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House fraud decision rocks industry

Bank 'did not take steps to scrutinize power of attorney,' judge rules

It took the better part of 18 months and more than $30,000 in legal fees, but Paul Reviczky has his property back in his own name, with the $337,500 mortgage in favour of HSBC Bank Canada finally discharged.

As reported last month in the *Star*, the Ontario Superior Court of Justice ruled Reviczky is not responsible for the mortgage that was taken out on his property after it was sold in 2006 without his knowledge. But Justice John Macdonald's decision has ramifications that extend far beyond the parties involved in the Reviczky litigation, and may well affect many future real estate and mortgage transactions.

In the summer of 2006, Reviczky's rental property on Sheppard Ave. W. was stolen from him. A fraudster used a forged power of attorney in favour of Reviczky's non-existent grandson to sell the house to an innocent third party for $450,000.

In June 2007, after months of legal proceedings at his own expense, Reviczky finally obtained a court order restoring ownership to him, but not discharging the purchaser's mortgage in favour of HSBC. Since both the purchaser and HSBC were unaware of the fraud, the court in June declined to discharge the HSBC mortgage, believing it to be valid.

Reviczky then faced the prospect of losing the house again, this time to the bank. At this point, Reviczky became involved in a messy contest among three insurers: Stewart Title, which insured and paid out the HSBC mortgage; LawPRO, the Law Society's insurer representing the lawyer who acted for the fraudster using the forged power of attorney; and the provincial Land Titles Assurance Fund, which protects the public from fraud in the land titles system.

Stewart Title paid out the HSBC mortgage, but under the Consumer Protection and Service Modernization Act, it was unable to recover its loss from the government assurance fund.

If the mortgage was determined by a court to have been valid, Reviczky would have had to pay off the HSBC loan by making a claim against the assurance fund. Stewart Title would be off the hook to the bank and would recover its payout from the public purse by way of Reviczky's claim. In that case, the title insurer would have found a loophole in the law.

In his ruling last month, Judge Macdonald voided the bank's mortgage because it "did not take steps to scrutinize the power of attorney." The bank "chose to put itself in proximity to the unknown fraudster in this transaction by dealing with him, yet it failed to make use of the opportunity to avoid the fraud, which that proximity gave it."

The judge said the lawyer representing the fraudulent seller sent a copy of the forged power of attorney to the lawyer acting for both the purchaser and the bank. Both lawyers were unaware the document was a fake. At this point, the second lawyer failed to "inform himself about the terms, conditions or validity of the power of attorney." Since HSBC, through its lawyer, had an opportunity to avoid the fraud and did not do so, the court decided it could not succeed in its claim that the mortgage was valid.

"The bank knew ... ," the judge wrote, "the person purporting to sell the property was acting pursuant to a power of attorney. The bank had the means of protecting its interests in this circumstance ... (T)he bank must have known (its) solicitor would be in direct dealings with the person purporting to sell, whether through that person's solicitor or otherwise."

Ultimately, the judge decided the issue was not the actions or inaction of a solicitor, but whether the bank had an opportunity to avoid the fraud. Effective immediately, the Reviczky decision will have an enormous impact on how banks, real estate agents, lawyers, buyers and sellers treat any transaction involving a power of attorney.

In every transaction, those documents are now going to be scrutinized, not only by the lawyer for the seller using the document, but by the lawyer for the buyer and the buyer's bank. If a seller cannot provide satisfactory evidence that the power of attorney is valid and enforceable, a buyer and his or her bank could conceivably refuse to close the transaction.

Just exactly how this will happen especially where the giver of the power of attorney is at the time mentally or physically incompetent, or overseas, or simply unavailable remains to be seen.

The vast majority of powers of attorney used in real estate transactions are legitimate documents, but from now on it will be tougher to use them to buy, sell or mortgage real estate in Ontario.

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Reviczky v. Meleknia, 2007 CanLII 56494 (ON S.C.)

PDF Format

Date: 2007-12-19

Docket: 07-CV-330124PD3

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Reflex Record (noteup and cited decisions)

Noteup

[Search for decisions citing this decision]

Legislation cited (available on CanLII)

- Land Registration Reform Act, R.S.O., 1990, c. L-4
- Land Titles Act, R.S.O., 1990, c. L-5
- Substitute Decisions Act, 1992, S.O., 1992, c. 30

Decisions cited

- Durrani v. Augier, reflex (2000), 50 O.R. (3d) 353 (2000), 190 D.L.R. (4th) 183
- United Trust v. Dominion Stores et al., 1976 CanLII 33 (S.C.C.) (1976), [1977] 2 S.C.R. 915

COURT FILE NO.: 07-CV-330124PD3

DATE: 20071219

ONTARIO

SUPERIOR COURT OF JUSTICE

(MOTIONS COURT)

B E T W E EN:	)	
	)	
PAUL REVICZKY	)	*Mr. Tonu Toome*
	)	for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
PEGMAN MELEKNIA and HSBC BANK CANADA	)	*Mr. Richard Horodyski*
	)	for the Respondent HSBC Bank Canada
Respondents	)	
	)	
- and -	)	
	)	
SHELDON CAPLAN	)	*Mr. Gavin Tighe* and *Ms. Jane E. Sirdevan*
Intervener	)	for the Intervener
	))))	
	)	
	)	**HEARD:** November 2, 2007

J. Macdonald J.

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REASONS FOR DECISION

THE APPLICATION

[1] Paul Reviczky owns residential property on which HSBC Bank Canada has a charge. Both Mr. Reviczky and the bank are victims of fraud. A fraudster acting pursuant to a fictitious Power of Attorney and posing as Mr. Revickzy's relative purported to sell the property to Pegman Meleknia, another victim of the fraud. Mr. Meleknia borrowed most of the purchase money from the bank, on the security of the aforesaid charge. The issue is the validity of the charge on Mr. Reviczky's property, which is the subject to the *Land Titles Act* R.S.O. 1990 c. L-5 as amended.

INTRODUCTION

[2] In *Lawrence v. Maple Trust Co. et al* (2007), 84 O.R. (3d) 54, Gillese J.A. for a five judge panel of the Court of Appeal held that the theory of deferred indefeasibility of title accords with the *Land Titles Act* and must be taken into account in analyzing its provisions. In her conclusion at para. [67], Gillese J.A. summarized the effect of this theory as follows:

> "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 the opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such opportunity. Therefore the deferred owner acquires an interest in the property that is good as against all the world".

[3] The theory of deferred indefeasibility is thus a rationale for allocating loss amongst victims of fraud who are competing holders of interests in property pursuant to the *Land Titles Act*.

THE POSITIONS OF THE PARTIES

[4] The bank submits that it innocently took its charge from Mr. Meleknia after he took title to the property from the fraudster. The bank submits that Mr. Meleknia was an intermediate owner and it is therefore a deferred owner. The bank submits that its charge is therefore indefeasible, even against the true owner, Mr. Reviczky.

[5] The intervener , Mr. Sheldon Caplan, is the solicitor who acted for the fraudster. There was no suggestion during argument that Mr. Caplan knew that his client was a fraudster. Mr. Tighe submitted on Mr. Caplan's behalf that:

i. Pursuant to *Lawrence* [*supra*], the bank is properly regarded as an intermediate owner whose charge is defeasible in favour of the true owner, Mr. Reviczky.

The bank is an intermediate owner because it dealt directly with the party responsible for the fraud. It retained the same solicitor as Mr. Meleknia and its solicitor dealt directly with Mr. Caplan, who acted for the fraudster. The bank and Mr. Meleknia both therefore had the opportunity to avoid the fraud;

ii. The bank is also an intermediate owner because its charge is a purchase money charge. Mr. Melknia's title to the property and the bank's charge on the property were, in reality, created simultaneously as part of one transaction, pursuant to *Home Trust Co. v. Zivic*, (2006) 277 D.L.R. (4th) 349 (Ont. S.C.J.).

iii. Alternatively, the theory of deferred indefeasibility of title is inapplicable to a purchase money charge, pursuant to *Home Trust Co.*, [*supra*].

[6] Mr. Caplan did not deliver an affidavit. He provided at least some of his file contents to Mr. Reviczky's counsel and they are exhibits in Mr. Reviczky's affidavit. The Power of Attorney is in evidence by this means, as is Mr. Caplan's written admission to Mr. Reviczky's counsel that he acted in the sale transaction pursuant to the Power of Attorney. Mr. Tighe did not make submissions about the form and content of the Power of Attorney or about the instrument which Mr. Caplan registered in the general register in respect of the Power of Attorney shortly before the closing.

[7] Mr. Meleknia has already conceded that his interest in the property was defeasible. The transfer in his favour has been struck from the parcel register pursuant to a consent order.

[8] The solicitor who acted for Mr. Meleknia and the bank is not a party. He filed an affidavit. Since he is simply an unrepresented witness in this application, none of my findings should be taken as affecting his legal interests. I will refer to him as "the solicitor".

[9] Mr. Reviczky adopted the position taken on Mr. Caplan's behalf. From Mr. Reviczky's perspective as the true owner and as the innocent victim of fraud, the distinction between the voided transfer in favour of Mr. Meleknia and the charge securing the borrowed money with which Mr. Meleknia purchased his voided title is an illusory and illogical distinction. However, as Epstein J. (as she then was) noted in *Durrani v. Augier* reflex, (2000), 50 O.R. (3d) 353 at paras. [78] and [79] , there may be those who will be deprived of legitimate interests in land because of the way the *Land Titles Act* operates. They are entitled to make a claim against the *Land Titles Assurance Fund*. A claim against the Fund would be small satisfaction for Mr. Reviczky, who wants clear title to his long-held property.

THE LEGAL ISSUES

[10] Broadly stated, the issue is whether the bank's charge is defeasible or indefeasible, pursuant to the *Land Titles Act*. A narrower focus discloses the following issues:

i. Since the decision in *Lawrence* [*supra*], is it correct that the theory of deferred indefeasibility of title does not apply to a charge registered pursuant to the *Land Titles Act* which secures purchase money, as was held in *Home Trust Co.* [*supra*]?

ii. If the theory of deferred indefeasibility applies to such a charge, what are the criteria for determining whether the chargee's interest is defeasible or indefeasible?

iii. In Lawrence [*supra*], the chargee was an intermediate owner. There was no deferred owner, as Gillese J.A. noted in para. [22] of her reasons. Are the conclusions and comments in *Lawrence* [*supra*] about deferred owners therefore *obiter dicta*?

THE FACTS

[11] In 1980, Mr. Reviczky and his wife purchased as joint tenants the residential property municipally known as 220 Sheppard Avenue West, Toronto, Ontario. Mrs. Reviczky died in 2005 and Mr. Reviczky was registered in the parcel register as the sole owner. The Reviczky's generally rented out the property.

[12] In March 2006, when Mr. Reviczky was 88 years old, he rented the property to a couple who paid rent in cash for March, April and May 2006. However, the couple did not occupy the property, allegedly because they rented it on behalf of occupants who were about to arrive in Canada. In early June 2006, Mr. Reviczky checked the vacant property and found a hydro bill in the name of Mr. Meleknia. Further inquiries disclosed that the property purportedly had been sold to Mr. Meleknia on May 15, 2006.

[13] A real estate broker had listed the property for sale on the Multiple Listing Service on April 19, 2006. Mr. Meleknia, assisted by his mother who was a real estate agent and by his father who was looking to invest in property, entered into an Agreement of Purchase and Sale for the property dated April 21, 2006. The Purchase Price was $450,000.00 and a deposit of $20,000.00 was paid. The Agreement of Purchase and Sale stated that the seller was Paul Reviczky. Beneath the vendor's purported signature on the Agreement of Purchase and Sale was the notation "Power of Attorney for Paul Reviczky".

[14] The solicitor, who acted for all of Mr. Meleknia, his parents and the bank, has filed an affidavit. He had acted for Mr. Meleknia's father for some time, and the father instructed him that the property was to be registered in Mr. Meleknia's name. The father also told the solicitor that a charge was being arranged with the bank and that the charge was to be in Mr. Meleknia's name, with the father and mother guaranteeing the charge.

[15] The solicitor received a copy of the Agreement of Purchase and Sale from the real estate agent on or about April 25, 2006. I find that the solicitor knew from it that the person purporting to sell the property was acting pursuant to a Power or Attorney. As mentioned, this was stated clearly on the face of the Agreement of Purchase and Sale. The solicitor was aware of this because, on May 3, 2006, he sent various documents to Mr. Caplan for the vendor's signature. Beneath the signature line on each document, the solicitor had placed the phrase "Paul Reviczky by his lawful attorney, Aaron Reviczky ".

[16] The solicitor's affidavit does not contain a copy of his letter of requisition. Mr. Caplan provided a copy of it to Mr. Reviczky and an incomplete copy of it is in Mr. Reviczky's affidavit. At the hearing, counsel provided me with what they agreed was a complete copy of the solicitor's letter of requisition. While it is dated May 1, 2006, it was faxed to Mr. Caplan on May 3, 2006. The Agreement of Purchase and Sale is referred to three times therein, further confirming the solicitor's knowledge of its contents. The requisition did not require either that a true copy of the Power of Attorney be produced, or that evidence be provided about the applicability of the Power of Attorney to the property in issue, or about its validity.

[17] The solicitor states in his affidavit that he searched the title to the property on May 3, 2006, and I infer that he did so before faxing his letter of requisition. The affidavit is explicit that the solicitor "searched title". I infer and find that he did not search the general register in respect of the Power of Attorney.

[18] Consequently, despite knowing that the person purporting to sell the property was acting pursuant to a Power of Attorney, the solicitor knew nothing about its form, content or validity and did not take any steps to learn about these issues.

[19] A representative of the bank has delivered an affidavit. I find from it that, in early May, the bank received a charge application from Mr. Meleknia and his parents. The bank also received a copy of the Agreement of Purchase and Sale. I infer that the bank received it with the charge application, in early May. I find that the bank reviewed the contents of the Agreement of Purchase and Sale in order to determine whether to loan the monies in issue and in order to instruct its appraiser. Consequently, I find that, from early May onwards, the bank was aware of what the Agreement of Purchase and Sale stated: the person purporting to sell the property was acting pursuant to a Power of Attorney.

[20] On or about May 4, 2006, the bank agreed to fund a new first mortgage in the sum of $300,000.00. I infer and find that it was on or shortly after May 4, 2006 that the bank retained the solicitor to act on its behalf. At the time of this retainer, both the bank and its solicitor knew that the person purporting to sell the property was acting pursuant to a Power of Attorney. At the time of this retainer, as mentioned, the solicitor had no knowledge about any of the terms, conditions or validity of the said Power of Attorney, and he made no inquiries in that regard. After being retained by the bank, the solicitor also made no inquiries about the Power of Attorney, its terms, conditions or validity.

[21] Under date of May 11, 2006, the bank forwarded to the solicitor its standard form Mortgage Loan Agreement. The contents of the bank's Loan Agreement establish that, prior to advancing any funds, the bank was well aware of a variety of risks in being a mortgage lender. The relevant provisions are as follows. Section A of the Mortgage Loan Agreement stated that the agreement takes precedence over the mortgage, in the event of any inconsistency between the two. Section K of the Mortgage Loan Agreement contained "General Terms and Conditions". Under the subheading "Conditions of Mortgage Loan and Advance", the bank's standard form stated:

> Before we will advance any portion of the principal amount of your mortgage loan, we require you to satisfy our applicable mortgage lending guidelines which include our receipt of such documents and assurances in form and substance satisfactory to us, our solicitor/notary relating to among other things:
>
> verification of ownership of the mortgaged property (including the contract of purchase and sale, an appraisal, survey and documentation with respect to encumbrances on the mortgaged property);

Under the subheading "Cancellation", the bank's standard form stated:

> We may terminate our obligations under this Agreement and refuse to loan you money if:
>
> we determine that any information you have provided to us is incorrect in any material way;
>
> you have failed to meet any of the conditions to mortgage loan advance described above.

[22] I find from the bank's standard form agreement that it knew, at all relevant times, of the risk of the purported vendor not being the true owner of the property. That is one of the reasons why it contracted for the rights and protections contained in the agreement, including the right to receive documents and assurances satisfactory to it about the "ownership" of the mortgaged property.

[23] With that awareness of the risk of the purported vendor not being the true owner of the property, and with the knowledge that the person purporting to sell the property to Mr. Meleknia was acting pursuant to a Power of Attorney, I find that the bank knew, from early May, that the form, content and validity of the Power of Attorney required scrutiny. However, I find that the bank, whether through its employees or its agents including the solicitor, failed to scrutinize these factors. The bank's affidavit establishes that it simply followed its "usual procedure" in reviewing and dealing with the application for a loan, and that the transaction was completed "in the normal course".

[24] The transaction was scheduled to close on May 15, 2006. On that day at 3:47 p.m., Mr. Caplan electronically registered an instrument in the general register in respect of the Power of Attorney. The instrument described the donor of the Power of Attorney as Paul Reviczky, the donee as Aaron Reveczky, and stated the following in respect of the powers given by the donor to the donee:

> "I appoint the donee as my attorney to act for and on my behalf to do all things which I am legally entitled to do".

At 3:52 p.m., Mr. Caplan faxed a copy of this Instrument to the solicitor.

[25] In para. 15 of his affidavit, the solicitor describes the steps which he took on the day of closing as follows:

> para. 15 "Immediately before completing the purchase transaction and the registration of the HSBC mortgage, I conducted a subsearch of title to determine whether the state of title to the Property had changed. It had not and Paul Reveczky [*sic*] continued to be the sole owner" (parenthesis added).
>
> para. 16 "On the day of closing and shortly before registration of the transfer and HSBC mortgage, Mr. Caplan sent back to me by facsimile transmission a copy of my earlier correspondence to him dated May 3, 2006, with the handwritten notation "transfer released POA last Instrument Reg. #AT1137886". Enclosed with the correspondence was a copy of the registration of a power of attorney, Instrument No. AT1137886 .
>
> On the basis of Mr. Caplan's advice and relying upon the state of title as disclosed in the parcel register, I proceeded to register the transfer and, thereafter, the HSBC mortgage."

[26] In his affidavit, the solicitor describes his various steps in the transaction in chronological order. I therefore find as follows. On the day of closing, the solicitor conducted a subsearch of "title" for the purpose of determining whether "the state of title" to the property had changed. I infer therefore that he did not search the general register in respect of the Power of Attorney. Consequently, up to that point in time, the solicitor still had no knowledge of the terms, conditions or validity of the Power of Attorney pursuant to which the property purportedly would be transferred. Then, shortly before the solicitor registered the transfer and the charge, he received from Mr. Caplan a copy of the instrument which he had registered in the general register in respect of the Power of Attorney. The solicitor does not state in his affidavit that he reviewed or relied on this instrument, or on its registration. I therefore find that he probably did neither. On the other hand, if he did review it, all he would have known at the time he registered the transfer and charge was that Paul Reviczky, the registered owner of the property, had given a general power of attorney to Aaron Reviczky to act on his behalf, and to do all things which Paul Reviczky was legally entitled to do. He would have had no knowledge about the validity of the Power or Attorney itself, as distinct from any deemed validity arising from registration of the instrument, pursuant to the *Land Titles Act* and the *Land Registration Reform Act* R.S.O. 1990, c. L-4. As mentioned subsequently, the issue is whether the bank had an opportunity to avoid the fraud. The issue in this case is not the effect of the instrument for conveyancing purposes.

[27] In his affidavit, the solicitor also does not state that he knew of, and relied on what was stated in the transfer which he registered electronically. In the box on the transfer entitled "Transferor", is the following unsworn and unsigned statement:

> I, REVICZKY, Aaron say that to the best of my knowledge and belief, the power of attorney is still in full force and effect and the principal had the capacity to give the power of attorney when giving it and was at least eighteen years of age when the power of attorney was executed. The power of attorney was registered as No. AT1137886 registered on 2006/06/15.

[28] The solicitor registered the transfer as Instrument No. AT1138040 and the charge as Instrument No. AT1138041. Both documents were registered at 4:21 p.m. on May 15, 2006.

[29] Registration of the transfer containing the unsworn and unsigned statement of the fraudster about the validity of the Power of Attorney does not change the fact that, before that, in proceeding with and in closing the transaction on behalf of both his clients, the solicitor had no knowledge about the validity of the Power or Attorney.

[30] Mr. Caplan obtained and kept a copy of the Power of Attorney and provided it to Mr. Reviczky's counsel. It is a "General Power of Attorney" dated April 18, 2006. It describes the donor as Paul Reviczky, born September 29, 1917 and the donee as Aaron Paul Reviczky born February 22, 1978. The document states that the donor gives the donee power and authority "to manage and conduct all of my affairs and to exercise all of my legal rights and powers ", including the power to:

> enter into binding contracts on the donor's behalf.
>
> sell, convey or perform any other act with respect to the donor's property, including real estate.

[31] The concluding paragraph in the Power of Attorney describes the only relevant limitations on the powers therein:

> This Power of Attorney shall become effective immediately, and shall not be affected by my disability or lack of mental competence, except as may be provided otherwise by an applicable state statute. This is a Durable Power of Attorney. This Power of Attorney shall continue effective until my death. This Power of Attorney may be revoked by me at any time by providing written notice to my Agent.

[32] Immediately below this paragraph are the date and the purported signature of Paul Reviczky. Below that is the following:

> Witness Signature: "illegible signature"
>
> Name: Dorsi Welsh
>
> City: Toronto
>
> Province: Ontario

> The foregoing Instrument was acknowledged before me this 18th day of April, 2006 by **REVICZKY PAUL**, who is personally known to

me and who has produced driver's license No. R2928-61901-70929 as identification.

"illegible signature"

Sheldon N. Caplan "NOTARIAL SEAL"

Barrister, Solicitor, Notary Public

150 Toro Road

Downsview, Ontario

Canada, N3J 2A9

[33] A review of the Power of Attorney would have disclosed the following:

a. The purported donor, at the age of 88 years, 7 months, gave a Power of Attorney valid until his death;

b. The Power of Attorney could be revoked at any time;

c. The Power of Attorney states that it shall not be affected by the donor's disability or lack of mental competence. The Power of Attorney thus purports to be a continuing Power of Attorney, and

d. Mr. Caplan's decision to affix his notarial seal, signature and stamp at the bottom of the page, as described above, would have led to the question of whether he was a witness to the purported signature of Paul Reviczky.

[34] Reading the witness information contained in the Power of Attorney would have answered the question of whether Mr. Caplan was a witness to Mr. Reviczky's purported signature. The Power of Attorney refers to only one witness. That is because there is, beside the heading "witness signature", only one signature and below that, only one name. That is also because the attestation immediately below this information refers to only person: it states that the instrument "was acknowledged before me ".

[35] Alternatively, the question about whether Mr. Caplan had witnessed Paul Reviczky's signature on the Power of Attorney could have been answered by asking Mr. Caplan that question. The affidavits of persons other than Mr. Caplan contain his unsworn, written assertions, made after discovery of the fraud, that he did not witness the donor's signature, he made a notarial copy of the Power of Attorney for his file. I find that, after discovery of the fraud, Mr. Caplan stated this. From this, I infer and find that, if Mr. Caplan had been asked before the closing whether he was a witness to the donor's signature on the Power of Attorney, he would have said that he was not.

[36] Consequently, I find that if the Power of Attorney had been reviewed by or on behalf of the bank prior to closing, the bank would have known that the donor thereof, at 88 years 7 months of age, gave a Power of Attorney valid until his death, which could be revoked at any time and which was to continue in effect despite the donor's lack of mental competence, but which had been witnessed by only one witness.

[37] Review of the Power of Attorney prior to closing therefore would have led to several questions about its validity. If the fraudster were questioned about the validity of the Power of Attorney through his solicitor, he likely would have abandoned the fraudulent scheme, to avoid apprehension and prosecution. Alternatively, if Mr. Reviczky were questioned to determine whether he was alive just prior to closing, whether he had revoked the Power or Attorney or whether he was mentally competent at relevant times, its invalidity would have been revealed. In either case, the bank would have avoided the fraud.

THE LAW

[38] In *Lawrence* [supra], the facts were as follows. Ms. Lawrence was the true owner of residential property. An imposter posing as her retained a lawyer to sell her home pursuant to a forged Agreement of Purchase and Sale. Pursuant to that agreement, the property was to be sold to another imposter, Wright. Wright applied to Maple Trust Co. for the alleged purpose of funding the purchase. Maple Trust Co. advanced monies, not knowing of the fraud. Immediately after a transfer was registered to Wright, a charge in favour of Maple Trust Co. was registered. Ms. Lawrence abandoned the allegation that Maple Trust Co. had failed to act with due diligence. The issue was whether that charge was valid as against the true owner. The Court of Appeal held that it was not.

[39] In para. [66] of *Lawrence*, the court held that the *Land Titles Act* gives statutory effect to the theory of deferred indefeasibility.

[40] The court came to this conclusion for several reasons, as follows. In *Dominion Stores Ltd. v. United Trust Co.*, 1976 CanLII 33 (S.C.C.), [1977] 2 S.C.R. 915, the Supreme Court interpreted various provisions of the *Land Titles Act*. Gillese J.A. stated at para. [54] of *Lawrence* that the majority of the Supreme Court appeared to subscribe to the theory of deferred indefeasibility. In what is described as the most important reason for this conclusion, Gillese J.A. held that deferred indefeasibility is preferable, for policy reasons, to the alternative theory of immediate indefeasibility, which would give an innocent homeowner no defence to the claim of a mortgagee for possession. The latter outcome would be contrary to the notion that real property, in such circumstances, is not fungible. In addition, Gillese J.A. stated that the theory of deferred indefeasibility is consistent with key provisions of the *Land Titles Act,* namely sections 68(1), 78 and 155. Lastly, Gillese J.A. commented that, while the homeowner had no opportunity to avoid the fraud, the mortgagee did have that opportunity. Gillese J.A. therefore held at para. [58]:

> "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".

[41] In para. [2] of these reasons, I quoted from para. [67] of the reasons in *Lawrence*. There, Gillese J.A. described an intermediate owner as a party "acquiring an interest in land from the party responsible for the fraud", and a deferred owner as "any subsequent purchaser or encumbrancer". These transactional proximities are the traditional basis for analysis and determination of the rights of the party acquiring a disputed interest in the land. In the case at bar, the bank urges this analysis on the court.

[42] However, I read the reasons in *Lawrence* as refining and changing the traditional analysis. In *Lawrence,* the chargee, Maple Trust Co., acquired its interest in the land from the fraudster. Gillese J.A. therefore could have relied on the traditional basis for holding that the chargee's interest was defeasible in favour of the true owner. That was not the ratio of the decision. Gillese J.A. looked deeper into the transactional dynamics, isolating a factor inherent in Maple Trust Co. having acquired its interest from the fraudster which, I believe, was determinative. The factor which determined that Maple Trust Co.'s interest was defeasible was that it had an opportunity to avoid the fraud. As Gillese J.A. stated in para. [67], parties acquiring an interest in land from the fraudster (called intermediate owners) are vulnerable to the true owner's claim "because" they had an opportunity to avoid the fraud. Gillese J.A. did not hold that Maple Trust Co.'s interest was defeasible because it acquired its interest from the fraudster. Consequently, within the broader notion of transactional proximities to the fraudster is the more specific, determinative factor, the opportunity to avoid the fraud.

[43] Gillese J.A. then went further, emphasizing this refined analysis by exploring its application to deferred owners, even though there was no deferred owner in *Lawrence*. Subsequent owners and encumbrancers, called deferred owners, have no opportunity to avoid the fraud. "Therefore", Gillese J.A. explained in para. [67], " the deferred owner acquires an interest in the property that is good as against all the world." The deferred owner therefore acquires an indefeasible interest as against the true owner because of having had no opportunity to avoid the fraud. That lack of opportunity is the determinative factor within the lesser transactional proximity to the fraudster which is implicit in being a subsequent purchaser or encumbrancer.

[44] My conclusion that *Lawrence* refined and changed the analysis is also based on what Gillese J.A. said in para. [58]: the burden of the fraud is placed on the party that had the opportunity to avoid the fraud by interpreting the *Land Titles Act* in accordance with the theory of deferred indefeasibility. To my mind, that indicates that the opportunity to avoid the fraud is now central to the theory of deferred indefeasibility as a rationale for allocating loss amongst competing parties who claim an interest in land under the *Land Titles Act*.

[45] Consequently, the analysis continues to be based on transactional proximities but with the relevant transactional attributes refined or redefined. The relevant transactional attributes now do not consist solely of formal transfers and charges, from whom they were obtained, and the sequence in which they were registered. The relevant transactional attributes now include the determinative one: whether a party to a transaction had the opportunity to avoid the fraud in issue. If this appears to be inconsistent with the *Land Titles Act*, it should be remembered that, in *Dominion Stores* [*supra*], the majority of the Supreme Court held that the common law continues to be part of the law of Ontario in respect of land under the *Land Titles Act* except where it is expressly abrogated. This is not a pure Torrens system.

[46] In Lawrence, there was no deferred owner, as Gillese J.A. noted at para. [22]. It is therefore necessary to consider whether *Lawrence*'s determination of the aforementioned defining characteristic of deferred owners is *obiter dicta*. I do not think it is, because an integral part of the court's *ratio decidendi* was that the *Land Titles Act* gives statutory effect to the theory of deferred indefeasibility. While the facts in *Lawrence* fell within one part of that theory, nonetheless the theory itself and its alternative consequences were essential aspects of the ratio. If I had decided that I am not bound by this determination, I would have chosen to follow it. Consistency is important in this evolving area of the law.

[47] The *Home Trust Co*. case [*supra*] was decided before *Lawrence.* The facts were as follows. Ms. Zivic was the true owner of the property. She rented the property to S. S purported to sell the property to B without Ms. Zivic's knowledge. B, also a fraudster, applied for purchase financing from two chargees. The chargees and B used the same solicitor. The purported transaction closed and a transfer was registered, followed shortly by the charges. B disappeared with the borrowed funds. The chargees sought a declaration that they had valid charges on Ms. Zivic's property.

[48] Pepall J. concluded at para. [25] that the transfer to the fraudster B and the two charges were, for all intents and purposes, registered simultaneously. Consequently, these registrations should be treated as one transaction. The doctrine of deferred indefeasibility therefore was inapplicable.

[49] In addition, Pepall J. noted that the chargees retained the same solicitor as B and as a result, there was no independent due diligence conducted on their behalf. Pepall J. therefore held at para. [25]:

> "It seems to me that the mortgagees, although innocent, should bear the burden of the fraud over the legitimate registered owner who had no role in the perpetration of fraud. Such a determination is consistent with maintaining the integrity of the *Land Titles* system but it also places a greater burden on mortgagees who had an opportunity to be more vigilant with respect to the transaction they entered into".

[50] The chargees application for a declaration of validity was dismissed.

[51] Pepall J.'s dismissal of the application appears to rest on two dominant reasons:

a. The transfer and charge registrations comprised one transaction; and

b. The chargees had the opportunity to "be more vigilant" and should bear the burden of the fraud instead of the true owner, who had "no role in the perpetration of the fraud".

[52] The conclusion that the theory of deferred indefeasibility was not applicable flowed from the conclusion that purchase money charges and a transfer to the purchaser should be regarded as a single transaction. With the benefit of the analysis in *Lawrence,* I think it is correct that the theory of deferred indefeasibility would now be taken into account in considering these issues. Regardless, in coming to a conclusion, Pepall J. relied on the criterion which the Court of Appeal later approved in *Lawrence* [*supra*], namely, the chargees' opportunity to avoid the fraud.

[53] Consequently, applying the *Lawrence* analysis and the theory of deferred indefeasibility to the facts in *Home Trust Co.*, the chargees had the opportunity to avoid the fraud and therefore, they are intermediate owners whose interests are defeasible in favour of the true owner.

[54] The ratio in *Lawrence* [*supra*] did not specifically address Pepall J.'s conclusion that the transfer and charges were to be treated as registered simultaneously and as comprising one transaction. *Lawrence* [*supra*] was a case of a purchase money charge and the Court of Appeal did not treat the transfer and charge as one transaction.

[55] A purchase money chargee may or may not have an opportunity to avoid the fraud. In *Home Trust Co.,* both the purchaser-chargor and the chargees were represented by the same solicitor, as in the case at bar. Pepall J. took that into account in concluding that the chargees had the opportunity to be more vigilant in respect of the fraud. Pursuant to the *Lawrence* analysis, the chargees had the opportunity to avoid the fraud.

The Land Titles Act

[56] The relevant provisions of the *Act* are as follows:

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

Section 70(1) A person may, under a power of attorney, authorize another person to act for that person in respect of any land or interest therein under this *Act*.

Section 70(2) A power of attorney or a notarial or certified copy of it may be registered in the prescribed manner.

Section 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.

Section 93(1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

Section 93(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

Section 155 Subject to this *Act*, a fraudulent instrument that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.

The various amendments to the *Act* which came into effect on October 19, 2006 do not apply to the facts herein.

[57] The *Land Titles Act* specifically addresses Powers of Attorney. In s. 70(1), the *Act* recognizes the effectiveness of a Power of Attorney for its purposes. Section 70(2) provides for registration of the Power of Attorney itself, or of a notarial or certified copy of it, as an alternative to an instrument which describes aspects of the Power or Attorney. This subsection is permissive, not mandatory. Nonetheless, the Legislature has recognized that the terms and conditions of a Power of Attorney may not be amenable to summary or to a short hand description in an instrument to be registered, and also that issues in respect of validity of the Power or Attorney as executed may be masked by a registered instrument.

[58] Section 78 is the successor to section 85 of the *Land Titles Act* R.S.O. 1970, c. 234, which was considered by the Supreme Court in *Dominion Stores Limited v. United Trust Co.* [*supra*]. The majority held that section 85 did not abrogate or displace the common law as it relates to land law in Ontario. As *Lawrence* [*supra*] holds, that is why the theory of deferred indefeasibility applies to the *Land Titles Act*, and the theory is why section 78(4) did not result in *Maple Trust Co.*'s registered charge being, in the words of section 78(4), "effective according to its nature and intent", and creating a charge.

[59] Section 93 applies specifically to charges. Section 93(1) parallels section 68(1). Section 93(3) parallels section 78(4) in legislating that registration of a charge confers a charge on the chargor's interest. In my opinion, the reasoning in the *Dominion Stores* case [*supra*] also applies to section 93(3) and, as was held in *Lawrence* in relation to section 78(4), the theory of deferred indefeasibility applies to section 93(3) and may prevent it from having its stated effect.

[60] Gillese J.A. addressed section 155 in para. [33] of *Lawrence* and held that, leaving aside the introductory clause, this section provides that a charge which, if unregistered, would be fraudulent and void remains fraudulent and void despite registration. In considering the introductory clause and its meaning, Gillese J.A. considered in particular section 78(4) and, at paras. [55] and [56] of *Lawrence*, held that these sections are consistent with the theory of deferred indefeasibility. In the result, the effect of sections 78(4) and 93(3) on a party acquiring an interest in land from the fraudster, or subsequent to that, depends on whether that party had an opportunity to avoid the fraud.

The Land Registration Reform Act **R.S.O. 1990 c. L-4, as amended**

[61] The relevant provision of this *Act* is as follows:

Section 22 If a document is registered in an electronic format and the document exists in a written form that is not a printed copy of the electronic document, the electronic document or a printed copy of the electronic document prevails over the written form of the document in the event of a conflict.

[62] This section was not addressed in argument. It applies to the instrument which Mr. Caplan registered in respect of the Power of Attorney, a copy of which he forwarded to the solicitor just prior to the closing. In the case at bar, the solicitor does not state that he reviewed or relied on the copy of the electronic document, or relied on its registration. I have concluded that he probably did neither. While the *Act* says that the electronic document prevails over the written Power of Attorney "in the event of a conflict", there was no conflict from the solicitor's perspective. Even if he did read and rely on the instrument, he took no steps to inform himself about the terms, conditions or validity of the Power of Attorney. In any event, the issue is not the effect of the instrument for conveyancing purposes. The issue is whether the bank had an opportunity to avoid the fraud.

The *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, as amended

[63] The relevant provisions of the *Act* are as follows:

Section 7(1) A power of attorney for property is a continuing power of attorney if,

(a) it states that it is a continuing power of attorney; or

(b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property.

Section 10(1) A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.

Section 10(2) The following persons shall not be witnesses:

1. The attorney or the attorney's spouse or partner.
2. The grantor's spouse or partner.
3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
4. A person whose property is under guardianship or who has a guardian of the person.
5. A person who is less than eighteen years old.

Section 10(4) A continuing power or attorney that does not comply with subsections (1) and (2) is not effective

[64] It is helpful to recall that the Power of Attorney in issue was a forged document which was being used to perpetrate a fraud. The relevance of this *Act* is not the ineffectiveness of this forged document. The relevance is the role which the aforesaid sections, particularly section 10, have in determining whether the bank had an opportunity to avoid the fraud. As I have said, if the Power of Attorney had been scrutinized, several questions in respect of its validity would have been apparent, and pursuing those questions, with either the purported donee or with the purported donor, likely would have prevented the fraud. The Power of Attorney purported to be a continuing power of attorney under section 7(1) but it was witnessed by only one witness, contrary to the mandatory requirements of section 10(1). I do not need to consider whether, under section 10(4), non-compliance with section 10(1) alone means that the power of attorney is invalid. That is because validity of this forged document is not the issue. The issue is that, if the Power of Attorney had been scrutinized on behalf of the bank, the contravention of section 10(1) and the question of possible invalidity under section 10(4) would have been reasons for making the inquiries which, if made, probably would have prevented the fraud.

CONCLUSION

[65] The ratio in *Lawrence* [*supra*], distilled to the essence, may be described as follows:

i. Evidence that a party dealt with a fraudster establishes that the party had an opportunity to avoid the fraud; and

ii. Having an opportunity to avoid the fraud makes the party's interest in land defeasible in favour of the true owner.

[66] In the case at bar, these factors are established. The bank, although technically a subsequent encumbrancer, dealt with the fraudster because the bank through its agent, the solicitor, dealt with the fraudster through his agent, his solicitor. That is sufficient to hold that the bank's charge is defeasible in favour of the true owner.

[67] In addition, the evidence shows that the bank could have avoided this fraud. Powers of Attorney are important legal mechanisms. Powers of Attorney are not standard and invariable in their form. They are infinitely variable in the powers granted and in their duration. They may be revocable or irrevocable, voidable, void, real or forged, or terminated by the death of the grantor. Like any legal mechanisms, a Power of Attorney may be misused. A forged Power of Attorney is an easy means of stealing a person's identity. Forged Powers of Attorney therefore are an easy means of perpetrating mortgage fraud.

[68] The bank knew, at all relevant times, that the person purporting to sell the property was acting pursuant to a Power of Attorney. The bank had the means of protecting its interests in this circumstance, whether through the chargor's obligations to it pursuant to its standard Mortgage Loan Agreement or through the solicitor. The bank chose to retain the purchaser/chargor's solicitor to act on its behalf, and I infer that the bank must have known that the solicitor would be in direct dealings with the person purporting to sell, whether through that person's solicitor or otherwise. Having been retained by the bank, it was the solicitor's responsibility to protect the bank's interests. However, the solicitor did nothing to scrutinize the Power of Attorney. As I have held, scrutiny of it would have led to questions which likely would have avoided the fraud. However, none of this was done because of a "business as usual" approach to a transaction which required something more. It required, for example, the level of care and analysis which the bank empowered itself to perform by its standard Mortgage Loan Agreement.

[69] I have refrained from commenting on Mr. Caplan's actions in registering the instrument in respect of the Power of Attorney, and also from addressing section 27 of the *Electronic Registration Regulation*, O.Reg. 19/99, pursuant to the *Land Registration Reform Act* [*supra*] which states:

In addition to the matters set out in sections 4 and 8, a power of attorney submitted for electronic registration shall contain,

(a) the name of the person or the title of the office holder appointed under the power;

(b) a statement that the attorney is entitled to make statements of spousal status under the *Family Law Act* on behalf of the donor; and

(c) a statement that the giving of the power has been witnessed in accordance with the *Substitute Decisions Act*, 1992, if the power is given under that Act.

The issue is whether the bank had an opportunity to avoid the fraud. This issue is not Mr. Caplan's actions or inaction in relation to section 27(c) of this Regulation.

Order

[70] A declaration will issue that the bank's charge is not a valid charge on Mr. Reviczky's property.

[71] An order will also issue that the Land Registrar delete the bank's charge from the parcel register for Mr. Reviczky's property.

[72] I award Mr. Reviczky his costs against the bank on a partial indemnity basis. I award no costs to the intervener, Mr. Caplan. My endorsement on the Application Record contains some additional terms of the costs order.

Concluding Thoughts

[73] Casting the test in terms of opportunity to avoid the fraud may appear to move it closer to a fault test. However, in *Lawrence*, allegations that the chargee, Maple Trust Co. failed to exercise due diligence were abandoned: see para. [4] of *Lawrence.* The Court of Appeal held that Maple Trust Co. had an opportunity to avoid the fraud even though there was no lack of due diligence on its part. Legal fault concepts were not part of the ratio in *Lawrence*. Yet, one of the principles on which the decision was based was encouraging lenders to be vigilant when making mortgages: see para. [58] of *Lawrence*.

[74] Premising defeasibility on an opportunity to avoid the fraud and determining opportunity solely on the basis of transactional proximity to the fraudster, without fault concepts including causation playing a role, is, I think, likely to result in difficulties. If lenders increase their vigilance in mortgage transactions, that will increase the likelihood that they will be in proximity to unidentified fraudsters. If the fraud is not discovered and a loan is made on the security of a mortgage, the risk of defeasibility is increased by that increased vigilance, if fault concepts including causation are not part of the test. On the other hand, being less vigilant and avoiding inquiries also avoids some of the risk of being in proximity to unidentified fraudsters. If a loan is made on the security of a mortgage, there will be an increased likelihood that the mortgage will be indefeasible.

[75] In *Rabi v. Rosu* (2006), 277 D.L.R. (4th) 544 (Ont. S.C.J.), Echlin J. touched on this issue when, at para. [41], he described deferred indefeasiblity as placing "the risk of fraud on the party who, by due diligence, has an opportunity to uncover and possibly prevent it". This decision was before the *Lawrence* decision. It was mentioned in *Lawrence* but Echlin J's due diligence analysis was not adopted.

[76] I am bound to follow the ratio in *Lawrence*. I am also respectfully of the opinion that the question of what constitutes an opportunity to avoid the fraud may need to be revisited, at some time in the future.

[77] These concerns do not arise in the case at bar. The bank had the opportunity to avoid the fraud on either view. It dealt with the fraudster and, whether through its solicitor or otherwise, it did not take steps to scrutinize the Power of Attorney. The bank chose to put itself in proximity to the unknown fraudster in this transaction by dealing with him, yet it failed to make use of the opportunity to avoid the fraud which that proximity gave it.

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Mr. Justice John Macdonald

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