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No Priority for a Matrimonial Property Certificate of Lis Pendens Sandwiched Between Writs of Enforcement

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Case Commented On: *Singh v Mangat*, 2016 ABQB 349 (CanLII)

The issue in *Singh v Mangat* was one of priority: in what order were different groups entitled to sale proceeds. There were three types of claimants to the proceeds of the sale of a husband's interest in the matrimonial home: the wife, who had brought a matrimonial property action and registered a certificate of lis pendens on the title to those lands; those of the husband's judgment creditors who registered their writs of enforcement on the title to the home *before* the wife's certificate of lis pendens; and those of the husband's judgment creditors who registered their writs of enforcement on the title to the home *after* the wife's certificate of lis pendens. The relative timing of the registrations created what Master A. R. Robertson, QC, called a "CLP sandwich" (at para 2). This case appears to be the first time an issue of priority in circumstances involving a "CLP sandwich" has come before the Alberta courts. Master Robertson analyzed a complex statutory interpretation issue in order to resolve the priorities issue in this decision (handed down in June 2016 but only added to the CanLII database in October). In a result that might surprise those accustomed to priorities under a Torrens land title system, he resolved the issue in favour of *all* of the judgment creditors, those registered before the certificate of lis pendens and those registered after.

The husband and judgment debtor was Nazar Singh (Manny) Mangat. He held a one-third interest in the matrimonial home. Another one-third was held by the wife, Pavitra Mangat, and the remaining one-third was held by Amarjot S. Mangat. Up for grabs in this case were the proceeds of the sale of the husband's one-third interest, an interest sold to satisfy the husband's debts.
The wife had begun a matrimonial property action against her husband in January 2007. Although a spouse who begins proceedings under the *Matrimonial Property Act*, RSA 2000, c M-8 (*MPA*), is entitled under section 35(1) to file a certificate of lis pendens — a notice of a pending court action — against the title to the matrimonial home at the Land Titles Office, the wife did not do so until February 22, 2013, more than six years later. Had the wife filed a certificate of lis pendens in January 2007, there would have been no priority issue for the courts to decide. The *MPA* in section 34(3) goes on to provide that, if a spouse files a certificate of lis pendens, any instrument (such as a creditor's writ of enforcement) that is subsequently registered and purports to affect that land is subject to the spouse's claim.

What happened in this case, however, was that the plaintiff, Arvind Singh, obtained a judgment for $19,200 against the husband in May 2012. The plaintiff registered a writ of enforcement of that judgment against the husband's interest in the matrimonial home on July 20, 2012. Another writ of enforcement, this time for $20,155, had been registered against the husband's interest by the Bank of Montréal on June 7, 2012. Then, on February 19, 2013, a caveat was registered against the matrimonial home by a civil enforcement agency instructed by the plaintiff, giving

notice of their intention to sell the husband's one-third interest under the *Civil Enforcement Act*, RSA 2000, c C-15 (*CEA*). It was shortly thereafter that the wife learned that her certificate of lis pendens had not been registered against the title to the matrimonial home and she acted to remedy that omission.

After the wife's certificate of lis pendens was registered against the title to the matrimonial home in February 2013, and before the sale of the husband's one-third interest was approved by the court in August 2015, five other writs were registered against title. One was for just over $61,000, a second for about $33,500, a third for just over $82,000, a fourth for about $57,600, and the fifth, a Justice Canada writ, for $8,620.

These events created what Master Robertson called a "CLP sandwich" – two writs totaling about $40,000 registered against the matrimonial home ahead of the certificate of lis pendens, and five writs totaling approximately $243,000 registered after the certificate of lis pendens.

The husband's one-third interest in the matrimonial home sold for $225,000 to a relative of the wife. No one appeared to contest the application by a civil enforcement agency for an order approving that sale. As the husband's one-third interest in the matrimonial home sold for only $225,000, not everyone could be paid. So in what order would the different groups of claimants be paid? It was clear the two judgment creditors who had registered their writs *before* the certificate of lis pendens would be paid first. But who would get the remaining $185,000 (less interest and costs)? Would it be the wife, perhaps leaving nothing for the other judgment creditors? Or would it be the judgment creditors who registered their writs *after* she registered her certificate of lis pendens, leaving nothing for the wife?

The tricky statutory interpretation point involved the interplay between the priority established by the *MPA* and the priority established by the *CEA* (at para 24). As Master Robertson stated, the problem is that the certificate of lis pendens has priority over subsequent writs under section 34(3) of the *MPA*, but a prior writ binds the judgment debtor's lands and the distribution scheme set out in the *CEA* "groups all of the writ holders together in writ proceedings for distribution amongst eligible claims in one distributable fund" (at para 7). He concluded that the *CEA* "creates a method of distribution of the funds, essentially a code, and the guiding principle is that writ holders are paid pari passu" (at para 8). Pari passu literally means "on equal footing". In other words, once one writ holder ranks ahead of the matrimonial property certificate of lis pendens, all writ holders do, even those whose writs were registered after the certificate of lis pendens.

As a result, the sale proceeds were ordered to be distributed to the writ holders, those prior to *and* those subsequent to the certificate of lis pendens. There was nothing left for the spouse from the sale of the husband's one-third interest.
It may seem odd that the interplay between the two statutes compels this conclusion. The two statutes do not expressly consider one another when dealing with the priority issue, so the question was whether they could be read in harmony with one another.

Section 35(3) of the *MPA* creates a priority by stating:

> 35 (3) If a certificate of lis pendens has been registered under this section, *any instrument* that

(a) is registered after the registration of the certificate of lis pendens, and

(b) purports to affect land included in the certificate of title,

is subject to the claim of the spouse who filed the certificate of lis pendens. (emphasis added)

The question was whether section 35(3) *MPA* meant that those who registered their writs of enforcement after the wife's certificate of lis pendens were *not* entitled to share in the distribution under the *CEA*, the statute under which the one-third interest had been sold at the instigation of the plaintiff writ holder.

Master Robertson found the key to be the concept of "writ proceedings" under the *CEA* and the idea that "writ proceedings" are a different "level" of claim than is the registration of a writ of enforcement (at para 41). The key *CEA* priority provisions were the following:

33(2) A writ,

(b) in the case of land under the *Land Titles Act*, on being registered under the *Land Titles Act binds all of the enforcement debtor's exigible land* described in the certificate of title against which the writ is registered;

34(1) Except as otherwise provided in sections 35 to 40 or in any other enactment, *an interest* acquired in property after the property is bound by a writ is subordinate to the writ.

(2) *Where an interest in property is subordinate to a writ*,

(a) *the property is subject to writ proceedings to the same extent that the property would have been if the subordinate interest did not exist*, and

(b) a person who acquires the property as a result of writ proceedings acquires the property free of the subordinate interest.

(emphasis added by Master Robertson, at para 42)

Note that section 34(2) provides that an interest in property that is subordinate to "a writ" — one writ — is subject to "writ proceedings" — and not just to that one writ — as though that subordinated interest did not exist (at para 43). Section 34(2)(a) does not say that it binds only for the benefit of the one writ holder (at para 102). The sale proceeds are available for distribution in the writ proceedings and "writ proceedings" are defined in section 1(1)(uu) of the *CEA* as "any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment." The delivery of a notice of intention to sell — in this case a step taken by the plaintiff — was the commencement of "writ proceedings" (at para 76).

Master Robertson also noted that section 34 talks about an "an *interest* acquired in property after the property is bound by a writ" and an "*interest* in property" being subordinated to a writ. A certificate of lis pendens gives notice of a claim that *might* become an interest after a court order (at para 104). Until then, and when the certificate is filed, it is merely an unproven claim (at para 111). However, Master Robertson did not rely on this particular point to reach his decision.

The CEA goes on to define what happens to the proceeds that are the result of "writ proceedings." Section 96(1)(a) of the *CEA* goes on to say that *all* the money that is realized through "writ proceedings" *must* be dealt with in accordance with Part 11 on "Distributions" (at paras 42 and 110). Section 97(a) provides that any money to which this Part applies constitutes a

"distributable fund". There is only one distributable fund (at para 99). Allowing the certificate of lis pendens to divide writ holders into those registering before and those registering after would in effect, create two distributable funds (at para 124). Then section 99(1)(a) sets out that the eligible claims under a "distributable fund" are "the amounts outstanding on *all related writs* that are in force against the enforcement debtor" (emphasis added by Master Robertson, at para 48). What are "related writs"? That is not discussed.

After reviewing peripherally-related case law and concluding that distribution pari passu is the correct approach (at paras 60-72), Master Robertson summarized potential problems with allowing the certificate of lis pendens to interrupt and postpone distribution to all or some of the writ holders. The writ holders argued a judgment debtor and his or her spouse could frustrate debt collection by filing a certificate of lis pendens to stop distribution and then never resolve the matrimonial property claim (at para 90). The ability to hold off judgment creditors indefinitely could become a bargaining tool (at para 91). Writ holders would have less incentive to direct a sale (at para 92). A second potential problem is that waiting to distribute might allow more judgment creditors to claim against the distributable fund, perhaps even creditors with debts left unpaid after the distributable fund is set up (at para 94). The judgment debtor could control when and who was paid from the sale of his property (at para 95), and judgment creditors might not bother to enforce their claims once a certificate of lis pendens was filed (at para 96).

Master Robertson concluded that for all of these reasons and more — but most particularly due to a careful analysis of the legislation — the entire interest of the judgment debtor in the matrimonial home was attached by the registration of the first writ and a subsequent certificate of lis pendens does not create two distributable funds, nor did it change the priorities as between writ holders, who rank pari passu (at para 101). Writ holders are to be treated as one group, sharing in the distribution of sale proceeds as a result of writ proceedings brought by any one of them (at para 121).

Master Robertson found that the priority provisions of the *CEA* could be read in harmony with those of the *MPA*. He concluded his interpretation of the *CEA* allowed a priority created by section 35 of the *MPA* to take effect between spouses but not necessarily between creditors, at least not unless the certificate of lis pendens is registered before writ proceedings are commenced — as it could have been in this case.

Is this reasoning applicable to other "sandwiches"? The answer which can be inferred from Master Robertson's case law discussion (at paras 60-72), is that it depends on the statute authorizing the sale. If that statute is the *CEA*, then this reasoning and result would apply. If a sale was conducted under a different statute, as in the case of a mortgage foreclosure, then the same reasoning and result might not follow. This is so because the reasoning is very dependent on the specific wording of the relevant statutes.

This post may be cited as: Jonnette Watson Hamilton "No Priority for a Matrimonial Property Certificate of Lis Pendens Sandwiched Between Writs of Enforcement" (9 November, 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/11/Blog_JWH_Singh_Mangat_Nov2016.pdf