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The Effect of Non-compliance with the *Dower Act* - Yet Again

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Cases Considered:
Webb (Re), 2011 ABQB 89

The context of this dower case is somewhat unusual. The Registrar in Bankruptcy had directed a trial to determine whether a caveat registered by a Mr. Karafiat, which claimed a secured interest in a homestead, was invalid because it did not comply with the *Dower Act*. The parties' concession that non-compliance with the requirements of the *Dower Act*, RSA 2000, c D-15 did not render the disposition of the homestead void is also somewhat unusual. This is the first case that I am aware of in which the parties conceded that non-compliance rendered the transaction voidable, and not void. It is true there has been a trend in Alberta towards finding that the effect of a disposition of a homestead without the consent of a spouse is to render the disposition voidable, and not void. However, the matter is not free from doubt because the Supreme Court of Canada's last word on the issue held such a disposition was void *ab initio*.

Facts

The facts as recounted by Justice Donna L. Shelley are relatively simple. In June 2001, Franklin Webb — the bankrupt — signed a promissory note in favour of Mr. Karafiat and granted him a secured interest in the matrimonial home which was at that time registered solely in Franklin Webb's name. In October 2001, the matrimonial home was transferred by Franklin Webb to Franklin Webb and Carmen Webb, his wife, as joint tenants. In November 2001, the Webbs gave Alberta Treasury Branches (ATB) a mortgage on the matrimonial home and Mr. Karafiat postponed his caveat in favour of that ATB mortgage. Two years later, in October 2003, the Webbs filed for bankruptcy. One year later, in October 2004, ATB foreclosed on the matrimonial home. After ATB's mortgage was paid in full, approximately $57,800 was left over. That surplus was paid to the Webb's Trustee in Bankruptcy and was claimed by Mr. Karafiat. The Trustee disallowed Mr. Karafiat's claim to the surplus because the disposition which had been effected by Mr. Webb granting the secured interest had not complied with the *Dower Act's* requirements for a spouse's consent.

Issues

In order to determine the validity of the caveat filed by Mr. Karafiat, Justice Shelley addressed three issues (para. 8):

a) the effect of non-compliance with the *Dower Act*;
b) the effect on Ms. Webb's dower rights of the transfer of the matrimonial home into joint tenancy; and
c) whether the disposition, even if initially unenforceable for non-compliance with the *Dower Act*, was "rehabilitated by other subsequent conduct so as to become enforceable."

Discussion

a) The effect of non-compliance with the *Dower Act*

The *Dower Act's* section 2 requirement for spousal consent to a disposition of a homestead was not complied with in this case. There was no question on that point. Mrs. Webb did not consent, at any time, to her husband granting security on the matrimonial home to Mr. Karafiat for the debt incurred by Mr. Webb.

Justice Shelley begins her consideration of the first issue — the effect of non-compliance with the *Dower Act* — with a reference to *Charanek v. Khosla*, 2010 ABQB 202, 27 Alta. L.R. (5th) 191, a case on which I have commented (No Dower Act Consent? Is the Transaction Void or Voidable?). Although the facts of the two cases are not similar, in *Charanek* Master in Chambers Jody L. Mason did conduct a thorough review of the legislation and case law relevant to the issue of whether noncompliance renders a disposition void or voidable and concluded (at para. 61) that "the consequence of non-compliance with the consent requirements of the *Dower Act* remains an open question." (I will not reiterate here the cases going either way on the void or voidable question; they are summarized in my earlier post.) The Master had also determined that "[t]he authorities show that the law has evolved to permit a flexible judicial response to non-compliance in certain circumstances." Justice Shelley seizes on the latter conclusion by the Master, together with the parties' concession, to determine that the issue is therefore "whether subsequent events rendered this voidable transaction enforceable" (at para. 13).

On the matter of the parties' concession that non-compliance rendered a disposition voidable, not void, it is true that since the 1994 decision of the Alberta Court of Appeal in *Schwormstede v. Green Drop Ltd*. (1994), 22 Alta. L.R. (3d) 89, 116 D.L.R. (4th) 622, 1994 ABCA 259 (CanLII), the courts in Alberta have been more inclined to see the effect of non-compliance as rendering the transaction merely voidable. However, the matter is not free from doubt, particularly because the Alberta Court of Appeal in *Schwormstede* did not discuss the Supreme Court of Canada's decision in *Meduk and Meduk v. Soja and Soja*, [1958] S.C.R. 167 which held that non-compliance rendered a transaction void. As the Supreme Court of Canada put it (at 175): "the making of the agreement by her without the consent in writing of her spouse was expressly forbidden by s. 3(1) of the Act and unless [her spouse] did consent in writing, her acceptance was ineffective to form a contract" (emphasis added). Until some court considers the Supreme Court of Canada's holding on the issue, it seems premature to make the concession made in this case.

b) The effect on Ms. Webb's dower rights of the transfer of the matrimonial home into joint tenancy

As for the second issue, the question is whether the matrimonial home ceased to be Mr. Webb's homestead under section 3(2)(a) of the *Dower Act*. That subsection provides that "[l]and ceases to be the homestead of a married person (a) when a transfer of the land by that married person is registered in the proper land titles office . . .". Mr. Karafiat argued that the transfer from

husband to husband and wife as joint tenants was a transfer within the meaning of subsection 3(2)(a). If that was true, however, the matrimonial home would still be Mr. Webb's homestead (as well as Mrs. Webb's) and the consent of Mrs. Webb would still be required (as would the consent of Mr. Webb to a disposition of his wife's interest). The problem with Mr. Karafiat's argument is that a transfer by one spouse to both spouses as joint tenants does not result in a loss of dower rights. Section 25(2) of the *Dower Act* makes it clear that spouses have dower rights in each other's interest when they are joint tenants.

Justice Shelley acknowledges this argument (at para. 15) and refers to *Bank of Montreal v. Pawluk* (1994), 158 A.R. 97, [1994] 10 W.W.R. 75 (QB), which held that the *Dower Act* does apply to joint tenancies. She does not, however, come to any conclusion on the point beyond suggesting that *Pawluk* supports the position that dower rights continue to exist in a joint tenancy of spouses.

In continuing on with her analysis of this second issue, Justice Shelley notes (at para. 16) that the *Dower Act* strikes a balance between protecting the dower rights of a spouse and the legitimate interests of a *bona fide* purchaser who acquires title to the homestead without notice of the spouse's dower rights. She cites *Senstad v. Makus*, [1978] 2 S.C.R. 44 for this general policy point. Unfortunately, *Senstad* is not on point. All of the cases that Justice Shelley cites on this point, including *Senstad*, are about people trying to use non-compliance with the *Dower Act* as an excuse not to go through with the sale or purchase of a home. Justice Shelley does acknowledge that the transfer in the *Senstad* case was to a third party but she did not note that the spouse in *Senstad* had actually given her consent to the disposition and that the issue in *Senstad* was the acknowledgment of that consent. The policy reasons for allowing noncompliance with the acknowledgment provisions of the Act should be different than those allowing noncompliance with the consent provisions as only the consent provisions must be complied with to avoid committing a quasi-criminal offense and to comply with section 2.

Justice Shelley's reliance (at para. 16) on one particular passage from *Senstad* for narrowing the "transfer" in section 3(2)(a) to transfers to third parties is misplaced for another reason. She appears to quote *Senstad* as follows (at para. 16):

> The *Charanek* decision is also helpful on this point. In her thorough review of the law on non-compliance with the *Dower Act*, the Master refers to Martland J.'s comment in *Senstad v. Makus*: "... the cessation of the homestead characterization upon the registration of a transfer of land to a third party."

(See also para. 17 even more directly attributing that same passage to Justice Martland). However, the quoted passage is not a comment made by Justice Martland in *Senstad.* The comment is instead from the summary of *Senstad* made by the Master in *Charanek* (at para. 41). Justice Shelley's reliance on the Supreme Court of Canada's focus on "third party" is therefore misplaced. The words "third party" do not occur in *Senstad*. Justice Martland does (at 56) pose a hypothetical involving a husband swearing a false affidavit to allow a transfer to be registered by a "transferee" but he quite clearly does not address his mind to the identity or characteristics of the person receiving the transfer — it was not necessary on the substantially different facts in *Sensatd*. The conclusion that a transfer referred to in section 3(2)(a) must be one to a third party may be correct — and certainly the general policy point about striking a balance between protecting the dower rights of a spouse and protecting the interests of a *bona fide* purchaser without notice is correct — but the reasoning by reference to authority is not.

Justice Shelley then finds (at para. 16), while still discussing the second issue, that Mr. Karafiat was not "an innocent third party purchaser for value without notice." He certainly was not one in connection with the transfer by Mr. Webb to his wife and himself; Mr. Karafiat was not any kind of party to that disposition. But there is no suggestion in the case that he was not a *bona fide* purchaser/mortgagee for value when he took security for the loan he made to Mr. Webb. It is not clear why Justice Shelley reaches the conclusion she does. Her stated reasons are as follows (at para. 16):

> Mr. Karafiat entered into his dealings with Mr. Webb months before Ms. Webb became a joint owner of the property. There is no evidence to suggest that Mr. Webb obtained the loan and signed the documents by misrepresenting his marital status or otherwise deceiving Mr. Karafiat into believing the *Dower Act* did not apply.

It seems most likely that Justice Shelley is implying that Mr. Karafiat had notice of Mrs. Webb's dower rights when he took security on the land, but the relevance of this to the later transfer into joint tenancy is not apparent.

Nevertheless, although the reasoning is confusing, Justice Shelley's conclusion (at para. 17) on the second issue that "the transfers referred to in ss. 4(2)(a) of the *Dower Act* must be transfers to third parties because it is innocent third parties for value without notice who were intended to be protected by that provision of the Act when it was introduced in 1948" is surely correct. A transfer of a homestead from a married person to that married person and his or her spouse is probably not a transfer within the meaning of subsection 3(2)(a).

c) Whether the disposition, even if initially unenforceable for non-compliance with the *Dower Act*, was "rehabilitated by other subsequent conduct so as to become enforceable."

That leaves the third issue: whether the disposition, even if initially unenforceable for non-compliance with the *Dower Act*, was "rehabilitated by other subsequent conduct so as to become enforceable." The argument appears to be an implicit consent or an estoppel-by-conduct type of argument, i.e., Mr. Karafiat argued that Mrs. Webb must have known about his charge on the land and must be taken to have consented to it by the way she conducted herself. These types of arguments have never fared well in the *Dower Act* context. In *Meduk*, for example, Justice Cartwright only assumed that estoppel might be available because the estoppel argument was easily dismissed on the facts. His comments leave little doubt about how inappropriate such an argument is in the *Dower Act* context (at 175):

> The submission of the respondents is that both Bessie Meduk and John Meduk are estopped by reason of their conduct from averring that John Meduk did not give the required consent. For the purposes of this branch of the matter I will assume, without deciding, that the doctrine of estoppel could be invoked to render valid a transaction which the Legislature has expressly forbidden, but even on that assumption, it is my opinion that the submission of the respondents fails. (emphasis added)

Justice Shelley notes that a disposition without the requisite consent is sometimes enforceable but only in situations in which the spouse in question explicitly consents to the disposition later on. These might be thought of as cases about non-compliance with the form of consent specified

by the *Dower Act*. In this case, however, there was no evidence that Mrs. Webb had ever explicitly consented to the disposition to Mr. Karafiat.

Conclusion

In conclusion, Justice Shelley found that the Trustee in Bankruptcy was correct to disallow Mr. Karafiat's claim as a secured creditor, in effect voiding the disposition made without consent. The result is undoubtedly correct, but the reasons given for reaching that result could be clearer and could pay more attention to authority from the Supreme Court of Canada.