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March 22, 2008

Power of attorney under scrutiny

Real estate fraud continues to be a problem for industry stakeholders. The latest tale comes from a decision of the Superior Court of Justice in Brampton last month.

Back in 1996, Lilianne and Donald O'Brien bought a residential condominium on Kimberley Cres. in Brampton. In 2004, the couple separated and Donald returned to his native home in Seychelles. Before he left, Donald gave his daughter Philippa a valid power of attorney to deal with his half-interest in the property.

Later in 2004, recognizing Philippa's contribution to the condo, her parents gave her a one-third ownership interest in the unit, and together they placed a new mortgage on it in favour of First National Financial Corp. for \$150,000.

The following year, mother and daughter had a disagreement over the property. Philippa wanted to mortgage it further, but her mother did not.

Philippa retained a lawyer to transfer the property into her name alone. She gave the lawyer two separate powers of attorney from her parents, authorizing her to deal with the property on their behalf. The power of attorney from Lilianne O'Brien was a forgery.

In October 2005, the deed to Philippa was registered and Royal Bank of Canada advanced a new mortgage of \$211,000, which was used to pay out the First National mortgage. Philippa got the net proceeds of slightly more than \$51,000.

When Lilianne discovered title had been transferred out of her name, she obtained a court order restoring one-third of the property ownership to her. She also obtained a judgment against her daughter for \$58,000 in damages and costs but by January this year had not collected any money.

Without knowing of the alleged fraud, the bank started mortgage default proceedings but suspended them when it discovered that Philippa's ownership was in question.

In January, Lilianne and the Royal Bank wound up in court in Brampton before Justice David L. Corbett. Lilianne asked the court to declare the registered mortgage void because it was obtained by fraud.

The Royal Bank, in turn, asked the court to declare that it had an enforceable debt against the property even though it wasn't properly signed by the legal owners.

In his decision last month, Justice Corbett wrote, "Lilianne O'Brien is entitled to have the (Royal) Bank's mortgage set aside. Philippa O'Brien took title to the property by fraud," even though she had a valid one-third ownership interest.

Reasoning that the Royal Bank mortgage had been used, in part, to pay off the old First National mortgage, the judge decided that the Royal Bank had an enforceable but unregistered interest in the property. This is known in law as an equitable mortgage and the court said it would have to be paid off by the sale of the property.

"This is unfair, to be sure," wrote the judge, "but it is unfairness wrought by Philippa's fraud. It is not unfair as between the Bank and Lilianne."

The judge ordered that when the condo is sold, Royal Bank should be reimbursed the \$149,000 it paid to discharge the First National mortgage. Any remaining sale proceeds will be paid into court so that it can be decided later whether the bank or any of the O'Briens will receive all or part of the surplus.

In the wake of cases like this, new rules go into effect on April 7 in the government's electronic land registration system. The rules will make it much more difficult to use a power of attorney even a valid one in a real estate transaction.

After that date, a lawyer will be required to certify that he or she has reviewed the power of attorney document with the person using it, and that this person is acting within the scope of the document.

The lawyer will also have to certify that the document has not been revoked and that the person using the document has confirmed to the lawyer that the document was lawfully given.

Hopefully, the new rules will cut down on the number of real estate frauds implemented with bogus powers of attorney.

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O'Brien v. Royal Bank of Canada, 2008 CanLII 6422 (ON S.C.)

PDF Format

Date: 2008-02-22

Docket: CV-07-3632-00 CV-07-3145-00

URL: <http://www.canlii.org/en/on/onsc/doc/2008/2008canlii6422/2008canlii6422.html>

[Reflex Record](#) (noteup and cited decisions)

Noteup

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Decisions cited

- [Elias Markets Ltd., Re](#), 2006 CanLII 31904 (ON C.A.) (2006), 274 D.L.R. (4th) 166 (2006), 25 C.B.R. (5th) 50 (2006), 216 O.A.C. 49
- [Lawrence v. Maple Trust Company](#), 2007 ONCA 74 (CanLII) (2007), 220 O.A.C. 19
- [Midland Mortgage Corp. v. 784401 Ontario Ltd.](#), 1997 CanLII 1946 (ON C.A.) (1997), 34 O.R. (3d) 594 (1997), 102 O.A.C. 226
- [Mutual Trust Co. v. Creditview Estate Homes Ltd.](#), 1997 CanLII 1107 (ON C.A.) (1997), 34 O.R. (3d) 583 (1997), 149 D.L.R. (4th) 385 (1997), 49 C.B.R. (3d) 113 (1997), 102 O.A.C. 246
- [Rabi v. Rosu](#), 2006 CanLII 36623 (ON S.C.)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:		
LILIANNE O BRIEN)	James S.G. Macdonald for the applicant
)	
)	
)	
Applicant)	
)	
)	
- and -)	
)	
ROYAL BANK OF CANADA)	Richard Horodyski for the respondent
)	
)	
)	
Respondent)	
)	Heard: January 15, 2008
)	Released: February 22, 2008

D.L. CORBETT J.

[1] Royal Bank of Canada seeks a declaration that it holds an equitable mortgage over Lilianne O Brien s one-third interest in a condominium known municipally as 27 Kimberley Crescent, Brampton. The Bank also seeks related relief quantifying the amount owed by Ms. O Brien under the equitable mortgage.

[2] Ms. O Brien seeks a declaration that the Bank s charge registered against the property is void because it was obtained by fraud. Ms. O Brien asks that the Bank s charge be deleted from title to the property.

[3] The property is a residential condominium. Title was held in one-third interests by Ms. O Brien, her husband, and their daughter Philippa. Philippa O Brien transferred the interests of her parents to herself and then refinanced the property with Royal Bank. Ms. O Brien says that her daughter acted fraudulently in transferring the property, and that she is an innocent victim of that fraud.

[4] The parties agree that the loan from Royal Bank was \$211,134.50. Of this amount, roughly \$150,000 was used to discharge a valid first mortgage held by First National Financial Corporation.

[5] Ms. O Brien says that this case is not distinguishable from *Lawrence v. Maple Trust Company*,^[1] and that the Bank s mortgage must be removed from title. Otherwise, she says, the Bank will be enriched to the detriment of Lilianne without any juridical reason for this result.

[6] The Bank notes that this case is quite different from other recent mortgage fraud cases. The wrongdoer, in this case, is closely associated with the victim . The wrongdoer was a valid one-third owner of the property. In the alternative, the Bank notes that Lilianne O Brien has benefitted in these transactions. She had a joint obligation to pay the First National mortgage, and has benefitted from the discharge of that mortgage. Moreover, since the Bank s enforcement actions, the bank has had to pay taxes and condominium fees for the property while Lilianne O Brien has continued to live in the property, rent-free.

[7] The circumstances surrounding the fraud are suspicious. Philippa O Brien has disappeared , though she has been seen, from time to time, at the subject property. She has allegedly defrauded her parents and the Bank, and yet her mother, who now seeks relief from the Bank, has taken no steps to have Philippa charged criminally. Ms. O Brien has a judgment against her daughter, in an undefended action. The decision in that case does not bind Royal Bank, which was not a party.

Background Facts

[8] Lilianne and Donald O Brien are natives of the Seychelles. They immigrated to Canada in the mid-1980 s. They had one daughter, Philippa, who was a small child when the family came to Canada. Philippa is now in her late 20 s and has a young son, Tyson.

[9] In 2004, Donald and Lilianne separated, and Donald returned to the Seychelles. Lilianne, Philippa and Tyson all remained in Canada. Donald gave Philippa a power of attorney when he left Canada.

[10] In 1996, Donald and Lilianne purchased the condominium as joint tenants. After Donald returned to the Seychelles, Lilianne had financial difficulties. Philippa, who was working at the time, contributed towards the costs of the condominium, and her parents decided to transfer a 1/3 interest in the property to her. This was done in December 2004, and at that time the property was mortgaged to First National for \$150,000.

[11] In 2005, Lilianne and Philippa had a disagreement over the property. Philippa wished to mortgage it further. Lilianne did not.

[12] Philippa retained counsel to transfer the property into her name alone. It appears that Philippa told counsel that her parents had both returned to the Seychelles. She proffered separate powers of attorney for her parents, authorizing her to enter into transactions on their behalf. The power of attorney from Lilianne O Brien is a forgery.

[13] The transfer took place on October 4, 2005. As noted above, Royal Bank advanced over \$211,000, which was used to pay out the First National mortgage and pay closing costs. Net proceeds of \$51,489.62 were apparently paid to Philippa. The transfer deed shows consideration paid for the sale of \$49,703, which Lilianne says she never received.

[14] Lilianne O'Brien is living in the property. She says that Philippa has moved out, and that she has no knowledge of what she has done with the mortgage proceeds.

Lilianne O'Brien's Action Against Philippa O'Brien

[15] Lilianne commenced proceedings against Philippa (CV-06-000108-00) and obtained rectification of title to the property by order of Dunn J. dated November 21, 2006. Final judgment was issued in that action by way of consent order granted by Snowie J. dated April 12, 2007. Under these orders, Lilianne was restored to her 1/3 interest in the property, and she obtained judgment against Philippa for \$50,000 in damages and \$8,000 in costs. She has not collected any of this money.

The Bank's Position

[16] The Bank takes the position that the power of attorney from Donald to Philippa was valid, and thus that Philippa's conduct binds Donald's interests. It may be that Philippa's conduct was a breach of her duties to Donald, but that is a matter between Philippa and Donald. In law, the Bank was entitled to rely upon the power of attorney, which was genuine, and on its face authorized Philippa to do what she did in respect to Donald's interest.

[17] The Bank says that, of the closing proceeds of \$211,140.00, \$149,179.32 was used to discharge the mortgage held by First National. \$2,171.62 was used to pay outstanding municipal taxes. The balance of \$51,489.62 was paid to Philippa. The Bank says that its mortgage went into default in May 2006, no payments have been made since, and it is owed \$19,554.60 in arrears of principal and interest. In addition, condominium fees went into default in April 2006, and the Bank has paid \$3,578.19 to keep those fees current.

[18] In addition, municipal taxes have not been paid. Arrears for 2006 and 2007, as of September 4, 2007, were \$5,786.06.

[19] The Bank says that as a result of the consent judgment in the action brought by Lilianne, Lilianne now holds a 1/3 interest in the property, and Philippa holds a 2/3 interest.

The Bank's Action Against Philippa O'Brien

[20] The Bank issued a notice of sale on September 18, 2006. It also commenced an action against Philippa for payment under the mortgage and for possession of the property. Default judgment was obtained on October 27, 2006, and a writ of possession was issued on November 10, 2006. These steps were taken without the Bank knowing of the alleged fraud. Further steps to enforce the judgment have been held in abeyance by the bank pending determination of these applications. The Bank advised during oral argument that it has been unable to collect any money from Philippa O'Brien as of yet.

Bank's Position

[21] The Bank seeks a declaration that it holds an equitable mortgage over Lilianne O'Brien's interest in the property for the following amounts:

Paid to First National to discharge	\$149,179.32
Paid outstanding property taxes	2,171.62
Condominium fees paid	3,578.19
Interest on (i) to (iii) to Sep. 14/07 ^[2]	9,279.83
Total:	\$164,208.83

[22] The Bank does not seek to recover the balance of its losses from Lilianne. However, there is insufficient equity in the property for the Bank to recover the outstanding balance it is owed by Philippa from the equity in the property if it is entitled to enforce the entire balance of the First National mortgage, and related claims, as against Lilianne's 1/3 interest before it looks to the remaining equity in the property. On the other hand, the obligations under the First National mortgage were joint and several.

Lilianne's Position

[23] Lilianne takes the position that the Bank's mortgage is simply void as against her. It was obtained by fraud, without her consent or knowledge.

Decision

[24] In my view, Lilianne O'Brien is entitled to have the bank's mortgage set aside. Philippa O'Brien took title to the property by fraud. The fact that she had a valid one-third interest does not diminish the fraud that put her in a position to obtain the Bank's mortgage. In this respect, I agree the case is on all fours with *Lawrence v. Maple Trust Company*.

[25] Lilianne O'Brien argues that an equitable charge ought not arise in favour of the Bank on the facts of this case, since an equitable charge arises only where there is a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances where that common intention is unenforceable under the strict demands of the common law.^[3] Lilianne O'Brien argues that there was never a common intention to charge the property to the Bank.

[26] With respect, there was a common intention on the part of the three owners of the property to charge it in favour of First National. Equitable subrogation will arise in these circumstances, where the bank's mortgage is unenforceable, but the mortgage it replaced was enforceable. The chargers have benefitted from removal of the First National mortgage, and they will be enriched if they are not required to repay the indebtedness associated with that mortgage.^[4]

[27] The fundamental principle underlying the doctrine of equitable subrogation is fairness, in light of all the circumstances. Where the

parties have been replaced to their former positions by subrogation, no injustice is done. [5] Indeed, this was the result in *Lawrence v. Maple Trust* itself:

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. [6]

[28] It would not be fair to permit the Bank to enforce the entirety of the First National charge against Lilianne O Brien s one-third interest in the property, and then enforce the balance of its claim against the 2/3 interest of Philippa O Brien. This would have the effect of imposing the loss occasioned by Philippa s fraud on Lilianne, rather than on the Bank.

[29] The familial relationships complicate the case here. Philippa did have a valid power of attorney from her father. Lilianne has been occupying the property and has paid no rent to her co-owners or to the Bank, and has not paid the ongoing occupancy expenses of condominium expenses and real estate taxes. The O Briens, not being at arm s length, cannot be relied upon to settle accounts as between themselves in a manner that fairly respects the Bank s interests. Lilianne currently has a judgment for \$50,000, plus costs, against Philippa, and it is not clear that this judgment is a claim that should be enforced if the Bank recovers its claims against Philippa in excess of the equitable charge solely against Philippa s interests in the property.

[30] I appreciate that, in these circumstances, it is almost certain that Lilianne will lose the property. But she did not own it by herself, as was the case in *Lawrence*. A co-owner, Philippa, has committed the fraud. Sale of the property to discharge the equitable charge, and to pay out Philippa s net proceeds to her creditors, is the only fair way to proceed. Where, as here, the underlying fraud is committed by one of the co-owners of the property, then the other co-owners will suffer collateral damage. This is unfair, to be sure, but it is unfairness wrought by Philippa s fraud. It is not unfair as between the Bank and Lilianne. Rather, it balances their interests, and precludes enrichment of Lilianne at the expense of the Bank.

Decision and Costs

[31] In the result, Lilianne O Brien s application is allowed and the Bank s mortgage shall be removed from title. The Bank s application is allowed, in part, and it shall have an equitable charge against the property in accordance with these reasons. The effective date of the charge shall be the date of advance of the funds by the Bank, and an order shall issue that this order be registered on title to the property to give notice of the Bank s equitable charge. The discharge of the mortgage and registration of the equitable charge shall be effected simultaneously. If Lilianne and the Bank do not agree to a sale of the property to Lilianne, then Lilianne may apply to the court for directions respecting purchase of the property, provided that such application must be brought within 21 days of release of this decision. If Lilianne and the Bank have not agreed to an agreement of purchase and sale of the property within 21 days, and if Lilianne has not sought directions from the court in this regard within 21 days, then the Bank shall thereafter be at liberty to sell the property to enforce its equitable charge. Lilianne may stay in possession of the property pending this sale, provided that she shall cooperate fully with the Bank in its efforts to sell the property, and shall vacate the property at least 48 hours prior to the scheduled closing of any sale transaction. Upon closing of the sale of the property, proceeds shall be applied as follows:

- (a) First, to the reasonable and actually incurred sale costs (legal fees on the transfer of the property, real estate fees, and any other reasonable costs incurred to effect the sale, including outstanding real estate taxes and condominium fees); and
- (b) Second, to the Bank, an amount equal to its aggregate payments on account of real estate taxes and condominium fees in respect to the property; and
- (c) Third, to the Bank, \$149,179.32, being the amount paid to discharge the First National mortgage; and
- (d) Fourth, the balance to be paid into court or, on the written consent of the parties, into a solicitor s trust account, to be distributed in accordance with the findings on the reference directed below.

There shall be a reference to determine the entitlement of all interested parties to the net proceeds of sale of the property. The Bank, Lilianne O Brien, Donald O Brien, Philippa O Brien and any other parties asserting an interest in the net proceeds shall be parties to the reference. The Bank shall have carriage of the reference. The parties may apply for further directions from the court if necessary.

[32] If the parties cannot agree upon costs they shall make written submissions within 30 days.

D.L. Corbett J.

Released: February 22, 2008

COURT FILE NO.: CV-07-3632-00
Brampton

DATE: 20080222

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LILIANNE O BRIEN

Applicant

- and

ROYAL BANK OF CANADA

Respondent

DECISION

D.L. CORBETT J.

[1] [2007 ONCA 74 \(CanLII\)](#), [2007] ONCA 74. See also *Rabi v. Rosu et al.*, [2006 CanLII 36623 \(ON S.C.\)](#), [2006] CanLII 36623 (Ont. S.C.J.).

[2] Calculated at 4.3%.

[3] See *In the matter of Elias Markets Ltd. et al.*, [2006 CanLII 31904 \(ON C.A.\)](#), [2006] CanLII 31904 (Ont. C.A.) at paras. 62-67.

[4] See *Mutual Trust Co. v. Creditview Estate Homes Ltd.* [1997 CanLII 1107 \(ON C.A.\)](#), (1997), 149 D.L.R. (4th) 385 (C.A.); *Midland Mortgage Corp. v. 784401 Ontario Ltd.* [1997 CanLII 1946 \(ON C.A.\)](#), (1997), 34 O.R. (3d) 594 (C.A.); *Armitage Motors Ltd. v. Royal Trust Corp. of Canada* (1997), 149 D.L.R. (4th) 198 (C.A.).

[5] See *Mutual Trust*, *supra.*, at para. 25, per Austin J.A., adopting the reasons of Adams J. below.

[6] *Lawrence v. Maple Trust Company*, *supra.*, at para. 77.