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Forgery, Fraud and the *Dower Act*

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Case Commented On: *Inland Financial Inc v Guapo*, 2018 ABQB 162 (Master) (CanLII), aff'd 2019 ABQB 15 (CanLII), aff'd 2020 ABCA 381 (CanLII)

Jose Neeves Guapo and Maria Guapo, a married couple, owned a home registered in the names "Jose Guapo and Maria Guapo" as joint tenants. Their son, Jose Domingos Guapo, lived in the home but had no ownership interest in it. It is important to note that father and son shared the same first name and surname and that the name on the register did not include Jose Guapo Sr's middle name. The Court of Appeal summarized the key facts as follows (at para 5):

> Jose Guapo Jr persuaded his mother to apply through a broker to Inland Financial for a loan to be secured by a mortgage on the home. He had done this on 12 different occasions with different brokers for progressively larger amounts. Inland Financial approved the loan in the amount of $245,000. The mortgage documents to secure the loan were prepared by Inland Financial's lawyers and signed by Maria Guapo and Jose Guapo Jr, impersonating his father, who had no knowledge of the transaction. Inland Financial thought the son owned the house with his mother particularly since they had both sworn a statutory declaration that they were the owners and the house was their principal residence. The mortgage was registered against the title to the home. Funds were advanced and used to pay out two previous mortgages, also fraudulently obtained by Jose Guapo Jr, and the balance of the funds were paid into a bank account in the names of Maria Guapo and Jose Guapo Jr. It is unclear whether Maria Guapo understood the nature of the transaction as she did not speak English and did only what her son instructed her to do. She had received a Grade 4 education in Portugal, at the lawyer's office her son spoke to her only in Portugese (sic), and she testified through an interpreter at questioning. There is no evidence that she received any funds from the mortgages.

When Jose Guapo Jr defaulted on the mortgage payments Inland commenced foreclosure proceedings. Inland also sought personal judgment against Jose Guapo Jr but did not seek a personal remedy in fraud against Maria Guapo. Jose and Maria Guapo defended; the son was noted in default.

As the title to this post suggests, these facts potentially engaged both the *Dower Act*, RSA 2000, c D-15 and the *Land Titles Act*, RSA 2000, c L-4 (*LTA*). The Court of Appeal decided the case solely on the basis of the *Dower Act* while the judgments below addressed the implications of both statutes.

On the facts recited above, both Inland and the Guapos sought summary judgment. The Court granted summary judgment at all three levels (Master Scott Schlosser, Justice Debbie Yungwirth

and the Court of Appeal (joint reasons of Justices Peter Costigan, Sheila Greckol and Kevin Feehan), although on somewhat different grounds. More specifically, Master Schlosser granted summary judgment, *in personam*, against the son (in an amount to be proven) and a declaration that the mortgage was invalid. Master Schlosser began with the *LTA* issues and only then moved to address the *Dower Act* issues. Justice Yungwirth affirmed but focused on the *LTA* issues. The Court of Appeal also affirmed but solely on the basis of the *Dower Act*. That Court found it unnecessary to say anything about the *LTA* issues.

The *Dower Act* Issue

The *Dower Act* prohibits the disposition of a homestead without the consent in the prescribed form of the non-owning spouse. The Guapos' property was clearly a homestead and the mortgage was clearly a disposition within the meaning of the *Dower Act*. Section 25(2) of the *Dower Act* constitutes an exception to the requirement of consent in the prescribed form if both spouses are on title and both execute the disposition. Section 25(2) provides as follows:

> When a married person and the married person's spouse are joint tenants or tenants in common in land, the execution of a disposition by them constitutes a consent by each of them to the release of their dower rights and no acknowledgment under this Act is required from either of them.

Consequently, if Jose Guapo Sr had executed the mortgage along with his wife, the mortgage would clearly have been valid – but that was not this case. The mortgage was executed by Maria Guapo and her son and section 25(2) is therefore inapplicable. Even if Maria Guapo as a matter of general property law could mortgage her own interest in the property, the *Dower Act* would require a consent in the prescribed form from her husband for that disposition – and there was no such consent.

Neither did registration of the mortgage in the Land Titles Office lead to a different conclusion. While registration would have perfected a *transfer* registered without the consent of the non-owning spouse (see *Dower Act*, s 3(2)(a)) this section (which achieves this result by causing the property to cease to be a homestead) does *not* apply to a registered mortgage. This has long been the position as decided by the Supreme Court of Canada in *British American Oil Co v Kos*, 1963 CanLII 107 (SCC), [1964] SCR 167 175. As the Court of Appeal observed in this case (at para 26):

> We are bound by the decision in *British American Oil*. Dower rights, limited only to dower rights with respect to an improper or fraudulent mortgage or encumbrance registered on title, remain an exception to any protections under the Torrens land title system. Only legislative amendment or a decision of the Supreme Court of Canada to the contrary can address any perceived inconsistency.

That was enough to decide the case: *stare decisis*, the decision of a higher court is binding as to the rule that it establishes.

The Land Titles Issue

The Court of Appeal (as it was entitled to) did not discuss the land titles issue at all in its judgment. This is unfortunate from the perspective of those seeking further clarity in this area because, unlike the *Dower Act* issue, the land titles issue is not governed by binding authority of the Supreme Court of Canada.

The land titles issue that presents itself is this: does registration of a registerable mortgage in the prescribed form (assuming that the registered mortgagee or transferee is not party to the fraud) cure the common law invalidity of a forged mortgage (or transfer), or, does that registered mortgage (or transfer) simply provide *a good root of title* for a subsequent transferee for value who registers that interest? If the first option holds, the mortgagee or transferee has obtained what is known as *immediate* indefeasibility, i.e. in this case, Inland gets a good mortgage simply by registering the mortgage. The principal Torrens authority supporting this view of the operation of the register is the Privy Council's decision in *Frazer v Walker*, [1967] AC 560 (JCPC) on an appeal from New Zealand. If the second option holds, then the only person who can get a good title is a transferee of the mortgage from Inland – a conclusion characterized as *deferred* indefeasibility. The principal Torrens authority supporting this approach is the Privy Council's much older decision in *Gibbs v Messer*, [1891] AC 248 (JCPC) on appeal from the then colony of Victoria (Australia).

The leading Torrens decision in western Canada on deferred vs. immediate indefeasibility is the relatively recent decision of the Saskatchewan Court of Appeal in *Hermanson v Schmidt Estate et al*., 1986 CanLII 3241 (SK CA). In that case the Court carefully analysed the indefeasibility provisions of the then *Land Titles Act* of Saskatchewan (largely on all fours with the indefeasibility provisions of Alberta's *LTA*) and came down in favour of immediate indefeasibility on the basis that, read in totality, the Saskatchewan *LTA* only denies indefeasibility to a registered transferee/mortgagee in a case of forgery or other fraud, *wherein the registered transferee/mortgagee has participated.* The transferee in that case had not participated in the fraud and was therefore entitled to retain the property.

However, in this case, both Master Schlosser and Justice Yungwirth favoured *deferred* indefeasibility and thus would have decided the case against Inland on land titles grounds as well as the dower ground. The unfortunate part of this is that neither decision comes to grips with *Hermanson*. We know from Master Schlosser's list of authorities that *Hermanson* was not cited to him. Justice Yungwirth did refer to *Hermanson* briefly (at para 14) but dismissed the relevance of the decision on the basis that "the mortgagee dealt with an *owner* who had obtained *title* by forgery or fraud" (emphasis in original). With respect, this is seriously misleading. The principal issue in *Hermanson* was the title of the immediate transferee (Martin) who took by way of a registered transfer executed by Mr. Schmidt and by an unknown party representing herself to be Valerie Hermanson (the former Mrs. Schmidt). The Court concluded that Martin took a good title because Martin was not party to the fraud perpetrated by Mr Schmidt and the unknown third party. It is true that there was a mortgagee in the picture – in fact two: a trust company and a second mortgage back to Schmidt himself to secure the balance of the purchase price. But the real issue in the case was the validity of Martin's title as the *immediate* transferee. The fact that Martin was a registered transferee rather than a registered

mortgagee is completely irrelevant; the *LTA* does not make any such distinction. The court's affirmation of *immediate* indefeasibility for Martin is the real *ratio* of the case: the first mortgage would have been valid even on the basis of *deferred* indefeasibility.

In sum, the Court of Appeal has done the easy work here. It has reaffirmed the applicability of the *Kos* decision of 1964. But that is just the operation of *stare decisis* and I can't imagine the Supreme Court of Canada granting leave to appeal, even if asked; no other result is tenable based on the language of the *Dower Act*.

The hard work has been deferred (I was going to say 'kicked down the road' but that seemed too colloquial, so you'll have to live with the pun). While we certainly have lower court decisions in Alberta that touch on the deferred vs. immediate indefeasibility issue (not always directly and with some preference – mistakenly in my view – for *deferred* indefeasibility), what we do not have is an appellate level decision that tackles this issue head on, and that also addresses the compelling reasoning of the Saskatchewan Court of Appeal in *Hermanson*. For that we will have to wait for a set of facts involving a forgery that does not engage the *Dower Act*.

My thanks to Jonnette Watson Hamilton for her comments on an earlier draft of this post which forced me, as always, to tighten up my reasoning. The remaining deficiencies are my responsibility.

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