

Date: 19990518
Docket: S025859
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

C.I.B.C. MORTGAGE CORPORATION

PETITIONER

AND:

**MARKE ANTONSEN, BARBARA ANTONSEN,
VANCOUVER CITY SAVINGS CREDIT UNION,
CHERYL ARCHAMBAULT, NORECOL ENVIRONMENTAL CONSULTANTS LTD.
P. TAABEL & CO.**

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE STROMBERG-STEIN

(IN CHAMBERS)

Counsel for the Petitioner:

P. Kent-Snowsell

Counsel for the Respondent
Vancouver City Savings Credit Union:

G.E.H. Cadman, Q.C.

Marke Antonsen acted as agent for
the Respondent Barbara Antonsen

Place and Date of Hearing:

New Westminster, B.C.
May 17, 1999

Background

[1] The petitioner, CIBC Mortgage Corporation, ("CIBC") is the holder of a first mortgage on property owned by the respondents, Marke and Barbara Antonsen. Marke Antonsen made an assignment in bankruptcy in 1997 and presently has no interest in the property. His discharge from bankruptcy is opposed by the respondent, Vancouver City Savings Credit Union ("Van City"), the holder of a second mortgage. CIBC foreclosed on the property and an order nisi of foreclosure was made on July 18, 1995 with a six month redemption period. The redemption amount, including costs, exceeds \$360,000.

[2] CIBC and Van City have joint conduct of sale of the property. Van City fears it will not recover the mortgage debt which was \$210,330.76 at December 9, 1998. The value of the property has decreased and it is currently listed for sale at \$625,000. There have been no offers to purchase. There have been difficulties showing the property to prospective purchasers since the Antonsens live on the property and have denied requests for access.

[3] Of greater concern to any prospective purchaser is the presence of pollutants on the property. There is a Pollution Abatement and Pollution Prevention Order dated August 26, 1991, superseded by an order dated July 10, 1996, requiring the Antonsens to address the issue of polluting substances emanating from the property due to wood waste. Two plans have

been approved by the Ministry of Environment, Lands and Parks ("the Ministry") to redress the pollution problem: (i) a "pump and treat" method; and (ii) removal of wood waste. Neither plan has been implemented by the Antonsens. Mr. Antonsen claims he is in the midst of delicate negotiations with the Ministry for a less costly clean-up plan.

[4] The Antonsens received a settlement in the amount of \$270,000 from the City of Maple Ridge in 1996 for remediation purposes. The settlement funds have not been applied to remediation to date. Mr. Antonsen agrees the property has to be cleaned up at his expense but he says it is unclear what has to be done to satisfy the Ministry. He is intent on identifying a cheap clean-up method that will satisfy the Ministry. Next Environmental Inc. has provided Van City with an estimate for remediation to remove the wood waste at a cost of about \$20,000 to \$30,000.

[5] Van City appeals the decision of the Master made January 29, 1999 dismissing its application for an order to effect remediation to make the property more marketable. CIBC supports the application of Van City for an order permitting remediation of the property.

Grounds of Appeal

[6] The parties agree that the test on appeal is whether the Master clearly erred in law. It is the position of Van City

that the Master erred in his application of the law to the undisputed facts:

- i) when he concluded the question of remediation costs being added to the redemption amount was not before the court;
- ii) when he determined the remediation costs were not protective disbursements incurred to preserve and protect the value of the property but were sought to improve and enhance the value; and
- iii) when he concluded the remediation plan had no guarantee of success, and if it failed to rectify the pollution problem and failed to increase the market value by at least the amount spent in remediation, it would result in a shortfall recoverable by Van City against Mrs. Antonsen.

[7] The position of Mrs. Antonsen, represented by her husband on this appeal, is that the Master did not err in law. However, there is no objection to remediation being undertaken by Van City. The only objection is the prospect of Van City being given a blank cheque to implement a remediation plan that may not be approved by the Ministry.

Analysis

[8] I agree with Van City that the question of whether remediation costs could be added to the redemption amount of

the mortgage was an issue before the court. The Master assumed, without deciding, that any costs incurred by Van City in removing pollutants from the property would be added to the redemption amount on the mortgage. This assumption is correct in law: *The Waterloo Manufacturing Co. Ltd. v. Holland*, [1917] 3 W.W.R. 198 at 199 (Sask. S.C.); *Commerce Capital Trust Co. v. Neufeld et al.* (1978), 9 B.C.L.R. 321 at 328 (B.C.S.C.). The Master assumed, as well, that remediation costs incurred by Van City would be recoverable pursuant to the amount the borrowers covenanted to pay pursuant to the mortgage. This assumption is borne out by the terms of the mortgage contract, specifically the Borrower's Covenants to (i) keep the land in good condition and repair; (ii) not to do anything that would decrease the value of the land; (iii) to ensure the land does not contain hazardous or noxious substances; and (iv) to remove any such substances and to indemnify and save harmless the lender from all costs and expenses connected with any breach relating to such substances. Under Lender's Remedies, where a default has occurred the lender has the option to compel the borrower to adhere to all of the Borrower's covenants. I agree with Van City that this includes compelling clean-up of the property. The mortgage contract itself anticipates the remedy sought by Van City.

[9] The Master concluded the application should be dismissed because the costs of remediation were not protective disbursements incurred to preserve and protect the value of the

property but would serve merely to improve the property and enhance its value. I conclude the Master was clearly in error having regard to: (i) evidence of the existence of Pollution Abatement and Pollution Prevention Orders in existence since 1991; (ii) evidence of the decrease in value of the property; and (iii) evidence of an adverse effect on prospective purchasers, supported by evidence that there have been no offers to purchase to date. It is clear that remediation of the property is essential to preserve and protect the value of the property, even though it may have the effect of improving and enhancing the value. The property is not marketable in its present state.

[10] Further, the Master concluded there was no guarantee of success and the remediation plan may prove ineffectual and more costly in relation to any benefit that may be derived in enhancing the value of the property. This would increase Mrs. Antonsen's exposure to liability. In reaching this conclusion, the Master was clearly in error. The mortgage contract allows Van City to implement a remediation plan at the expense of the borrowers whether or not such cost increases the value of the property and whether or not the result may be an increased liability to the borrower, in this case Mrs. Antonsen.

Conclusion

[11] The Antonsens has been on notice since 1991 that the property must be cleaned up. The two proposals for remediation accepted by the Ministry have yet to be implemented despite the fact the Antonsens have received a substantial settlement to clean-up the site. Mr. Antonsen purports to continue to negotiate with the Ministry to obtain agreement on a remediation plan that is not costly. Since the foreclosure in 1995 there have been a number of orders for conduct of sale but no offers from potential purchasers. The Antonsens live freely on the foreclosed property and have no incentive to make the property marketable by implementing a remediation plan. This state of affairs has thwarted the lenders from recovering their investment while they are forced to sit on the side lines as the value of the property decreases.

[12] The appeal from the Master is allowed. Van City is granted an order, permitting the expenditure of up to \$50,000 or such further amount as may be authorized by the court from time to time, to effect remediation of the property, subject to prior Ministry approval of the remediation plan and subject to remediation being carried out to the satisfaction of the Ministry.

[13] Van City is awarded costs on Scale 2.

"S. Stromberg-Stein, J."