lender, would be unable to turn to the Fund for compensation. This, it was said, arises from the precondition for recovery under the Act that an applicant must actually receive an interest in the land and then lose it. It was suggested that the theory of deferred indefeasibility leads to the conclusion that Maple Trust never acquired an interest in the Property and, therefore, never lost it. [See Note 12 below] Indeed, this is one of the arguments levied against the theory of deferred indefeasibility on the basis that Maple Trust's inability to recover from the Fund offends the insurance principle.

[73] In my view, the theory of deferred indefeasibility as reflected in the Act, does not necessarily lead to the conclusion that Maple Trust never acquired an interest in the Property. It is at least arguable that it did acquire such an interest. However, the interest that it acquired was subject to defeat by the true registered owner of the Property, for the reasons already given. The existence of an interest, albeit one that is defeasible in very limited circumstances, is demonstrated by the fact that if a bona fide [page112] third party took from Maple Trust, for value and without notice (i.e., a deferred owner), its interest would be indefeasible. Even in an action between the deferred owner and the true owner, the deferred owner would win. If Maple Trust had no interest in the Property, what did it convey to the deferred owner and why would the deferred owner succeed?

[74] It is correct that at common law, Maple Trust had no interest in the Property. That is because Maple Trust acquired its interest from Wright and Wright never had good title as he procured title by fraud. At common law, Wright could convey no better title than he had. It is also correct that s. 155 provides that Maple Trust's charge, which would have been void if unregistered, remains void despite registration. However, that result is expressly made "Subject to the provisions of this Act". As previously explained, the provisions of the Act made Maple Trust a registered owner and enabled a deferred owner to take good title from it.

[75] Arguably, once s. 155 is understood in accordance with

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the theory of deferred indefeasibility, it has the effect of transforming what would have been a void interest on the part of Maple Trust at common law into a valid interest that was defeasible by the true owner. This view is consonant with the conclusion that, as an intermediate owner, Maple Trust's interest in the Property had to yield to the rights of the true owner but that, because of registration of its charge, a deferred owner could rely on Maple Trust's charge to obtain an indefeasible title.

[76] I would hasten to add that these comments are intended only to clarify my views of how the theory of deferred indefeasibility operates, as expressed in the Act. They are not intended to decide the question whether Maple Trust is entitled to compensation from the Fund. That determination is for another body at another time.

Disposition

[77] Accordingly, I would allow the appeal and set aside paras. 2 and 3 of the judgment. I would grant the application and set aside the charge in favour of Maple Trust but order Ms. Lawrence to pay to Maple Trust the value of the benefit she received as a result of the discharge of the TD Bank mortgage.

[78] I would order costs of the appeal and the application to the appellant fixed at $20,000 and $5,000, respectively, such costs to be payable by the respondent and to be inclusive of disbursements and GST. No order as to costs in respect of the Intervenor.

Appeal allowed. [page113]

Notes

Note 1: [Sub nom.] CIBC Mortgages Inc. v. Chan.

Note 2: Bill 152, An Act to modernize various Acts administered by or affecting the Ministry of Government Services, 2nd Sess., 38th Leg., Ontario, 2006 (assented to 20

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December 2006), amends both the Act and the Land Registration Reform Act, R.S.O. 1990, c. L.4. The intervenor advised the court that Bill 152 is intended to make clear that, as of the effective date, the Act operates on the basis of deferred indefeasibility.

Note 3: Legislative assembly, Legislature of Ontario Debates, No. 4 (29 January 1960) at 68 (Hon. Roberts).

Note 4: Legislative assembly, Legislature of Ontario Debates, No. 8 (5 February 1960) at 184-85 (Hon. Roberts).

Note 5: Section 68(1) reads as follows:

> 68(1) No person, other than the registered owner, is entitled to transfer or charge registered freehold or leasehold land by a registered disposition.

Note 6: While this interpretation of ss. 68(1), 78(4) and 155 may appear strained, I note Professor Sullivan's remarks in Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002) at pp. 127-28:

> The jurisdiction to adopt a strained interpretation in order to promote the purpose of legislation or avoid absurdity is well established and frequently exercised.

Note 7: For example, this interpretation would have the effect of rendering meaningless the introductory clause in s. 155.

Note 8: She explains that this trend was reversed in Australia and New Zealand by the decision in Frazer v. Walker, [1967] 1 A.C. 569, [1967] 1 All E.R. 649 (P.C.), but notes that the Act, unlike land titles legislation in other Canadian provinces, does not closely resemble the legislation in Australia and New Zealand. She also notes, at p. 182, that Canadian authority may preclude this as case law "uniformly supports the concept of deferred indefeasibility".

Note 9: The rule excluding legislative history as an aid in statutory interpretation has been relaxed over the years.

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Legislative history may now be admitted as relevant to both the background and purpose of the legislation: see Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418n, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2.

Note 10: Household Realty followed an earlier decision of this court: R.A. & J. Family Investment Corp. v. Orzech (1999), 44 O.R. (3d) 385, [1999] O.J. No. 2249 (C.A.).

Note 11: I recognize that this raises a question as to the effect, if any, on the joint tenancy. However, for the purposes of this appeal, that question need not be answered.

Note 12: This view is discussed in Sidney H. Troister, "Fraud in Real Estate Transactions: The Effects and the Remedies", The Law Society of Upper Canada, ed., Special Lectures 2002 Real Property Law: Conquering the Complexities (Toronto: Irwin Law Inc., 2003) at pp. 550-52.

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