Court File No.: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

BOOK OF AUTHORITIES OF GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS

(Monitor's motion for advice and directions returnable July 24, 2013)

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TAB 1

Black's Law Dictionary®

Seventh Edition

Bryan A. Garner
Editor in Chief

ST. PAUL, MINN., 1999

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164–0526
1–800–328–9352

Printed in the United States of America

ISBN 0–314–22864–0
ISBN 0–314–24130–2—deluxe

TEXT IS PRINTED ON 10% POST CONSUMER RECYCLED PAPER

subordinate political power. See POLITICAL POWER.

subordination, *n.* The act or an instance of moving something (such as a right or claim) to a lower rank, class, or position <subordination of a first lien to a second lien>.

subordination agreement. See AGREEMENT.

subordination clause. A covenant in a junior mortgage enabling the first lien to keep its priority in case of renewal or refinancing.

suborn (sə-**born**), *vb.* **1.** To induce (a person) to commit an unlawful or wrongful act, esp. in a secret or underhanded manner. **2.** To induce (a person) to commit perjury. **3.** To obtain (perjured testimony) from another. — **subornation** (səb-or-**nay**-shən), *n.* — **suborner** (sə-**bor**-nər), *n.*

subornation of perjury. The crime of persuading another to commit perjury. — Sometimes shortened to *subornation.*

subpartnership. See PARTNERSHIP.

sub pede sigilli (səb **pee**-dee si-**jil**-ī). [Latin] Under the foot of the seal.

subpoena (sə-**pee**-nə), *n.* [Latin "under penalty"] A writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. — Also spelled *subpena.* Pl. **subpoenas.**

alias subpoena (**ay**-lee-əs sə-**pee**-nə). A subpoena issued after an initial subpoena has failed.

subpoena ad testificandum (sə-**pee**-nə ad tes-tə-fi-**kan**-dəm). [Law Latin] A subpoena ordering a witness to appear and give testimony.

subpoena duces tecum (sə-**pee**-nə **d**[**y**]**oo**-seez **tee**-kəm *also* **doo**-səz **tay**-kəm). [Law Latin] A subpoena ordering the witness to appear and to bring specified documents or records.

subpoena, *vb.* **1.** To call before a court or other tribunal by subpoena <subpoena the material witnesses>. **2.** To order the production of (documents or other things) by subpoena duces tecum <subpoena the corporate records>. — Also spelled *subpena.*

subpoenal (sə-**pee**-nəl), *adj.* Required or done under penalty, esp. in compliance with a subpoena.

sub potestate (səb poh-tes-**tay**-tee). [Latin] Under the power of another, as in a child or other person not *sui juris.* See SUI JURIS.

subreptio (səb-**rep**-shee-oh). [Latin "surreptitious removal"] *Roman law.* **1.** Theft. **2.** The obtaining of a grant from the emperor under false pretenses. — Also termed (in French law) *subreption.*

subrogate (**səb**-rə-gayt), *vb.* To substitute (a person) for another regarding a legal right or claim.

subrogation (səb-rə-**gay**-shən), *n.* **1.** The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor. • For example, a surety who has paid a debt is, by subrogation, entitled to any security for the debt held by the creditor and the benefit of any judgment the creditor has against the debtor, and may proceed against the debtor as the creditor would. **2.** The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. See EQUITY OF SUBROGATION. Cf. ANTISUBROGATION RULE.

> "Subrogation is equitable assignment. The right comes into existence when the surety becomes obligated, and this is important as affecting priorities; but such right of subrogation does not become a cause of action until the debt is fully paid. Subrogation entitles the surety to use any remedy against the principal which the creditor could have used, and in general to enjoy the benefit of any advantage that the creditor had, such as a mortgage, lien, power to confess judgment, to follow trust funds, to proceed against a third person who has promised either the principal or the creditor to pay the debt." Laurence P. Simpson, *Handbook on the Law of Suretyship* 205 (1950).

> "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has paid a debt owed by the defendant." Dan B. Dobbs, *Law of Remedies* § 4.3, at 404 (2d ed. 1993).

conventional subrogation. Subrogation that arises by contract or by an express act of the parties.

legal subrogation. Subrogation that arises by operation of law or by implication in equity to prevent fraud or injustice. • Legal

TAB 2

The Law of Restitution

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Canada Law Book Inc.
240 Edward Street, Aurora, Ontario

Printed in Canada

Canadian Cataloguing in Publication Data

Maddaugh, Peter D., 1942-
The law of restitution

ISBN 0-88804-083-0

1. Restitution — Canada. I. McCamus, John D.
II. Title.

KE1229.M23 1990 346.71029 C90-093566-9

Another common application of this type of subrogation arises in the context of suretyship. Upon payment of the debt, or portion thereof, which the surety has guaranteed,[28] the surety will be entitled to stand in the shoes of the creditor so as to take advantage of any secured interest[29] or other preference[30] that the latter may have against the principal debtor in relation to the debt, or portion thereof, thereby satisfied.[31] In *Craythorne v. Swinburne*,[32] Sir Samuel Romilly put it this way:

> . . . a surety will be entitled to every remedy, which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety;[33] having a right to have those securities transferred to him; though there

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[28] Where the payor has not specifically guaranteed the debt to the creditor and, hence, is not technically a surety, it has been held that he is not entitled to be subrogated. See, *e.g.*, *Boone v. Martin* (1920), 53 D.L.R. 25, 18 O.L.R. 205 (S.C. App. Div.) and *Ashwin v. Ashwin*, [1933] 1 D.L.R. 577, [1933] 1 W.W.R. 141 (Man. C.A.). However, we would argue that this view is too narrow and that the better test of the availability of subrogation is whether or not the payment has been made officiously in the circumstances. See, *post*, at pp. 181-5.

[29] *Morgan v. Seymour* (1637), 1 Ch. R. 120, 21 E.R. 525; *Parsons and Cole v. Briddock* (1708), 2 Vern. 608, 23 E.R. 997; *Ex p. Crisp* (1744), 1 Atk. 133, 26 E.R. 87; *Greerside v. Benson* (1745), 3 Atk. 248, 26 E.R. 944; *Aldrich v. Cooper* (1803), 8 Ves. Jun. 382, 32 E.R. 402; *Craythorne v. Swinburne* (1807), 14 Ves. Jun. 160, 33 E.R. 482; *Yonge v. Reynell* (1852), 9 Hare 809, 68 E.R. 744; *Newton v. Chorlton* (1853), 10 Hare 646, 68 E.R. 1087; *Drew v. Lockett* (1863), 32 Beav. 499, 55 E.R. 196; *Duncan, Fox & Co. v. North & South Wales Bank* (1880), 6 App. Cas. 1 (H.L.); *Gray v. Coughlin* (1891), 18 S.C.R. 553; *McKay v. O'Hanley* (1910), 8 E.L.R. 115 (P.E.I.S.C.); *A.-G. Ont. v. Railway Passengers Ass'ce Co.* (1918), 43 D.L.R. 344 (Ont. S.C. App. Div.); *Harris v. Carnegie*, [1933] 4 D.L.R. 760, [1933] O.R. 844 (C.A.); *Jamieson v. Trustees of the Property of Hotel Renfrew*, [1941] 4 D.L.R. 470 (Ont. H.C.J.); *Traders Finance Corp. Ltd. v. Ross*, [1943] 1 D.L.R. 49, [1942] O.R. 618 (H.C.J.); *Prince Albert (City) v. Underwood, McLellan & Associates Ltd.*, [1969] S.C.R. 305, 3 D.L.R. (3d) 385; *Re Windham Sales Ltd.* (1979), 102 D.L.R. (3d) 459, 26 O.R. (2d) 246 (S.C. in Bkcy); *E C & M Electric Ltd. v. Medicine Hat General & Auxiliary Hospital and Nursing Home District No. 69* (1987), 35 D.L.R. (4th) 80, 76 A.R. 281 (Q.B.).

[30] *R. v. Bennett* (1810), Wight. 1, 145 E.R. 1151; *R. v. Land* (1847), 3 U.C.Q.B. 277; *Re Churchill; Manisty v. Churchill* (1888), 39 Ch. D. 174; *Re Pathé Frères Phonograph Co. of Canada Ltd.* (1921), 64 D.L.R. 628, 50 O.L.R. 644 (S.C. in Bkcy); *Employers Liability Ass'ce Corp. Ltd. v. The Queen*, [1969] 2 Ex. C.R. 246. In *Fox v. Royal Bank of Canada*, [1976] 2 S.C.R. 2, 59 D.L.R. (3d) 258, a sub-surety who had paid the principal debtor's debt was subrogated to the rights of the creditor against the debtor and all sureties of a prior degree.

[31] "In other words, . . . the right of the surety [is] to be reimbursed rather than . . . the right instead to choose to pay and to take the security": *Royal Trust Co. Mortgage Corp. v. Nudnyk Holdings Ltd.* (1974), 49 D.L.R. (3d) 169 at p. 172, 4 O.R. (2d) 721 (H.C.J.), *per* Parker J. See also *Ewart v. Latta* (1865), 4 Macq. 983; *Ex p. Brett; Re Howe* (1871), 6 Ch. App. 838; *Ferguson v. Gibson* (1872), L.R. 14 Eq. 379; *Goodwin v. Gray* (1874), 22 W.R. 312; *Ex p. Turquand* (1876), 3 Ch. D. 445 (C.A.); *Coursolles v. Fookes* (1889), 16 O.R. 691 (H.C.J.); *Locarno Investments Ltd. v. Industrial Mortgage & Finance Corp. Ltd.* (1967), 62 D.L.R. (2d) 60 (B.C.S.C.).

[32] (1807), 14 Ves. Jun. 160 at p. 162, 33 E.R. 482, *arguendo*. The statement met with the approval of Lord Eldon: *ibid.*, at p. 169 Ves. Jun.

[33] See, *e.g.*, *Aldrich v. Cooper* (1803), 8 Ves. Jun. 382, 32 E.R. 402; *Mayhew v. Crickett* (1818), 2 Swans. 185, 36 E.R. 585; *Hodgson v. Shaw* (1834), 3 My. & K. 183, 40 E.R. 70; *Newton v. Chorlton* (1853), 10 Hare 646, 68 E.R. 1087; *Pearl v. Deacon* (1857), 24 Beav. 186, 53 E.R. 328; *Duncan, Fox & Co. v. North & South Wales Bank* (1880), 6 App. Cas. 1 (H.L.); *Forbes v. Jackson* (1882), 19 Ch. D. 615; *Gray v. Coughlin* (1891), 18 S.C.R. 553; *Leicestershire Banking Co. Ltd. v. Hawkins* (1900), 16 T.L.R. 317 (Q.B.); *Nicholas v. Ridley*, [1904] 1 Ch. 192 (C.A.).

TAB 3

THE LAW
OF
GUARANTEE

A Treatise on Guarantee, Indemnity and the Standby Letter of Credit

Second Edition

by

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Canadian Cataloguing in Publication Data

McGuinness, Kevin Patrick
The law of guarantee

2nd ed.
Includes index.
ISBN 0-459-56008-5

1. Suretyship and guaranty — Canada. 2. Indemnity against liability — Canada. 3. Letters of credit — Canada. 4. Security (Law) — Canada. I. Title.

KE1211.M34 1995 346.71'074 C95-932956-0
KF1223.M34 1995

CARSWELL
Thomson Professional Publishing

One Corporate Plaza, 2075 Kennedy Road, Scarborough, Ontario M1T 3V4
Customer Service:
Toronto: 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164
Fax 1-416-298-5094

(2) Subrogation

7.11 A surety who is called upon to perform the principal's obligation is subrogated to the full rights to which the creditor is entitled against the debtor.[42] For instance, a surety who pays a judgment in respect of the guaranteed debt is entitled to an assignment of the judgment[43] and also any securities held in respect of the guaranteed obligation.[44] As discussed in Chapter 8, the surety's rights against the principal are not truly subrogatory, as they are independent rights to which the surety is entitled. The surety is entitled to proceed against the principal in his own name. In contrast, where the surety pays the creditor in full and the creditor is entitled to claim against some person other than the debtor in respect of the breach by the principal (as, for instance, a right of claim based upon the negligence of a professional employed to monitor the performance of the principal) the surety is subrogated to that right of claim. This is a true right of subrogation, and thus any such claim must be brought in the name of the creditor.[45]

7.12 A distinction exists between the assignment of, and the subrogation of a person to, a right belonging to another person. Both assignment and subrogation permit one person to acquire and enjoy the benefit of a right belonging to another person. However, rights of subrogation normally arise by operation of law[46] rather than by contract. Rights of subrogation take effect automatically upon payment (as,

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42 See, for instance, *Kin Tye Loong v. Seth*, [1920] 2 W.W.R. 450 (P.C.) at 455; *R. v. O'Bryan* (1900), 7 Ex. C.R. 19; *O'Connor v. Malone* (1852), 4 Ir. Jur. 205. See also the *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10, s. 2; *Mercantile Law Amendment Act, 1856*, c. 97 (U.K.). And see generally: J.J. Hlafesake, "The Nature and Extent of Subrogation Rights of Fidelity Insurers Against Officers and Directors of Financial Institutions" (1986) 47 U. Pittsburg L.R. 727.

43 *Smith v. Burn* (1880), 30 U.C.C.P. 630; *Cockburn v. Gillespie* (1865), 11 Gr. 465; see also *Embling v. McEwan* (1872), 3 V.R.(L) 52 (Vic.).

44 *Drew v. Lockett* (1863), 32 Beav. 499, 45 E.R. 196; *Imperial Bank v. London & St. Katharine Dry Docks Co.* (1877), 5 Ch.D. 195. The nature and terms of the surety's rights to be subrogated to the position of the creditor are discussed in greater detail later in this Chapter and in Chapters 8, 9 and 10. As to the time when these various subrogatory rights arise, see, generally: *Re Miller*, [1957] 2 All E.R. 266; *Re Howe* (1871), 6 Ch. App. 838 at 841; *Re British Power Traction*, [1910] 2 Ch. 470; see also *Jones v. Hill* (1893), 14 N.S.W.L.R. 303; *Ontario (Attorney General) v. Railway Passengers Assurance Co.* (1918), 43 O.L.R. 108 (C.A.); *Merchants Bank v. McKay* (1888), 15 S.C.R. 672; *Boone v. Martin* (1920), 47 O.L.R. 205; *Re Victor Varnish Co.* (1907), 16 O.L.R. 338 (H.C.); *Standard Brands Ltd. v. Fox* (1972), 29 D.L.R. (3d) 167, affirmed (1973), 44 D.L.R. (3d) 69 (N.S. C.A.); *Independent Order of Foresters v. Lethbridge Northern Irrigation District*, [1944] 1 W.W.R. 206 (Alta. C.A.); *Drager v. Allison* (1958), 13 D.L.R. (2d) 204 (Sask. C.A.); *Household Finance Corp. v. Foster*, [1949] 1 D.L.R. 840 (Ont. C.A.); *Mather v. Bank of Ottawa* (1919), 46 O.L.R. 499 (C.A.). A guarantor of part of the debt of the principal is entitled to be subrogated to the rights of the creditor to a proportionate extent of the securities and other rights held or enjoyed by the creditor in respect of the whole debt: *Ward v. National Bank of New Zealand* (1889), 8 N.Z.L.R. 10. In *Re Victor Varnish Co.* (1907), 16 O.L.R. 338 (H.C.), it was held that a surety who had paid a bank creditor could not be subrogated to the security rights which the bank had acquired under s. 88 (now s. 178) of the *Bank Act* (Canada).

45 *Prince Albert (City) v. Underwood, McLelland & Associates*, [1969] S.C.R. 305.

46 There is debate as to whether the right is founded in common law or in equity.

for instance, by an insurer) by the person entitled to be subrogated, without any further step being required on the part of the person to whom the right originally belonged. In contrast, an assignment requires either an instrument executed by, or at least some agreement on the part of, the part of the assignor. Any consideration given by an assignee is sufficient to make an assignment binding on an assignor, and the assignment will be effective to the full extent agreed. In contrast, subrogation arises only where the rights to which it relates have been satisfied by the person claiming to be subrogated.[47]

7.13 Ordinarily acts of the creditor prejudicing the surety's right of subrogation will release the surety from liability only to the extent of any prejudice actually suffered; the guarantee otherwise remains enforceable. However, in an extreme case the effect of the prejudice may be sufficient to entitle the surety to be discharged in full. For instance, in *Moase Produce Ltd. v. Royal Bank*,[48] Mitchell J. found that the creditor bank had tricked a corporate principal into believing that it had accepted the company's reorganization plan when all the while the bank was secretly planning a receivership. After the guarantee had been obtained from the sureties and they had invested additional cash in the corporate principal, the bank gave the corporation no time at all to put its rescue plan into effect. It appointed a receiver without notice or warning. It was found that the bank also acted with deliberate, illegal and complete disregard for the sureties. The sureties sought declarations that they were no longer liable on their guarantees. In finding in their favour, Mitchell J. said:

> I would hold that both plaintiffs are entitled to such a declaration. . . . The precipitous action of the defendant completely destroyed the goodwill and viability of Moase Produce, thereby materially impairing the value of the security it held for the company's indebtedness. . . . The intervention of the receiver resulted in significant under-realization on the company's assets; e.g. virtually all the potato inventory was lost. As a result, the guarantors' equitable rights of subrogation and indemnity were substantially destroyed. Due to the fact that the bank acted illegally and committed intentional acts of trespass and conversion, it cannot rely on the protective clauses contained in the guarantees or the debenture to preserve its rights.[49]

(3) Securities in Favour of the Creditor

7.14 The sureties rights of subrogation are not limited to the rights *in personam* to which the creditor is entitled. It is an ancient principle,[50] founded upon the equitable

47 *Bank of Montreal v. Guarantee Co. of North America* (1991), 47 C.L.R. 267 (B.C. C.A.), *per* Hollinrake J.A. at 271.

48 (1987), 64 C.B.R. (N.S.) 191 (P.E.I. S.C.).

49 *Ibid.* at 193-94.

50 *Morgan v. Seymour* (1638), 1 Rep. Ch. 120, 21 E.R. 525 (Ch.); *Swain v. Wall* (1641), 1 Rep. Ch. 149, 21 E.R. 534 (Ch.), *per* Hutton J.

doctrine of marshaling,[51] that unless otherwise agreed[52] on payment or performance by the surety of the guaranteed obligation,[53] the surety has the right to the benefit of all securities that the creditor has received from the principal debtor in respect of the debt in order to enable the surety to obtain satisfaction for what he has paid.[54] The surety will be released to the extent of any prejudice suffered if the creditor cannot, by reason of what he has done, give the surety the securities in the same condition as they were formerly held by the creditor in respect of the guaranteed debt.[55] If the creditor diminishes or destroys through laches (unreasonable delay) or neglect a security to which the surety would otherwise have been entitled, the creditor is bound to credit the surety with the fair value of the security so prejudiced.[56] The surety's right to receive the benefit of these securities applies irrespective of whether the surety had knowledge of their existence at the time when he became a surety.[57] A surety for a limited amount has in respect of that amount the same rights as the creditor. To the extent of his liability, therefore, the surety is entitled to the benefit of any security held by the creditor in respect of the whole

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51 The term "marshaling" refers to the practise in equity of ranking or arranging classes of creditors with respect to the assets of a common debtor so as to provide for the satisfaction of the greatest number of claims. In *Fatallis North America Inc. v. Pigott Construction Ltd.* (1992), 3 P.P.S.A.C. (2d) 30 (Ont. Gen. Div.), Austin J. explained the operation of the doctrine in the following terms (at 34):

> Marshaling is an equitable doctrine which applies to protect a creditor who has recourse to one fund of a debtor from the actions of another creditor who has access to more than one fund of the same debtor. . . . The court will not interfere with the rights of creditor X against any or all of the funds, but if X resorts to the one funds against which Y has rights, then in appropriate circumstances the court will subrogate Y to the rights of X in the other funds. . . . Three conditions must prevail in order for the doctrine to apply:
> (a) the claim must be against a single debtor;
> (b) the two funds must be at the debtor's disposal;
> (c) the two funds must be in existence when the question of marshaling arises.

52 *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; but *cf. Pioneer Trust Co. v. 220263 Alberta Ltd.*, [1989] 4 W.W.R. 154, 94 A.R. 86 (Q.B.), *per* Virtue J. at 94; *C.I.B.C. v. Morrison* (1986), 33 D.L.R. (4th) 132 (N.S. C.A.).

53 In *Dixon v. Steel*, [1901] 2 Ch. 602, Cozens-Hardy J. at 607 made it clear that while the right of the surety to take an assignment does not arise till payment, the right to the benefit of a security arises at the time when the surety assumes his obligations as such.

54 See, for instance, *Ex p. Crisp* (1744), 1 Atk. 133, 26 E.R. 87 (L.C.) at 135; *Pledge v. Buss* (1860), John 663, 70 E.R. 585 (V.C.); *Duncan, Fox & Co. v. North & South Wales Bank* (1880), 6 App. Cas. 1 (H.L.).

55 *Wulff v. Jay* (1872), L.R. 7 Q.B. 765, *per* Hannen J. at 764.

56 *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596 (P.C.), *per* Lord Watson at 602-603; *Traders Finance Corp. v. Ross*, [1942] O.R. 618 (H.C.); *McKay v. O'Hanley* (1910), 8 E.L.R. 115 (P.E.I. S.C.), *per* Fitzgerald J. at 118; *Macdonald v. Hirsch* (1932), 5 M.P.R. 469 (N.S. C.A.).

57 See, for instance, *Leicestershire Banking Co. v. Hawkins* (1900), 16 T.L.R. 317 (Q.B.); *Duncan, Fox & Co. v. North & South Wales Bank, supra*, note 54; *Nicholas v. Ridley*, [1904] 1 Ch. 192 (C.A.); *Merchants Bank of London v. Maud* (1871), 16 W.R. 657; *Forbes v. Jackson* (1882), 19 Ch. D. 615.

TAB 4

1982 CarswellOnt 115, 16 B.L.R. 156, 34 O.R. (2d) 681, 22 R.P.R. 38, 131 D.L.R. (3d) 576, 12 A.C.W.S. (2d) 235

Canadian Financial Co. v. First Federal Construction Ltd.

CANADIAN FINANCIAL CO. v. FIRST FEDERAL CONSTRUCTION LTD. et al.

Ontario Supreme Court, Court of Appeal

Jessup, Lacourcière and Thorson JJ.A.

Heard: October 22, 1981
Judgment: January 8, 1982

Counsel: *J. Edgar Sexton*, Q.C. and *R.J. Morris*, for plaintiff-appellant.

W.G. Dingwall, Q.C., for defendants-respondents.

Subject: Corporate and Commercial; Property

Mortgages --- Sale — Contractual power of sale — Notice requirements — Entitlement to notice — General.

Mortgages --- Sale — Contractual power of sale — Claim for deficiency — Liability of guarantor.

Guarantee and indemnity — Guarantee of mortgage — Default under mortgage — Mortgagee exercising power of sale — Notice of exercise of power of sale not given to guarantors — Guarantors not interested in mortgaged property — Guarantors not entitled to notice of exercise of power of sale — Subrogation rights not prejudiced by sale.

The plaintiff was the mortgagee under a second mortgage given by the defendant F and guaranteed by the three individual defendants. The three individuals were officers and directors of F and two of them spoke and acted for F throughout.

After the mortgage fell into default, the plaintiff served a notice of exercise of power of sale under the mortgage on F. The individual defendants did not receive the notice of exercise of power of sale as such but two of them were fully aware as the officers and directors acting for F. Negotiations ensued in which the guarantors sought to delay sale under the power of sale in an effort to obtain a buyer who would pay more. After seven months, the plaintiff sold the property and made demand on the individual defendants to make up the deficiency. The individual defendants made no payments and the plaintiff commenced this action. The plaintiff's action was dismissed at trial.

Held, on appeal:

The appeal was allowed.

The individual defendants alleged that the notice of sale had to be served on them individually or the plaintiff could not seek to enforce their guarantees. The trial Judge agreed and held that failure to serve the individual defendants resulted in their absolute discharge.

The individual defendants also argued that the plaintiff had lulled them into a false sense of security in telling them that the notice of sale was served only to preserve the plaintiff's position and not to carry out the sale. They also argued that the sale took place on less advantageous terms than the defendants could have achieved, given enough time. They alleged that if they had been aware of the terms under which the property was sold they could have acted to restore the mortgage to good standing.

The trial Judge did not accept the argument as to an improvident sale and it was not pressed on the appeal. The trial Judge did, however, find that the individual defendants were deceived about the significance of the notice of sale. The Court of Appeal reversed this finding on the basis that it was unsupported by the evidence. Two of the individual defendants were aware well in advance of the sale that it was being carried out.

The finding of the trial Judge that the notice of sale had to be served on the individual defendants was also reversed on appeal. Under s. 30 of the Mortgages Act (Ontario) a notice of sale must be served on persons who "by the register of title" or by actual notice to the mortgagee have "an interest in the mortgaged property". The guarantees in this case were included in the mortgage which was registered on title. The item in the register referred to a "Guarantor's Clause" but the register did not identify the guarantors. Recourse would have to be had to the mortgage itself to identify them. The trial Judge held there was a duty to examine the mortgage as he found the register included all original instruments on which the abstract was based. The Court of Appeal held that this would distort the notion of a register of title. The requirement to examine late-filed instruments should not be extended to apply to all underlying documents.

The trial Judge concluded that the individual defendants as guarantors had an "interest in the mortgaged property" under subs. 30(1) of the Act. He found such an interest in their rights of subrogation to the creditor's interest in the property. He found the sale of the property destroyed the individual defendants' right to that security even though no money was paid by them.

The Court of Appeal disagreed. Upon a guarantor paying a guaranteed mortgage debt, the guarantor is entitled to an assignment of the security held by the creditor and to be subrogated to the creditor's rights against the principal debtor under the security. The essence of subrogation is that the guarantor has a right to be reimbursed rather than a right to pay the debt so that he may take over the security. A guarantor who pays some or all of the mortgage debt has an interest in the security. However, a guarantor who has not paid any part of the mortgage debt has no charge on the mortgaged property. Having no charge, such a guarantor is not entitled to redeem nor is he a necessary party to a foreclosure or an exercise of a power of sale. Thus, upon a sale, where the proceeds did not extinguish the debt, the guarantor remains liable for the deficiency and is not discharged.

In this case, the mortgage did not require by its terms any notice beyond that required by the Act. In fact, two of the three individual defendants had full knowledge at all relevant times concerning the proposed terms of sale. There was also a close relationship among the individual defendants. Thus, they were not prejudiced by the absence of notice.

The Court did not deal with the argument that the individual defendants had contracted out of any rights of subrogation by the terms of the mortgage.

Statutes considered:

Land Titles Act, R.S.O. 1980, c. 230.

Mercantile Law Amendment Act, R.S.O. 1980, c. 265, s. 2.

Mortgages Act, R.S.O. 1970, c. 279, s. 30.

Mortgages Act, R.S.O. 1980, c. 296, s. 30.

Authorities considered:

deColyar, The Law of Guarantees and of Principal and Surety (3rd ed., 1897), pp. 318-22.16 Hals. (4th ed.) 970, para. 1440.20 Hals. (4th ed.) 104, para. 193.Marriott and Dunn, Practice in Mortgage Actions in Ontario (3rd ed., 1971), p. 46.Rowlatt, The Law of Principal and Surety (3rd ed., 1936), pp. 172-73.
APPEAL from dismissal of an action to recover from three individual guarantors the balance owing on a mortgage debt following exercise of a power of sale in the mortgage, reported at 15 R.P.R. 175, 29 O.R. (2d) 741, 114 D.L.R. (3d) 252.

The judgment of the Court was delivered by *Thorson J.A.*:

1 This is an appeal concerning the rights and obligations of the mortgagee, on the one hand, and of the guarantors of the obligations of the mortgagor, on the other hand, in connection with a duly registered second charge ("mortgage") on an apartment building property in Oakville, Ontario. The plaintiff corporation which is the appellant before this Court was the mortgagee under the mortgage and the defendant corporation was the mortgagor. The three individual respondents were the guarantors of all of the mortgagor's obligations under the mortgage pursuant to a contract of guarantee contained in the mortgage instrument. All three of the guarantors were officers and directors of the mortgagor and two of them, Max Zentner and John J. Ryan, were the directors who spoke and acted for it throughout the period with which this appeal is concerned.

2 It is unnecessary to detail here the circumstances as a result of which, some time after the second mortgage was entered into, the mortgagor found itself in financial difficulties. These, however, in turn led to the falling into arrears of the first mortgage on the property and the payment of those arrears by the appellant as the second mortgagee, followed not long afterwards by the mortgagor's default under the second mortgage. It was this default which led to the service by the appellant on the mortgagor of a notice of exercise of the appellant's power of sale under the mortgage. The notice was in the form required by Pt. III of the Mortgages Act, R.S.O. 1970, c. 279. No like notice was served on the guarantors although both Zentner and Ryan, as the two officers and directors who spoke and acted for the mortgagor in the discussions and communications with the appellant which both preceded and followed the service of the notice on the mortgagor, received copies of the notice and were at all relevant times fully aware of its contents.

3 The discussions and communications which ensued between the appellant and the two guarantors Zentner and Ryan following the service of the notice on the mortgagor indicate that the main concern of the guarantors was that the sale of the property be delayed until the property could be disposed of on the best terms obtainable.

The guarantors were apparently convinced that given enough time they could find a buyer who would be willing to pay a large enough price and put up sufficient cash on closing that the mortgagor would be enabled to salvage at least something from its investment. It is to be noted, however, that neither before nor after the service of the notice on the mortgagor did any of the guarantors make any payment on account of the outstanding mortgage debt pursuant to the terms of their guarantee to the appellant.

4 The search for a buyer who would be willing to purchase the mortgaged property on the terms sought by the guarantors proved unsuccessful, and some seven months after the notice of sale was served on the mortgagor the appellant sold the property on terms which it was prepared to accept. The amount realized on the sale was not, however, sufficient to discharge the full amount of the outstanding mortgage debt, with the result that following the sale the appellant made a formal demand upon the guarantors, calling on them to make up the deficiency as required by the guarantee they had given to the appellant.

5 The guarantors disputed their liability to do so in the above-described circumstances, and the issue on this appeal is whether the appellant was obliged in law to serve notice of the exercise of its power of sale on the guarantors personally, in order to preserve its right to look to them to make up the deficiency.

6 The learned trial Judge held that although the appellant was entitled to judgment against the mortgagor for the full amount determined on a reference to the Master to be the amount due and owing to it, the appellant's action against the three guarantors had to be dismissed [reported at 29 O.R. (2d) 741, 15 R.P.R. 175, 114 D.L.R. (3d) 252]. In his opinion [at p. 181 R.P.R.] the appellant's failure to serve the notice on them went "in the teeth of the requirements of the statute" and resulted in their "absolute discharge" from any obligation they would otherwise have had under the guarantee. With great respect, I think the learned trial Judge erred in his conclusion that the failure to serve the notice on the guarantors personally went against the requirements of the Mortgages Act. Moreover it was not helpful in my opinion that, while concluding that the appellant was entitled to succeed against the mortgagor in its claim for the balance due and owing following the sale, the trial Judge chose to deal with the question of the guarantors' liability on the basis that the appellant's failure to serve them with the notice resulted in their "absolute discharge" under the guarantee. The receipt by the appellant of whatever amount it realized on the sale would necessarily have operated to discharge the guarantors' obligation to pay the mortgage debt pro tanto, leaving only the question of their liability to pay the deficiency since that was the only question that could then have been in issue.

7 At trial counsel for the guarantors argued that the appellant, through its representative Rosenfeld, had held out to the guarantors at the time of the service of the notice on the mortgagor that the notice was being served "merely as a precaution" taken to safeguard the appellant's position in view of the default under the mortgage, and that as a consequence the guarantors were deceived by the conduct of the appellant when the property was subsequently sold by it on terms which were less advantageous to the mortgagor than those which they felt they could have eventually negotiated had they been given enough time to do so. For this reason, it was argued on behalf of the guarantors, the deficiency remaining as a result of the sale of the property pursuant to the mortgagee's power of sale was much larger than it should have been, and had the guarantors been aware that the property was to be sold on the terms on which it was in fact sold, they would have intervened to place the mortgage in good standing so as to prevent the sale on those terms.

8 This latter argument does not, of course, turn on any allegation that the guarantors did not know of the notice of sale served on the mortgagor. It is, rather, essentially an allegation either of an improvident sale by the appellant, or of a sale in circumstances in which there was conduct on the appellant's part amounting to deceit.

The learned trial Judge dismissed the respondents' counterclaim based on the allegation of an improvident sale, when it was conceded by counsel for the respondents that there was insufficient evidence to support that claim. That matter was not pressed further on this appeal. The learned trial Judge did, however, make a finding that the respondents were in fact deceived about the significance of the notice of sale served upon the mortgagor. In my respectful opinion, his finding on this point is unsupported by the evidence, which leaves no real doubt that both Zentner and Ryan had been made aware, well in advance of the actual sale, that the appellant intended to go ahead with the sale of the property on the best terms it could get. Furthermore, the guarantors made no allegation of deceit in their statements of defence, nor did they seek to lead any evidence at trial to establish the kind of knowledge or intent on the part of the appellant that would be necessary in law to support a finding of deceit.

9 The issue then comes down to whether the mortgagee was obliged to serve the notice of sale upon the guarantors personally, if it wished to preserve its right to look to them to make up the deficiency on the sale. The learned trial Judge concluded that there was such an obligation on the mortgagee, and that the guarantors, not having been served with the required notice, were not liable to make up the deficiency. As already mentioned, I think he erred in this conclusion.

10 The sale in this case was pursuant to the power of sale contained in the mortgage. The conditions on which that power may be exercised, and the notice to be given by the mortgagee of its exercise, are governed by what now appears as Pt. III of the Mortgages Act, R.S.O. 1980, c. 296. Section 30 of that Act, which is found within Pt. III, deals with the persons to whom a mortgagee must give notice before exercising a power of sale. The immediately relevant portions of s. 30 are as follows:

> 30. — (1) A mortgagee shall not exercise a power of sale unless a notice of exercising the power of sale in Form 1 has been given by him to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and any other persons subject to whose rights the mortgagee proposes to sell the mortgaged property:
>
> 1. Where the mortgaged property is registered under the *Land Titles Act*, to every person appearing by the register of title and by the index of executions to have an interest in the mortgaged property.
>
> . . . . .
>
> 4. Where the mortgagee has actual notice in writing of any other interest in the mortgaged property and where such notice has been received prior to the giving of notice exercising the power of sale, to the person having such interest.
>
> (2) In subsection (1), the expressions 'register of title' and 'abstract index' include instruments received for registration before 4.30 p.m. on the day immediately prior to the day on which a notice of exercising the power of sale is given.

11 It will be seen that the description in ¶ 1 of s. 30(1) of "every person" to whom the notice must be sent contains two distinct elements: first, the person must be one "appearing by the register of title" to have an interest of the kind specified; and second, the interest which he thus appears to have must be "an interest in the mortgaged property".

12 The first element of the description imports the definition of the expression "register of title" contained

in s. 30(2). That definition, however, is not an all-inclusive definition of the kind usually preceded by the word "means"; rather, it is an extended definition which brings in, by specific inclusion, some particular thing that would not, in the absence of an extended definition, ordinarily be expected to be embraced within the expression being defined. What is brought in in this case are late-filed instruments which, because of their lateness, could not be expected to have yet been entered on the register that is kept under the Land Titles Act, [now R.S.O. 1980, c. 230]. There is no issue of a late-filed instrument in this case. In this case, the mortgage guarantee provisions were contained in the mortgage instrument itself, which was duly entered on the register when the mortgage was registered. In that entry, the only reference to a guarantor, or indeed to the existence of a guarantee provision, appears in these terms: "Interest as therein provided for in said Charge, with a Guarantor's Clause." Quite clearly it would not be possible to identify the guarantors in this case as persons appearing *by the register* to have an interest in the property (assuming for the time being that they had in fact such an interest). There could be no reliance on the register for that purpose; anyone looking at the entry on the register relating to this mortgage would be obliged to go behind the register and consult the original mortgage instrument in order to ascertain the names of the guarantors and the precise terms of the contract of guarantee contained in that instrument.

13 The trial Judge concluded that because, under s. 30(2), any instrument received for registration before 4:30 p.m. on the day before the notice is given is made part of the register, the register "thus includes all original instruments filed upon which the abstract is based" [p. 179], and therefore there was a duty on the appellant, as a condition precedent to the exercise of its power of sale, to ascertain the names of the guarantors by recourse to the original instruments, and then to give them notice of its exercise. In my opinion, to ascribe any such intent to s. 30(2) would be to distort the very notion of the register of title and the place which it occupies in the scheme of the Land Titles Act, and would carry the effect of the subsection far beyond what I take to be its evident purpose, which is simply to ensure that late-filed instruments will not be ignored or disregarded by reason only that they may not have been filed in sufficient time to be entered on the register in the usual way.

14 Nevertheless, having regard to the inclusion in s. 30(1) of the Mortgages Act not only of ¶ 1 but also of ¶ 4, which the trial Judge did not deal with but which provides for notice to be given to persons having an interest in mortgaged property of which the mortgagee has actual notice, I do not think it would be proper to allow this appeal solely on the basis of what I take to be an error by the trial Judge in the interpretation of s. 30(2). There is a more fundamental objection to the trial Judge's conclusion based on s. 30 of the Act which is urged upon us by counsel for the appellant and which is common both to the second element of ¶ 1 and to ¶ 4 of s. 30(1).

15 That objection is to the conclusion reached by the trial Judge that the guarantors were in fact persons having an "interest in the mortgaged property" within the meaning of s. 30(1) of the Act. In his view, the interest which the guarantors in this case had in the property was their right, upon payment of the amount guaranteed to the principal creditor (in this case the appellant) to be subrogated as surety to the principal creditor's interest in the mortgaged property. Thus when the demand for payment was eventually made upon the guarantors following the sale resulting in the deficiency, "the paramount right of the guarantor, that is to have the security preserved by the creditor, has disappeared, and he has lost the power to exercise his right of subrogation by paying the sum guaranteed" [p. 181].

16 The trial Judge reached this conclusion after considering and in turn rejecting various authorities referred to by counsel for the appellant, and notwithstanding that "in this case that no money was paid" by the guarantors [p. 180].

17 With great respect to the learned trial Judge, I think he was wrong in his conclusion on this issue. The cases considered by the trial Judge in his reasons are, in my opinion, not particularly helpful when applied to the facts of this case, but they do contain certain passages from learned authorities on, inter alia, the law of principal and surety, that have some relevance to the issue. Among these, for example, is a passage from Marriott and Dunn, Practice in Mortgage Actions in Ontario (3rd ed., 1971), at p. 46, as follows:

> A surety who merely covenants to pay the mortgage debt has no charge to secure his right of indemnity against the principal on the property of the principal affected by the mortgage, and having no charge to protect, is not entitled to redeem and is not a necessary party in an action against the principal for foreclosure ...

Later the authors continue:

> However, a surety who has paid part of the mortgage is entitled as against the mortgagor to a charge on the estate and is therefore a necessary party as an encumbrancer ...

Commenting on this statement the learned trial Judge merely remarked that it seemed to him "quite clear that that has no application either in actuality or by analogy to the question of exercising of a power of sale" [p. 182]. I am frank to admit that I do not understand this remark, except insofar as it calls attention to the well-recognized distinction between an action for foreclosure and the exercise by a mortgagee of a power of sale contained in a mortgage.

18 In my opinion, the principles which apply with regard to this issue are essentially those advanced in the appellant's statement, on which this Court did not call on counsel for the appellant for oral argument except in reply to the arguments advanced by counsel for the respondent. Those principles can, I think, be stated quite briefly. Upon paying a guaranteed mortgage debt, but not before doing so, a guarantor is entitled to an assignment of the security held by the creditor relating to that debt, and to be subrogated to the rights of the creditor against the principal debtor under the security. The purpose of the subrogation is to enable the guarantor to utilize the security to recover from the principal debtor the amount he has paid, to the end that the guarantor may obtain indemnification from the principal debtor for the payment made by him. The governing principle is that, subject to the paramount right of the creditor to have the debt that is owed to him paid, the guarantor who has paid a mortgage debt should have available to him all the remedies of the creditor in order that the ultimate burden of the debt may fall upon the principal debtor as the person primarily liable for it. The essence of the subrogation is that the guarantor has a right to be *reimbursed*, rather than a right to pay the debt so that he may then take over the security. See, generally, the Mercantile Law Amendment Act, R.S.O. 1970, c. 272, s. 2 [now R.S.O. 1980, c. 265, s. 2]; 16 Hals. (4th ed.) 970, para. 1440; 20 Hals. (4th ed.) 104, para. 193; Rowlatt, The Law of Principal and Surety (3rd ed., 1936), pp. 172-73; deColyar's Law of Guarantees and of Principal and Surety (3rd ed., 1897), pp. 318-22.

19 However, a guarantor of a mortgage who has not paid any part of the mortgage debt has no charge on the mortgaged property. Having no such charge, he is not a person entitled to redeem, nor is he a necessary party defendant in any action for foreclosure. His situation is not different by reason only that the mortgagee may elect to sell the property pursuant to a power of sale contained in the mortgage. The distinction remains that the guarantor who pays some or all of the debt has an interest in the security, but the guarantor who does not has no such interest.

20 The submission made by counsel for the appellant is that where the guarantor has paid the mortgage debt, the guarantor is entitled only to the *benefit* of the security, not the security in and of itself. I do not disagree with this way of putting the matter. However, where no part of the debt has been paid by the guarantor and there is a default under the mortgage followed by the giving of notice of the exercise of a power of sale thereunder, the creditor may proceed to realize on the security. If upon any such realization the full value of the security is then credited to the outstanding mortgage debt, I do not think the guarantor can be heard to complain that his rights have been prejudiced in any way by the actions of the creditor. To whatever extent the mortgage debt exceeds the full value realized by the creditor, the debt remains, and to that extent the guarantor is not discharged from the guarantee given by him.

21 Before leaving the subject of "the requirements of the statute", I might add that Pt. III of the Mortgages Act, which is entitled "Notice of Exercising Power of Sale", is not as I see it concerned with the rights, inter se, of the mortgagee and those who claim an interest in the mortgaged property. Rather, it seems to me, the concern of Pt. III is with ensuring that a vendor acting under a power of sale can be confident of giving a good title to the purchaser. Accordingly, in my opinion, Pt. III cannot assist the respondents in any argument that could be advanced on their behalf seeking support for such a claim from the statutory requirements of that part.

22 In the case at Bar, the contract of guarantee contained in the mortgage did not itself provide for or require the giving to the guarantors of any notice of exercise of the mortgagee's power of sale under the mortgage. Moreover, in the mortgage instrument proper, the only contractual stipulation for such notice was for "notice ... as provided in *The Mortgages Act*". Where neither the guarantee itself nor the mortgage instrument in which it was contained required any such notice to the guarantors, I do not think it can be contended by them that they should nevertheless have been served with notice of the mortgagee's exercise of its power of sale, quite apart from any notice required by the statute. To whatever extent the basis for that contention may be said to be that they were collectively or individually prejudiced by the absence of such notice by having been denied the opportunity to protect themselves as they might have done had they received the notice that was given to the mortgagor, the contention strikes me as having no foundation in substance. First, there is the consideration that the two guarantors Zentner and Ryan had at all relevant times knowledge of the notice given to the mortgagor and acted in reliance on that knowledge in all their dealings with the appellant regarding the terms on which the property ought to be sold. Second, there is the relationship which existed between all three of the guarantors throughout the period with which this appeal is concerned. Taking these two factors together the contention based on prejudice is, in my opinion, untenable.

23 In the light of the conclusions reached to this point, it is not necessary to express any view on the alternative submission advanced on behalf of the appellant to the effect that the guarantors, by reason of their contract with the appellant in which they guaranteed "all of the obligations of the mortgagor" under the mortgage, including its obligation to pay the mortgage debt notwithstanding any release by the mortgagee of its security, contracted out of their right of subrogation or of any right they may have had to insist that the mortgaged property be preserved for their benefit. Since I am not persuaded that there was any such right in the circumstances of this case, this alternative submission requires no further comment.

24 For the foregoing reasons, I am of the opinion that the appellant in this case had no obligation under s. 30(1) of the Mortgages Act to give notice of the exercise of its power of sale under the mortgage to the respondent guarantors as persons appearing by the register to have or as persons having an interest in the mortgaged property, nor did it have any contractual obligation to give them such notice. I would accordingly allow the appeal and set aside paras. 4 and 5 of the formal judgment. In place of para. 4, I would substitute an order and

judgment in favour of the appellant against the respondents Max Zentner, Sam Zentner and John J. Ryan for the same amount determined on the reference before the Master at Toronto to be due and owing to the appellant by the defendant First Federal Construction Limited. In place of para. 5, I would substitute an order and judgment that the three individual respondents do pay to the appellant its costs of this action at trial and its costs of the said reference, forthwith after taxation thereof. Finally the three individual respondents should pay to the appellant its costs of this appeal.

Appeal allowed.

END OF DOCUMENT

TAB 5

2011 CarswellAlta 1883, 2011 ABCA 314, 210 A.C.W.S. (3d) 52, 343 D.L.R. (4th) 304, 515 A.R. 147, 532 W.A.C. 148, [2012] A.W.L.D. 1775, [2012] A.W.L.D. 1739, [2012] A.W.L.D. 1738, [2012] A.W.L.D. 1737, [2012] A.W.L.D. 1735, 68 Alta. L.R. (5th) 400

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2011 CarswellAlta 1883, 2011 ABCA 314, 210 A.C.W.S. (3d) 52, 343 D.L.R. (4th) 304, 515 A.R. 147, 532 W.A.C. 148, [2012] A.W.L.D. 1775, [2012] A.W.L.D. 1739, [2012] A.W.L.D. 1738, [2012] A.W.L.D. 1737, [2012] A.W.L.D. 1735, 68 Alta. L.R. (5th) 400

Alberta Treasury Branches v. Weatherlok Canada Ltd.

Mark Wesley Trinier also known as Mark Trinier and Deborah Ellen Trinier also known as Debbie Trinier, Appellants (Defendants) and Donald Shurnaik and Debbie Shurnaik, Respondents (Defendants) and Alberta Treasury Branches, Not a Party to the Appeal (Plaintiff) and Weatherlok Canada Inc., Not a Party to the Appeal (Defendant)

Alberta Court of Appeal

Jean Côté, Marina Paperny, R. Paul Belzil JJ.A.

Heard: September 7, 2011
Judgment: November 4, 2011[FN*]
Docket: Edmonton Appeal 1103-0033-AC

Proceedings: reversing *Alberta Treasury Branches v. Weatherlok Canada Ltd.* (2011), 2011 ABQB 15, 2011 CarswellAlta 17 (Alta. Q.B.); additional reasons at *Alberta Treasury Branches v. Weatherlok Canada Ltd.* (2011), 2011 ABCA 360, 2011 CarswellAlta 2473 (Alta. C.A.)

Counsel: N.D. Anderson for Appellants

G.J. Lintz for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — General principles

Plaintiff creditor brought action against T defendants and S defendants on their personal guarantees of company debt — T defendants paid full debt and took assignment of plaintiff's default judgment against S defendants — Guarantee included provision for payment of solicitor-client costs, which were part of assigned judgment debt — Taxing officer awarded solicitor-client costs of proceedings to enforce judgment debt — Appeal by S defendants was allowed on basis that assignment of default judgment and debt did not include right to solicitor-client costs — Costs award was overturned — T defendants appealed — Appeal allowed — There was contractual right to solicitor-client costs — Guarantee, loan agreements and assignment were drafted in wide terms, and provided for solicitor-client costs — Assignment contained power of attorney clause which empowered T de-

fendants to do all matters in relation to judgment that plaintiff could do — Court proceedings were against guarantors — Statement of claim recited terms of note and loan agreements which provided for solicitor-client costs — Costs incurred by T defendants in trying to collect from S defendants were incurred under all financial documents — Default judgment taxed solicitor-client costs against S defendants — Since T defendants were paying guarantors, they had every remedy which creditor had against other guarantors — Decision of previous judge clearly stated that costs were to be on solicitor-client basis — Solicitor-client costs were available on default judgment.

Guarantee and indemnity --- Practice and procedure — Guarantee — Liability for costs

Plaintiff creditor brought action against T defendants and S defendants on their personal guarantees of company debt — T defendants paid full debt and took assignment of plaintiff's default judgment against S defendants — Guarantee included provision for payment of solicitor-client costs, which were part of assigned judgment debt — Taxing officer awarded solicitor-client costs of proceedings to enforce judgment debt — Appeal by S defendants was allowed on basis that assignment of default judgment and debt did not include right to solicitor-client costs — Costs award was overturned — T defendants appealed — Appeal allowed — There was contractual right to solicitor-client costs — Guarantee provided for solicitor-client costs, and was assigned — Assignment contained power of attorney clause which empowered T defendants to do all matters in relation to judgment that plaintiff could do — Court proceedings were against guarantor — Statement of claim recited terms of note and loan agreements which provided for solicitor client costs — Default judgment taxed solicitor-client costs against S defendants — Since T defendants were paying guarantors, they had every remedy which creditor had against other guarantors — Costs incurred by T defendants in trying to collect from S defendants were incurred under loan documents, guarantee and assignment.

Civil practice and procedure --- Default proceedings — Judgment following default — By signing default judgment — General principles

Costs — Plaintiff creditor brought action against T defendants and S defendants on their personal guarantees of company debt — T defendants paid full debt and took assignment of plaintiff's default judgment against S defendants — Guarantee included provision for payment of solicitor-client costs, which were part of assigned judgment debt — Taxing officer awarded solicitor-client costs of proceedings to enforce judgment debt — Appeal by S defendants was allowed on basis that assignment of default judgment and debt did not include right to solicitor-client costs — Costs award was overturned — T defendants appealed — Appeal allowed — There was contractual right to solicitor-client costs — Guarantee provided for solicitor-client costs — Costs incurred by T defendants in trying to collect from S defendants were incurred under loan documents, guarantee and assignment — Decision of previous judge clearly stated that costs were to be on solicitor-client basis — Previous proceedings were proper — Solicitor-client costs were available on default judgment — Default judgment taxed solicitor-client costs against S defendants — Clerk of court had clear power to grant judgment for any liquidated claim pleaded after default.

Civil practice and procedure --- Costs — Costs of particular proceedings — Miscellaneous

Default judgment — Plaintiff creditor brought action against T defendants and S defendants on their personal guarantees of company debt — T defendants paid full debt and took assignment of plaintiff's default judgment against S defendants — Guarantee included provision for payment of solicitor-client costs, which were part of assigned judgment debt — Taxing officer awarded solicitor-client costs of proceedings to enforce judgment debt

— Appeal by S defendants was allowed on basis that assignment of default judgment and debt did not include right to solicitor-client costs — Costs award was overturned — T defendants appealed — Appeal allowed — There was contractual right to solicitor-client costs — Guarantee provided for solicitor-client costs — Costs incurred by T defendants in trying to collect from S defendants were incurred under loan documents, guarantee and assignment — Decision of previous judge clearly stated that costs were to be on solicitor-client basis — Previous proceedings were proper — Solicitor-client costs were available on default judgment — Default judgment taxed solicitor-client costs against S defendants — Clerk of court had clear power to grant judgment for any liquidated claim pleaded after default.

Cases considered by *Jean Côté J.A.*:

Arbitus Leasing Ltd. v. X-Zibit A Inc. (2006), 405 A.R. 288, 2006 ABQB 764, 2006 CarswellAlta 1416, 34 C.P.C. (6th) 311, 68 Alta. L.R. (4th) 173 (Alta. Q.B.) — considered

Brennan v. Arcadia Coal Co. (1929), [1929] 3 W.W.R. 446, 24 Alta. L.R. 236, [1929] 4 D.L.R. 1025, 1929 CarswellAlta 32 (Alta. C.A.) — followed

British American Co. v. Law & Co. (1892), 21 S.C.R. 325, 1892 CarswellNS 84 (S.C.C.) — referred to

Brown v. Coughlin (1914), 28 D.L.R. 437, 50 S.C.R. 100, 1914 CarswellOnt 423 (S.C.C.) — referred to

Collings, Re (1937), 1937 CarswellOnt 72, 18 C.B.R. 97, [1936] S.C.R. 613, [1937] 1 D.L.R. 409 (S.C.C.) — referred to

Csepregi v. Bygrove (2001), 2001 CarswellAlta 547, 2001 ABCA 108 (Alta. C.A.) — referred to

Davidson v. Patten (2006), 2006 CarswellAlta 663, 2006 ABQB 370 (Alta. Q.B.) — referred to

Dyck v. Wilkinson (2004), 2004 ABQB 731, 2004 CarswellAlta 1338 (Alta. Q.B.) — referred to

Dykes v. Goczan (1996), 38 Alta. L.R. (3d) 425, 49 C.P.C. (3d) 306, 188 A.R. 352, 1996 CarswellAlta 279 (Alta. Q.B.) — considered

Elliott v. Hill Bros. Expressways Ltd. (1999), 1999 CarswellAlta 138, 41 M.V.R. (3d) 142, 232 A.R. 258, 195 W.A.C. 258 (Alta. C.A.) — referred to

Hill v. Stephen Motor & Aero Co. (1929), 1929 CarswellSask 47, 23 Sask. L.R. 552, [1929] 3 D.L.R. 676, [1929] 2 W.W.R. 97 (Sask. C.A.) — referred to

Hillas & Co. v. Arcos Ltd. (1932), 43 Ll. L. Rep. 359, [1932] UKHL 2, [1932] All E.R. Rep. 494, 147 L.T. 503, 38 Com. Cas. 23 (U.K. H.L.) — referred to

Johnson, Re (1957), 8 D.L.R. (2d) 221, 1957 CarswellSask 16, 21 W.W.R. 289 (Sask. C.A.) — referred to

Klinck v. Drinnan (1985), 1985 CarswellAlta 246, 41 Alta. L.R. (2d) 299, 66 A.R. 321 (Alta. Q.B.) — referred to

McElroy v. Cowper-Smith (1967), [1967] S.C.R. 425, 60 W.W.R. 85, 1967 CarswellAlta 36, 62 D.L.R. (2d) 65 (S.C.C.) — followed

Mills v. Dunham (1891), [1891] 1 Ch. 576, 39 W.R. 289, 7 T.L.R. 238, 60 L.J. Ch. 362 (Eng. C.A.) — referred to

R. v. Frontenac Gas Co. (1915), 1915 CarswellNat 46, (sub nom. *Quebec, Jacques Cartier Electric Co. v. R.)* 51 S.C.R. 594, 24 D.L.R. 424 (S.C.C.) — considered

Robinson v. Fiesta Hotel Group Resorts (2008), 2008 ABQB 311, 2008 CarswellAlta 732, 91 Alta. L.R. (4th) 158, 450 A.R. 167, [2008] 12 W.W.R. 152 (Alta. Q.B. [In Chambers]) — referred to

Royal Bank v. Fox (1975), (sub nom. *Standard Brands Ltd. v. Fox)* [1976] 2 S.C.R. 2, 6 N.R. 382, 59 D.L.R. (3d) 258, (sub nom. *Fox v. Royal Bank)* 13 N.S.R. (2d) 176, 1975 CarswellNS 34, 1975 CarswellNS 34F (S.C.C.) — referred to

Royal Trust Corp. of Canada v. Rick Holdings Ltd. (1999), 250 A.R. 156, 213 W.A.C. 156, 1999 CarswellAlta 591, 1999 ABCA 187 (Alta. C.A.) — referred to

Schwartz v. Longview Motel & Saloon Corp. (1994), 1994 CarswellAlta 80, 18 Alta. L.R. (3d) 358, (sub nom. *Schwartz v. Stinchcombe)* 152 A.R. 241 (Alta. Q.B.) — referred to

Smith v. McPherson (1921), 51 O.L.R. 457, 69 D.L.R. 477 (Ont. C.A.) — referred to

Spiller v. Brown (1973), [1973] 6 W.W.R. 663, 43 D.L.R. (3d) 140, 1973 CarswellAlta 99 (Alta. C.A.) — followed

Standish Hall Hotel Inc. v. R. (1962), 35 D.L.R. (2d) 140, 1962 CarswellNat 298, [1963] S.C.R. 64 (S.C.C.) — referred to

Sulef v. Parkin (1966), 1966 CarswellAlta 49, 57 W.W.R. 236 (Alta. C.A.) — followed

Syncrude Canada Ltd. v. Tibo Steel Products Ltd. (2001), 2001 ABQB 478, 2001 CarswellAlta 741, 292 A.R. 368 (Alta. Q.B.) — referred to

Thimer v. Alberta (Workers' Compensation Board Appeals Commission) (2000), 2000 CarswellAlta 1111, 2000 ABQB 706, 89 Alta. L.R. (3d) 353, 31 Admin. L.R. (3d) 281, 276 A.R. 236 (Alta. Q.B.) — referred to

Wright v. Murray Rosen Professional Corp. (2005), 2005 ABCA 116, 2005 CarswellAlta 332 (Alta. C.A.) — referred to

Yaremchuk v. Haight (2001), 8 M.V.R. (4th) 12, 6 C.P.C. (5th) 112, 89 Alta. L.R. (3d) 311, 2001 ABCA 7, 2001 CarswellAlta 28, 277 A.R. 160, 242 W.A.C. 160 (Alta. C.A.) — referred to

Statutes considered:

Vendors' and Mortgagees' Costs Exaction Act, R.S.A. 1955, c. 357

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 142(1)(a) — referred to

R. 149(1) — referred to

R. 318 — referred to

R. 319 — referred to

R. 321(2) — referred to

R. 321(3) — referred to

R. 327 — referred to

R. 548 — referred to

R. 605(1) — referred to

APPEAL by paying co-guarantors from judgment reported at *Alberta Treasury Branches v. Weatherlok Canada Ltd.* (2011), 2011 ABQB 15, 2011 CarswellAlta 17 (Alta. Q.B.), setting aside order for solicitor-client costs.

***Jean Côté J.A.*:**

A. Introduction

1 The issues here revolve about entitlement to solicitor-client costs after default judgment, and settling and entering formal orders. The respondents and the chambers judge under appeal have raised a number of procedural grounds for objecting to such costs and those orders.

2 The biggest surprise of civil litigation befalls lay people who learn that their real troubles often begin after they win. Collecting on a judgment is often frustrating, even if the debtor has assets. Soon this suit will be eight years old, yet the successful appellants still have achieved limited progress.

B. Facts

3 The appellants and the respondents are two couples who guaranteed the Treasury Branches' loan to a private company. The company did not pay, so the creditor Treasury Branches sued all of them. The respondents neither paid nor defended. So the Treasury Branches signed default judgment against the respondents.

4 Over seven years ago, the appellants paid off the Treasury Branches and got an assignment from it. In the document, the Treasury Branches expressly assigned both its default judgment against the respondents, and also the costs (present or future), and the moneys recoverable. Since the appellants had paid the whole debt and not merely their proportionate share, they moved for contribution from the respondents; i.e. reimbursement of the excess.

5 That post-judgment litigation has limped since. The appellants appeal the latest order (with leave of the

Queen's Bench chambers judge who made it).

C. The Latest Proceedings

6 The appeal is from an order whose formal portion reverses a decision of the taxing officer and reduces "costs" from solicitor-client to party-party. The formal order does not confine that costs reduction to any particular stage, nor to any particular issues. The chambers judge even gave some costs to the respondents (judgment debtors).

7 The underlying motion to the chambers judge was an appeal from the Clerk and Taxing Officer's decision of late 2009. The chambers judge heard argument in January and April 2010. His formal order is based on his written Reasons issued on January 10, 2011. They are cited as 2011 ABQB 15 (Alta. Q.B.). They conclude that the appellants were not entitled to solicitor-client costs, and set aside intermediate orders of another Queen's Bench judge giving solicitor-client costs. The Reasons do not purport to disturb the default judgment.

D. Benefit of the Contracts for Solicitor-Client Costs

8 The guarantee to the Treasury Branches is in evidence and calls for solicitor-client costs. That part is quoted toward the end of Part F below.

9 One part of the Reasons of the chambers judge finds no contractual right to solicitor-client costs. It so concludes on the basis that only the default judgment and the debt were assigned. The assignment does include costs present or future.

10 I respectfully disagree with that reasoning.

11 First, the assignment here contains a power of attorney clause. It expressly empowers the appellants to "do all acts matters and things in relation to the judgment as the [Treasury Branches] could do." That widens the assignment and fully links it to the loan documents and to the guarantee.

12 The guarantee is in evidence (Ex C to December 12, 2009 affidavit). It expressly calls for solicitor-and-own-client costs (para 17). The guarantee is signed by both the appellants and the respondents, so the respondents cannot dispute the correctness or justness of solicitor-client costs. Nor is this a contract with strangers, so no assignment of it is necessary. (It is quoted below in Part F.)

13 The debtor company had no money, and the costs were incurred in the suit. That suit, the payment, the default judgment, and steps since, were all on the guarantee. The judgment and later steps were not against the company; the part of the suit against the company went nowhere, and incurred none of the costs. The court proceedings were against the guarantors. I respectfully suggest that that alone suffices to found all the solicitor-client costs in question here.

14 The statement of claim does recite the terms of the note and loan agreements between the plaintiff Treasury Branches and the company borrower (pp P1-P2). The statement of claim (p P2, para 8) recites that the borrower covenanted to pay "legal costs as between a solicitor and his own client on a full indemnity basis".

15 The statement of claim also recites (paras 9-10) that the appellants contracted to guarantee all that, and (paras 15-16, pp P3-P4) that the respondents also guaranteed the whole indebtedness including "all costs, charges and expenses which may be incurred by the plaintiff in recovering any indebtedness ...". And the state-

ment of claim's prayer expressly calls for solicitor-and-own-client costs (para (g), p P5). The defendants are the company, the appellants and the respondents.

16 So which document was assigned does not matter here, because all three documents give these higher costs.

17 The chambers judge's Reasons are critical of a statement to him by the appellants' counsel, that the underlying contracts ("financial documents") called for solicitor-client costs. Indeed the Reasons purport to upset an earlier order of the same judge because of that statement. But all the above shows that that statement by counsel was accurate.

E. Default Binds Respondents

18 Indeed the various covenants for solicitor-client costs are incontestible. The respondents did not defend, and default judgment was signed against them on April 21, 2004 (7-1/2 years ago). On its face, the default judgment taxes solicitor-client costs against the respondents.

19 In July 2005, the respondents applied to open up that judgment (AR pp P7-8) (and on September 21, 2006, says the appellants' factum, para 7). Argument (written and oral) concedes that the court never did open up the judgment, and it was never appealed. The respondents say that the opening up question was heard in October 2007. In any event, opening up has never happened, and no one suggests that it is going to happen or is still pending.

20 The body of the statement of claim recites what the loan documents say. The recitals are not evidence, but they became stronger than evidence after default judgment. A long line of authority holds that not filing a statement of defence constitutes an admission of the facts alleged in the statement of claim. Older English authority is cited in *Hill v. Stephen Motor & Aero Co.*, [1929] 2 W.W.R. 97 (Sask. C.A.), 98-99, which also adopts the proposition. Though at times some jurisdictions have had express Rules of Court on the topic, that is not necessary. See *Sulef v. Parkin* (1966), 57 W.W.R. 236 (Alta. C.A.), 239. And most cases cite no Rule saying that.

21 Supreme Court authority for the deemed admission is *McElroy v. Cowper-Smith*, [1967] S.C.R. 425 (S.C.C.), 428, (1967), 60 W.W.R. 85 (S.C.C.), 88. Its majority adopt statements to that effect by Spence J., dissenting on other grounds, who follows the Alberta Court of Appeal.

22 Alberta Court of Appeal authority for the deemed admission is *Brennan v. Arcadia Coal Co.*, [1929] 3 W.W.R. 446 (Alta. C.A.), 448, (1929), 24 Alta. L.R. 236 (Alta. C.A.); *Sulef v. Parkin, supra* (citing a 19th Century English textbook); and *Spiller v. Brown*, [1973] 6 W.W.R. 663 (Alta. C.A.), 666. There are similar *dicta* in *Yaremchuk v. Haight*, 2001 ABCA 7, 277 A.R. 160, 6 C.P.C. (5th) 112 (Alta. C.A.).

23 Alberta's Court of Queen's Bench has also held the same, adopting the defaulting defendant's deemed admission of the plaintiff's pleading: *Klinck v. Drinnan* (1985), 66 A.R. 321 (Alta. Q.B.), 325-36, (1985), 41 Alta. L.R. (2d) 299 (Alta. Q.B.) (paras 22-24) (citing much authority); *Schwartz v. Longview Motel & Saloon Corp.* (1994), 18 Alta. L.R. (3d) 358 (Alta. Q.B.), 385 (para 90); *Syncrude Canada Ltd. v. Tibo Steel Products Ltd.*, 2001 ABQB 478, 292 A.R. 368 (Alta. Q.B.), (citing much law); *Dykes v. Goczan* (1996), 188 A.R. 352 (Alta. Q.B.); *Robinson v. Fiesta Hotel Group Resorts*, 2008 ABQB 311, [2008] 12 W.W.R. 152, 450 A.R. 167 (Alta. Q.B. [In Chambers]), 172-73, (2008), 91 Alta. L.R. (4th) 158 (Alta. Q.B. [In Chambers]) (paras 10-12) (citing authority); *Dyck v. Wilkinson*, 2004 ABQB 731 (Alta. Q.B.), [2004] A.R. Uned 657, JDE 0103-01520 (para 9).

A Master has held the same, in *AMHC v. Keith Empy Homes* (M July 22 '86) JDE 8603-07910, AUD (M) 109.

24 *Dykes v. Goczan*, *supra*, holds that contrary evidence by the defendant is inadmissible. The same thing is said in 16 *Hals. Laws of Eng.* § 1172-73 and 1559-1561 (4th ed), but in somewhat narrower circumstances than apply to the deemed admission.

25 I have not found any exceptions to the rule which are relevant here. I see no need to discuss here the exceptions, nor their scope, whether based on type of claim, relief sought, relevance of the pleading, or otherwise.

26 Furthermore, this default judgment does not say "costs to be taxed." An integral part of the judgment is an itemized and taxed bill of costs, and the judgment itself awards the bill's total amount. That amount is patently solicitor-client costs. The costs taxed and awarded there are far beyond Schedule C (i.e. beyond party-party costs). The services listed are lengthy and most bear no relation to the few services listed in Schedule C. Nor are any individual amounts from Schedule C (or for individual services) given. This is a solicitor-client bill of costs.

27 The chambers judge relied on *Arbitus Leasing Ltd. v. X-Zibit A Inc.*, 2006 ABQB 764, 405 A.R. 288 (Alta. Q.B.). Even if it were correct, it would be distinguishable here for two reasons. First, the face of the default judgment here awards solicitor-client costs. Second, where the statement of claim leading to the default judgment recites a covenant for solicitor-client costs, there is no room for any presumption that "costs" mean party-party costs, as explained above.

28 If a formal judgment is ambiguous, the taxing officer may look at the trial judge's Reasons for decision, in order to tax costs: *R. v. Frontenac Gas Co.* (1915), 51 S.C.R. 594 (S.C.C.), 598, 600. (That was a case about solicitor-client expenses.) Cf *Standish Hall Hotel Inc. v. R.* (1962), [1963] S.C.R. 64, 35 D.L.R. (2d) 140 (S.C.C.), 153. If a judgment gives a thing, that thing is not to be presumed then to be taken away by other words in the same judgment: Re *Smith*, *supra*, at p 480 (DLR). One cannot go back further behind the reasons: *Johnson, Re* (1957), 21 W.W.R. 289 (Sask. C.A.), 201.

29 Reasons for decision are to be read reasonably, generously, and not *contra proferentem*: *Elliott v. Hill Bros. Expressways Ltd.* (1999), 232 A.R. 258 (Alta. C.A.), 261 (para 18). Cf. 2 Williston and Rolls, *Law of Civil Procedure* 1046 (1970); Re *Smith v. McPherson* (1921), 51 O.L.R. 457 (Ont. C.A.) , 463, (1921), 69 D.L.R. 477 (Ont. C.A.), 480. That should apply to oral reasons too. Reasons are to be read as a whole, not in little isolated pieces: *Elliott v. Hill Bros. Expressways Ltd.*, *supra* at para 22 (and cf paras 23-27).

30 When there is an express covenant for solicitor-client costs, there is no reason to presume that a judgment does not speak of them.

F. Contribution Among Guarantors

31 Next, I will go beyond the particular technical objections recited above. I turn to substance, and to the general rules about contribution among co-guarantors. The assignment of judgment and debt here is not the only cause of action which the appellants had against the respondents (despite what the Reasons seem to imply).

32 If a guarantor pays the creditor the debt guaranteed (not merely the payor's proportionate share of it), the paying guarantor becomes subrogated to the rights of the creditor so paid: Goff & Jones, *The Law of Restitution*, paras 3-009, 3-025 (7th ed 2007); Maddaugh & McCamus, *The Law of Restitution*, 8-1, 8-2 (2d ed 2004); Fridman, *Restitution*, 403 (2d ed, 1992); *Royal Bank v. Fox* (1975), [1976] 2 S.C.R. 2 (S.C.C.), 7, (1975), 6 N.R.

382, 59 D.L.R. (3d) 258 (S.C.C.) .

33 That subrogation gives the paying guarantor every remedy, every security, and every means of payment which the creditor had against the other guarantors. That subrogation is automatic, and does not depend in any way on contracts, such as an assignment. See Fridman, *op cit. supra* at 402-03; Goff and Jones, *op cit. supra* at paras 3-025 and 3-027; *Brown v. Coughlin* (1914), 50 S.C.R. 100 (S.C.C.), 104; cf *Royal Trust Corp. of Canada v. Rick Holdings Ltd.*, 1999 ABCA 187, 250 A.R. 156 (Alta. C.A.), (para 2).

34 Besides, it is very doubtful that there is any gap or discrepancy here between the guarantee, the loan agreements, and the assignment. All are drafted in wide terms. Obviously the assignment is designed to give to the appellants the Treasury Branches' rights. And the guarantee is designed to enforce all the rights of the Treasury Branches under the loan. A contract should be interpreted to make it workable; it is not a penal statute for courts to construe narrowly and technically. See Burrows, *Interpretation of Documents* 92-94 (2d ed 1946); Broom, *Legal Maxims* 361-69 (10th ed 1939); *Hillas & Co. v. Arcos Ltd.* (1932), 147 L.T. 503 (U.K. H.L.), 514, [1932] UKHL 2 (U.K. H.L.); *British American Co. v. Law & Co.* (1892), 21 S.C.R. 325 (S.C.C.); *Mills v. Dunham*, [1891] 1 Ch. 576 (Eng. C.A.), esp. at 590, (1891), 60 L.J. Ch. 362 (Eng. C.A.).

35 What does the subrogation give here? To answer that, it is useful to look at the precise covenants to pay solicitor-client costs. One covenant in one loan and agreement (the General Security Agreement) was to pay

> all costs and expenses incurred ... **in connection with** any recovery action commenced ... including, without limitation, legal costs as between a solicitor and his own client on a full indemnity basis.
>
> (Statement of Claim, para 8, emphasis added)

The equivalent covenant in another loan agreement (the mortgage) called for:

> ... all costs and expenses incurred by the Plaintiff in respect of exercising or enforcing or attempting to enforce or in pursuance of any right, power, remedy or purpose thereunder, including, without limitation, legal costs as between a solicitor and his own client on a full indemnity basis and an allowance for the time, work and expenses of the Plaintiff or of any agent, solicitor, or servant of the Plaintiff.
>
> (Statement of Claim, para 14)

The guarantee contained the respondents' covenant to pay

> ... all costs, charges, and expenses (including, without limitation, lawyers' fees as between solicitor and his own client on a full indemnity basis) incurred by [the plaintiff] for the ... enforcement of this guarantee ...
>
> (December 12, 2009 affidavit, Ex C)

The appellants and the respondents are all direct original parties to the guarantee. They are bound by it, and can sue and benefit under it. It sets the extent of the obligations, and that expressly includes solicitor-client costs.

36 These covenants about costs are not against public policy. The *Vendors' and Mortgagees' Costs Exaction Act* was repealed by 1965 c 98.

37 The efforts and expenses of the appellants were expended to collect from guarantors on the guarantee.

They were not incurred exclusively under the loan; the company (the principal debtor) obviously could not pay, and the steps in question here involved no futile attempts to get money from the company.

38 The topic is costs. The guarantee is to enforce the loan agreements, which were assigned. Given all that, it appears to me beyond doubt that costs incurred by the appellants in trying to collect from the respondents were incurred under all the documents (loan agreements, guarantee, and assignment).

G. Any Discretion?

39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.

40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.

41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.

42 Besides, the covenants here are for solicitor-and-*own*-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

H. Previous Orders

43 The chambers judge's Reasons offered another ground for denying solicitor-client costs. They concluded that there was no order providing for solicitor-client costs. This proposition was not argued earlier.

44 In fact, however, in August and October 2007, Lewis J. had ordered solicitor-client costs. And in January 2008, the very chambers judge now appealed had done the same. Only one of those three previous orders was appealed, and then that appeal was abandoned.

45 The Reasons now under appeal hypothesized that all three of those earlier orders lacked legal effect.

46 First, the Reasons said that this same chambers judge's own previous order of 2008 should somehow be upset because the then-counsel for the appellants had stated that both the guarantee and the loan agreement called for solicitor-client costs. Counsel's statement was accurate; both contracts did (and in any event, one alone would suffice). There was no misrepresentation at all of any sort. Counsel was not required to foresee the narrow and strained interpretation later imposed by the judge's Reasons. Such reasoning would be virtually circular. (And even the *Arbitus* case there relied upon, was not decided until late 2006.)

47 The previous order by the same chambers judge in question was not *ex parte*, and it is not clear how or why it could be upset. There was no suit to upset it for fraud, and such a suit could not possibly succeed. No law on upsetting orders was cited.

48 In my view, the transcript of the decision of the previous judge (pp F19-20) clearly says that costs are to be on a solicitor-client basis.

49 In any event, there is an entered order on the topic, by the former judge, Lewis J. (AR pp F27-28). It clearly states that costs are to be on a solicitor-client basis (para 4). There was no ground for a different judge to revisit that question later.

50 The explanation for that attempt to revisit is found in the "Background Facts" part of the Reasons now under appeal (para 20). It reads as follows:

> Mr. Moroz drafted forms of orders in relation to the appearances before Lewis, J. in October, 2007. Those orders have never been signed by any Judge of the Court, nor have they been filed with the Clerk. Therefore, to this date there are no formal filed orders of Lewis, J. in respect to the two October 2007 hearings.

However, the end of the recital is incomplete. As noted, there *were* settled formal orders of the previous judge filed with the clerk's office (i.e. entered).

51 The chambers judge's Reasons and the respondents argue that the entered orders were nullities or had to be upset by the judge appealed from. They offer two grounds.

52 The first ground suggested for invalidity is that the orders were never signed by a judge. However, the Rules then in force directed that the *Clerk* sign orders: see Rr 321(2), (3). This was not a case where the opposite party neglected to approve the draft. The parties disagreed as to what the formal order should say. In such circumstances, the Rules called on the *Clerk* to settle the wording: Rr 318, 319. Often judges used to do that, but no Rule called for that, and that practice could not detract from that Rule.

53 The transcript of the sessions before Mr. Christensen shows no objection by anyone to his jurisdiction to settle the wording of these previous orders by Lewis J. pronounced on October 16, 2007 and October 30, 2007. (See transcripts of argument on September 17, 2009, October 27, 2009 and November 5, 2009.) Yet the proper wording was expressly decided at the last session (November 5).

54 Mr. Christensen settled this wording for the formal order, after a formal appointment to do so (AB p P17), and after a contested hearing (transcript, pp F106-F122). He is a Deputy Clerk and so had the power to do so. The formal Appointment refers to him as Clerk, not as Taxing Officer. In practice the Clerk himself almost never acts, and such tasks are performed by Deputy Clerks.

55 The statement in the Reasons under appeal that the "Taxing Officer attempted to settle the terms" is puzzling. Mr. Christensen did so in his capacity as a Deputy Clerk.

56 In my view, the formal order of Lewis J. reflects the transcript of the hearing before him, and the minutes of the order as settled by the Deputy Clerk are correct.

57 The chambers judge now being appealed was not the trier of fact, nor the one to settle the minutes. All that had occurred beforehand. The chambers judge sat in an appellate capacity. The standard of review on appeal from him to the Court of Appeal is therefore correctness.

58 Now I turn to another argument made by the respondents (AR p 200).

59 The respondents rely upon a letter of Wachowich J. responding to an inquiry about an unanswered letter to the previous judge (Lewis J.) who had since retired. Wachowich J. said to go to a judge. His letter did not refer to any specific judge, and even then said to get advice from "a chambers judge ... as to how to deal with the matter, taking into account the Rules of Court that are to be considered ...". In no sense was this letter an order, still less one removing jurisdiction. It did not remove the authority of the Clerk to settle minutes of previous orders, still less make such settlement a nullity. A letter from a judge could not repeal a Rule of Court.

I. Time Limit for Entry

60 The second possible ground to upset the entered order of the previous judge, Lewis J., seems not to be a foundation for the Reasons now under appeal (though they recite that the argument was then made: para 28). Nor is this point mentioned in the respondents' "Notice of Appeal from Taxation", which is what was before the chambers judge. The respondents argue that a year having expired, the Clerk had no power to enter the order (old R 327).

61 That Rule gave a time limit for entry, not for settling the contents of an order. It is impossible to enter an order until its wording is either approved or settled.

62 And any breach of R 327 would not produce nullity. The grounds for extending the year are many, and the tests are lax. An unentered order exists and has force, and where parties have relied on it, a later judge should not upset it just because he or she thinks that it is wrong, or because one year has gone by without it being entered.

63 There is full discretion for the court to allow entry of an order despite expiry of a year: *Wright v. Murray Rosen Professional Corp.*, 2005 ABCA 116 (Alta. C.A.), [2005] AR Uned 44, [2005] AJ #274, Calg 0301-0355 AC (March 10/16). Indeed, an extension of time to do so should not be refused unless it would cause real prejudice to the other side: *Csepregi v. Bygrove*, 2001 ABCA 108 (Alta. C.A.), [2001] AR Uned 31, [2001] AUD 1051 (April 17/May 3). At times, fairness requires entering an order late: *Thimer v. Alberta (Workers' Compensation Board Appeals Commission)*, 2000 ABQB 706, 276 A.R. 236 (Alta. Q.B.), 252-53 (paras 53-59).

64 If R 327 was operative before this chambers judge (which is far from clear), his Reasons did not consider the mandatory topic of a time extension. The appellants' factum argues it and calls it "a fiat" (paras 12-14, 27, 37). The appellants' factum also suggests (para 37) that the respondents lay in the weeds for years, and then raised technical objections after it seemed too late to fix them. The respondents' factum does not answer that.

65 The fact that counsel for the respondents refused to sign the draft of the formal order of Lewis J. certainly explains some time gap. The minutes of the proposed order were correct. Why was it not entered promptly? Simply because counsel for the respondents would not approve it as to form, as admitted in the respondents' factum (p 5, para (3)). So it ill lies in the respondents' mouths to complain of the delay in entry.

66 There is no suggestion (let alone evidence) that the appellants caused the delays. Both Lewis J. and Mr. Christensen lost some time over their health issues. Ordinary time hazards of litigation must not destroy an order.

67 For a century, R 548 and similar Rules on extensions of time set by Rules or orders were always generously interpreted. It would be a rare case where someone would lose his rights through a few months' delay which were not wilful, and caused no significant irreparable prejudice. See the cases collected in 1 Stevenson &

Côté, *Civil Procedure Encyclopedia*, pp 18-19 and 18-20 (Chapter 18, Part N) (2003).

68 Maybe the factum of the respondents suggests that leave had to occur before entry (p 6, replying to ground 3). If so, that is wrong, because it is expressly contrary to old R 548(2).

69 Rarely, an order can be abandoned by the party getting it; but what happened here was the opposite. The appellants kept trying to enforce the orders which they had obtained and entered, but were thwarted by the respondents' objections and motions.

70 Therefore, solicitor-client costs were the proper basis for the costs of all these proceedings, the previous proceedings were proper, and there was no reason to question, to attack collaterally, nor to reverse, any order to that effect.

J. Can Default Judgments Give Solicitor-Client Costs?

71 The respondents' factum relies on the entire *Arbitus* decision (factum, paras 16(1) and 18), and so do the Reasons under appeal. That decision suggests that a default judgment cannot give solicitor-client costs.

72 The decision in *Arbitus* gave three grounds for not allowing solicitor-client costs on one particular default judgment there. The first and probably biggest point was as follows: default judgments supersede the covenant for solicitor-client costs (405 AR. p 293, at the end of para 19). The Reasons cite only two bits of authority: *Black's Law Dictionary* (no page cited, but maybe the definition of "merger"), and an 1844 decision. The latter decision merely says that one cannot sue a second time on a cause of action after one has got judgment on it. Of course that is not what happened here. And it would create a Catch 22: you cannot sue now because you sued before, and you cannot rely on the judgment because the part of it in your favour is invalid. That would be both unfair and self-contradictory.

73 The second ground stated in the *Arbitus* case was just that the particular default judgment in that case merely said "costs" or maybe "costs to be taxed" with no further detail (p 294 AR, para 22). Of course that is not the situation here, where the default judgment itself awarded solicitor-client costs as described above in Part E.

74 Finally, the *Arbitus* judgment came at the matter a third way. It suggested that a default judgment could not go above party-party costs because R 605(1) did not let a taxing officer go higher than party-party costs "unless ordered". It cited some decisions by taxing officers.

75 With respect, that is another *non sequitur*. Default judgments are not given by taxing officers. These are given by the Clerk of the Court. And the Clerk of the Court had very clear power to grant judgment for any liquidated claim pleaded (or for recovery of a specific asset) after default: old Rr 142 (1)(a), 148(1); cf R 149(1). It is quite common for such default judgments to compute interest or unit prices in debt, and similar matters. Often the default judgment is for a whole set of accounts with amounts in both directions (e.g. new invoices and then partial payments).

76 To support this third ground, the *Arbitus* judgment took out of context a statement that pleadings and admissions cannot confer on the court a new jurisdiction (pp 294-95). But there is no question about the jurisdiction of the court in the *Arbitus* case, nor the present case. Moreover, there is no doubt about the jurisdiction of the Clerk (or Deputy Clerk) to give default judgment, as noted.

77 There is a somewhat similar brief argument in the respondents' factum in the Court of Appeal (reply to

ground of appeal number 2, on p 6). It suggests that only a judge can award costs, and so the Clerk cannot even settle minutes of judgment or sign them, if their subject is entitlement to costs where what the judge pronounced was ambiguous. This proposition seems wrong in principle, and at the very best is circular reasoning. It is clear that pronouncing a decision (or reconsidering it) are totally different from settling the wording of the formal order recording that. Settling asks what was decided, not whether it was correct. See *Davidson v. Patten*, 2006 ABQB 370 (Alta. Q.B.), JDC 0101-00193, [2006] AR Uned 318 (May 18); *Collings, Re* (1937), [1936] S.C.R. 613 (S.C.C.), 614-15, [1937] 1 D.L.R. 409 (S.C.C.) (one judge). Whoever settles the minutes cannot go off on a voyage of discovery of his or her own, and is the servant not the master.

78 The reply by the respondents' factum (to point number 1) implies that the minutes of the orders were settled by a taxing officer who cannot award solicitor-client costs. But the same person (here Mr. Christensen) has two hats. One is Deputy Clerk and the other is Taxing Officer. As noted, he settled the orders in the former capacity.

K. Side Issue?

79 That leaves another argument of the respondents. Their counsel firmly suggested in oral argument to us that even if solicitor-client costs are proper for true collection procedure, they should not extend to (or not yet extend to) another substantive issue. It attempts to see whether the 45% contribution owed by the respondents should include a sum said to have been paid by the appellants to the Treasury Branches on the loan, before the suit and before its default judgment.

80 The first answer to that argument is that the loan contracts and the guarantee antedate the past payment by the appellants which is now in question. That the evidence of the guarantee was filed later, or that the admission of the facts about the loan agreement came later, is irrelevant. In any event, the motions about that payment came after the default judgment. So there is nothing retroactive about this part of the claim for solicitor-client costs.

81 The second answer is that the covenants for solicitor-client costs in all contracts (loan and guarantee) are very broad. (They are quoted above in Part F.) Those extend to indirect or ancillary proceedings.

82 The appellants were only responsible for 55% of the obligations guaranteed, but actually paid the whole thing, and the Treasury Branches' default judgment and security assigned and subrogated to the appellants are for more than the amount the appellants seek from the respondents. Therefore, this one motion to fix the amount (of which the respondents must pay 45%) is connected to the respondents' covenants to pay solicitor-client costs, and connected to the security.

83 The respondents next argue that the question of whether the respondents must pay 45% of the sum paid by the appellants before suit has not yet been decided and is to be tried. They say that it could even be decided against the appellants. That may be true, but the question at the moment is not the costs of some future trial of an issue. The question now is costs of motions on preliminary procedure decided some years ago. In no sense did the appellants lose these motions, and they had to bring them.

84 Sometimes it may be sensible to defer costs awards of interim steps; but given the long gap, and the various contests with the respondents which intervened, such deferral is inappropriate here. The previous judge (Lewis J.) exercised his discretion and decided not to defer them. That costs question was no longer open. Settling terms of a formal order is not an appeal from it on the merits. It is not a reopening of the merits. Counsel

who attempt that produce serious delay. Costs now and not years later involve no error in principle. This case has seen too much delay.

85 The appellants should get solicitor-client costs of that issue too.

L. Conclusion

86 I would allow the appeal, reinstate the formal orders of Lewis J. as settled by the Deputy Clerk, reinstate the former costs order dated August 27, 2007 which this chambers judge set aside, and would award the appellants solicitor-client costs (full indemnity) for all steps to date, with no deduction for unreasonableness or overcaution. The order for costs against the appellants should be set aside.

87 If the parties cannot agree on costs, then within 10 days of the date of these Reasons they may each file and serve a submission on costs. These should be double spaced and not exceed 10 pages each.

88 Court of Queen's Bench written Reasons are easily obtained on the Alberta Courts' website. The appeal record should not have used a faxed copy of the Reasons under appeal (with the faxing line and page numbers superimposed and scribbled marginal notes). The appeal record does not state who prepared it. I would deduct $200 from the appellants' disbursements on appeal for those flaws.

***Marina Paperny J.A.*:**

I concur:

***R. Paul Belzil J.A.*:**

I concur:

Appeal allowed.

FN* Additional reasons at *Alberta Treasury Branches v. Weatherlok Canada Ltd.* (2011), 2011 ABCA 360, 2011 CarswellAlta 2473 (Alta. C.A.).

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Court File No.: CV-09-8122-00CL

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SUPERIOR COURT OF JUSTICE
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