HSBC Bank Canada v. Channel Ridge Properties Limited, 2009 BCSC 118

2009-01-28

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HSBC Bank Canada v. Channel Ridge Properties Limited,*** 2009 BCSC 118

Date: 20090128

Docket: H081041

Registry: Vancouver

Between:

HSBC Bank Canada

Petitioner

And:

Channel Ridge Properties Limited, Channel Ridge Estate Holdings Inc.,
HSBC Capital (Canada) Inc., Equishare Mortgage Investment Corporation,
and Olympia Trust Company

Respondents

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment

In Chambers
January 28, 2009

Counsel for Petitioner	G. Thompson
Counsel for Respondents Channel Ridge Properties Limited and Channel Ridge Estate Holdings Inc.	G. Plottel
Counsel for HSBC Capital (Canada) Inc.	R.P.W. Sloman
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** The petitioner, HSBC Bank Canada (the "Bank"), seeks an order *nisi* of foreclosure on the usual terms against the respondents. The respondents, Channel Ridge Properties Limited and Channel Ridge Estate Holdings Inc. and Equishare Mortgage Investment Corporation (collectively "Channel Ridge"), oppose the granting of the order *nisi* and seek an order converting the petition to an action under Rule 52(11).

[2] The issue before me is whether the respondents have raised a triable issue amounting to a defence that should be tried with the petitioner's claim for foreclosure. Put another way, is the claim asserted by the respondents not a defence, but rather an independent claim that should be addressed in a separate action, without impeding the foreclosure proceedings?

[3] By way of background, most of the facts are not in dispute. Channel Ridge is a developer of a property located on northern Salt Spring Island. Since 2001 Channel Ridge has been working to develop a 1,400 acre village and residential development overlooking Stuart Passage on Salt Spring Island. The project is to be built in four phases. The lands on which the project is to be developed are the subject of these proceedings. The parties agree that the approximate value of the lands is $32.8 million.

[4] In January 2005, the Bank loaned Channel Ridge $1 million under the terms of a commitment letter. Repayment of the loan was secured by a mortgage in the principal amount of $11 million and by a general security agreement.

[5] In March 2005, Channel Ridge sought additional money from the Bank to assist with the construction of the project and the loan was increased to $8.25 million, made up of Land Loan A in the amount $4.05 million and Land Loan B in the amount of $4.2 million.

[6] The Bank informed Channel Ridge that it would only increase the loan if the covenant of Channel Ridge was supported by a guarantee from an individual or a company with a demonstrated substantial net worth. Because of the nature of the ownership structure of Channel Ridge, no one person with the requisite net worth was prepared to guarantee a loan. As a result, the Bank referred Channel Ridge to HSBC Capital Canada Inc. (“Capital”), a member of the HSBC group but a separate and independent entity from the Bank. Channel Ridge and Capital entered into a credit enhancement guarantee to guarantee repayment of Land Loan A to the Bank. The terms and amount of the loan were increased or extended on at least six occasions. The loans are due and payable on demand. The Bank has made demand for payment on Channel Ridge and the guarantor, Capital. As noted earlier, the lands subject to the petition are valued at more than $32 million. The amount owing on the mortgage is $14.3

million. In the circumstances, the petitioner makes no claim that it will be prejudiced by delay in selling the lands and in fact seeks the usual six-month redemption period.

[7] The issue is whether the respondents have raised a *bona fide* triable issue, which could amount to a defence to the petitioner's claim for foreclosure that requires a trial to be determined. In ***Northland Bank v. Kocken*** (1993), 25 B.C.A.C. 292 at para. 34, the Court of Appeal considered this issue. It said:

The introduction of Rule 50 recognized that in many, if not most, foreclosure proceedings default is not contested. Removing all foreclosure proceedings into chambers effected a saving in time and money in most cases. In my view, however, Rule 50 was not intended to derogate from the legitimate rights of mortgagors.

[8] Madam Justice McLachlin, as she then was, wrote in ***Royal Bank of Canada v. Rizkalla*** 1984 396 (BC SC), (1984), 59 B.C.L.R. 324 at 325 (S.C.):

There is no dispute as to the legal principles which should guide this court in determining whether the petitioner's claim should be referred for trial. Unless it is manifestly clear that the mortgagors are without a defence that deserves to be tried, their application to place the matter on the trial list should be granted. ... When the affidavit material contains evidentiary conflicts, a trial is warranted if:

(a) There are facts in dispute;

(b) The resolution of those facts would determine the outcome of an issue in dispute;

(c) The resolution of the issue will determine the outcome of the litigation.

[9] The first question I have to address is whether the respondents have raised a *bona fide* triable issue. In the case at bar the facts in dispute relate to the respondents' desire to repay Land Loan A when it came due in August 2007. Channel Ridge says it told the Bank it wanted to use the $4.1 million it had raised through Equishare to pay out Land Loan A and thereby retire the credit enhancement guarantee, which was a source of significant ongoing cost to Channel Ridge. Capital charged an initial fee for the credit enhancement guarantee of $60,750 and monthly fees of $46,575 thereafter. In addition, Channel Ridge was charged for the extensions of the credit enhancement guarantee made necessary by extensions of the loan; $1.58 million was paid for the credit enhancement guarantee between March 2005 and August 2007. In the alternative, Channel Ridge offered to place the $4.1 million in the Bank's account as replacement security for the guarantee with Capital.

[10] The respondents say that the Bank, through Mr. Joseph Rangel, who was a senior account manager, did not accept either proposal and told Channel Ridge that it was not possible for it to repay Land Loan A or to replace the guarantee with a deposit of $4.1 million. Channel Ridge says that it therefore used the $4.1 million to pay creditors and remove builders' liens from title. It also agreed to an extension of Land Loan A and Land Loan B.

[11] Channel Ridge claims that as a consequence of the Bank's wrongful refusal to accept repayment of Land Loan A, fees and interest have accrued in relation to that loan in the amount of $1,157,684.23 since August 2007. Fees and interest, the respondents say, they should not have had to pay and which should be returned to them. They frame their claim in constructive trust or, in the alternative, in misrepresentation, but the allegation is fundamentally that the Bank breached its obligation under the mortgage agreement.

[12] The respondents say that the Bank, in August 2007, denied

Channel Ridge its right of equitable redemption, which is an inherent term of every mortgage. Channel Ridge asserts that actual production of funds was not required in order to perfect tender given the Bank's position that it would not accept the funds and the magnitude of the funds, which they say in normal commercial practice would not actually be delivered at that point.

[13] The Bank disputes the facts relied upon by the respondents to establish their claim. The Bank concedes that Channel Ridge raised the idea of repaying Land Loan A in August 2007, but disagrees entirely with the respondents' assertion that the money was tendered and that the Bank refused to accept repayment. To the contrary, says the Bank, it merely pointed out to Channel Ridge that both Land Loan A and Land Loan B were coming due and that, even if Land Loan A were repaid, an extension on Land Loan B would be required and the Bank would not do so without a credit enhancement guarantee in relation to that portion of the loan. The Bank also pointed out that use of the entire equity available to Channel Ridge to pay off Land Loan A would leave Channel Ridge without the funds necessary to continue to develop the project and stay afloat. The Bank points to builders' liens in excess of $4 million, registered against the lands in August 2007, which was contrary to the mortgage agreement.

[14] The Bank submits that Channel Ridge is a sophisticated client, fully aware of its right to pay out a loan at the end of the term. The Bank asserts that it is implausible to suggest that the Bank, which was a reluctant lender at this point, would refuse to accept repayment of a loan it was concerned about. I acknowledge that there is some basis for scepticism about the respondents' claim. But at this stage of the proceeding, I am not to enter into a detailed consideration of the merits of the respondents' claim. Nor am I to determine whether tender was adequate or whether the Bank refused repayment. Rather, I am only to determine whether there is a *bona fide* triable issue.

[15] The threshold for establishing a triable issue is not high. The test has been worded as "a real substantial question to be tried, a dispute as to facts or law which raises a reasonable doubt or a defence that deserves to be tried". To use Madam Justice McLachlin's approach in ***Royal Bank*** at 327, I cannot at this point "categorically conclude" that the respondents' claim is "entirely without merit". There is, therefore, a *bona fide* triable issue that should go to trial provided the issue relates to a defence which might bear on the outcome of the petitioners' action.

[16] That brings me to the second question: is the issue raised a counterclaim which should be heard in a separate action that will not impede the petitioner's pursuit of its foreclosure remedy? In my view the respondents' claim goes to the root of the foreclosure action and raises a defence to the petitioners' claim. The mortgagor, Channel Ridge, claims it attempted in August 2007 to redeem the mortgage as it related to Land Loan A. It claims further that the Bank refused to accept that payment, thereby denying the mortgagor its equitable right of redemption under the mortgage. If that is proved at trial, the Bank may be barred from retaining interest and fees collected on that loan from the date of the refusal. If the court holds that those sums are to be returned to the respondents, the amount owed to Channel Ridge by the Bank will significantly exceed the amount in default claimed by the Bank under the loan, directly affecting the amount that must be paid by the respondents to redeem the mortgage currently. What is in issue is the Bank's right to have collected interest on the very loan agreement it now says is in arrears.

[17] The respondents say that the Bank has collected and retained interest and fees on Land Loan A after August 2007 without a legal right to do so, resulting in unjust enrichment of the Bank and a corresponding deprivation of Channel Ridge, with no juristic reason for the enrichment. This amounts to a defence: a denial that the amount claimed in relation to Land Loan A is due. For this reason, I

conclude that the petitioner's claim should go to trial and should be converted to an action.

[18] I therefore order that the petition should be converted to an action; that the date of the petition will be the date of service of the writ of summons and statement of claim; that the petitioner, now plaintiff, is at liberty to amend its petition; and finally, that costs will be in the cause.

[19] Counsel, are there any matters arising? Any need for clarification?

[20] MR. THOMPSON: I don't think so, My Lady.

[21] MR. PLOTTEL: No, My Lady.

[22] THE COURT: All right. Thank you. We will adjourn then.

The Honourable Madam Justice Fenlon

- McCordic v. Hidden Rock Drilling Ltd. and 409060 BC Ltd., 2006 BCSC 1428
- Ruzic v. Insurance Corporation of British Columbia, 2008 BCSC 180
- Cady v. Cady, 1995 430 (BC SC)

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