Court File No. CV-18-00608086-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

MONEY GATE MORTGAGE INVESTMENT CORPORATION

Respondent

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act*, R.S.O. 1990, C.S.5, as amended

FACTUM OF THE RECEIVER, GRANT THORNTON LIMITED

(re distribution of Dovercourt Funds)
(returnable January 30, 2020)

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FACTUM OF THE RECEIVER, GRANT THORNTON LIMITED

PART I – OVERVIEW

1. This factum is filed by Grant Thornton Limited, in its capacity as Court-appointed receiver (the "**MGMIC Receiver**") of the property, assets and undertakings of Money Gate Mortgage Investment Corporation ("**MGMIC**").[1]

2. MGMIC carried on business as a mortgage investment corporation that lent money, which was raised from individual investors, to borrowers with loans secured by residential and commercial mortgages.

[1] Capitalized terms used and not defined in Part I have the meanings ascribed to such terms in the remainder of the factum.

3. MGMIC advanced a $611,000 second mortgage loan to a related party (254). The property has been sold and the MGMIC Receiver is holding the net sale proceeds (Dovercourt Funds) in trust. The Dovercourt Funds are insufficient to repay the MGMIC Mortgage in full. As a result, the individual investors will be suffering a loss with respect to MGMIC's loan to 254.

4. As MGMIC had a registered mortgage on the Dovercourt Property, the MGMIC Receiver is presumptively entitled to receive the Dovercourt Funds.

5. One of 254's shareholders (A13MG) claims that the MGMIC Mortgage is invalid, as it did not consent to the granting of the mortgage, as required by 254's by-laws. The evidence before the Court is clear that A13MG and the beneficial owner of its shares (Curah) consented to 254 granting a second mortgage on the Dovercourt Property.

6. A13MG also alleges that, if it consented to the granting of a mortgage, it was conditional on 254 using the mortgage funds to repay A13MG/Curah's investment in 254. A13MG alleges that it received none of the MGMIC Mortgage funds, contrary to such agreement.

7. Other than bald statements from A13MG, there is no evidence before the Court that A13MG objected to the manner by which 254 used the MGMIC Mortgage funds. Conversely, A13MG continued to deal with 254 with respect to the Dovercourt Property and discussed a refinancing/assignment of the MGMIC Mortgage and 254 possibly granting a third mortgage over the property. Additionally, A13MG sat idle and took no steps to demand payment from 254 or challenge the validity of the MGMIC Mortgage for over 18 months.

8. In the event that 254 and its principal, the other shareholder in 254 (Payam), used the MGMIC Mortgage funds contrary to an agreement amongst the parties, that is irrelevant to the

validity of the MGMIC Mortgage. Any dispute over 254's and its principal's failure to adhere to the agreement are claims more properly pursued as breaches of fiduciary duty and/or breaches of contract. Such a dispute cannot serve as the basis for the Court to hold the MGMIC Mortgage to be invalid.

9. In the alternative, if the MGMIC Mortgage is declared to be invalid, MGMIC is entitled to an equitable mortgage over the Dovercourt Funds.

10. The MGMIC Receiver respectfully submits that the Court grant an order that the Dovercourt Funds be released to the MGMIC Receiver.

PART II – FACTS

Background

11. MGMIC carried on business as a mortgage investment corporation that lent money to borrowers with loans secured by residential and commercial mortgages.

> Motion Record of the Receiver dated October 21, 2019, Tab 2, Third Report of the Receiver dated October 18, 2019 ("**Third Report**"), para. 2.

12. MGMIC raised approximately $11 million from approximately 155 investors through the sale of preferred shares from August 2014 and April 2017. The investments were pooled and loaned to borrowers on a secured basis.

> Third Report, para. 3.

13. Morteza Katebian, also known as Ben Katebian, and Payam Katebian ("**Payam**", and collectively, the "**Katebians**"), were each a director and officer of MGMIC, and its directing mind.

> Third Report, para. 5.

14. On November 6, 2018, Grant Thornton Limited was appointed as MGMIC Receiver over the property, assets and undertaking of MGMIC. At the time of the appointment, MGMIC's mortgage portfolio included a mortgage over the Dovercourt Property.

Third Report, paras. 1 and 18.

Dovercourt Property

15. Pursuant to commitment letter dated May 25, 2017 between MGMIC and 2546456 Ontario Inc. ("**254**") (the "**Commitment Letter**"), MGMIC agreed to loan $611,000 to 254 to be secured by a second mortgage over real property owned by 254 and municipally known as 558 Dovercourt Road, Toronto (the "**Dovercourt Property**").

Third Report, paras. 14 and 16 and Appendix "D".

16. On May 29, 2017, MGMIC transferred $611,000 from its bank account to the bank account for 254's solicitors.

Third Report, paras. 19 and 22 and Appendix "F".

17. On May 31, 2017, 254 received $595,741.26. The reduction from the $611,000 transferred by MGMIC to 254's solicitors was likely as a result of payment of lender and legal fees pursuant to the terms of the Commitment Letter.

Third Report, paras. 22-23.

18. On June 5, 2017, a Charge/Mortgage in the principal amount of $611,000 was registered on title to the Dovercourt Property in favour of MGMIC (the "**MGMIC Mortgage**").

Third Report, para. 18 and Appendix "E".

19. On July 4, 2018, MGMIC commenced an application for the appointment of a receiver over the Dovercourt Property. On July 30, 2018, this Court appointed Ira Smith Trustee & Receiver Inc. as receiver over the Dovercourt Property (the "**Dovercourt Receiver**").

Third Report, para. 24.

20. In December 2018, the Dovercourt Receiver served a motion seeking Court approval of a sale of the Dovercourt Property and a distribution of the net sale proceeds to the first mortgagee of the Dovercourt Property and to the MGMIC Receiver on behalf of MGMIC as second mortgagee.

Third Report, para. 25.

21. On January 7, 2019, A13MG first raised an objection to the validity of the MGMIC Mortgage, as a result of the objection, on January 23, 2019, this Court approved the sale of the Dovercourt Property and ordered that the net sale proceeds were to be paid to the Receiver and held in trust pending a distribution motion.

Third Report, paras. 26-27 and Appendix "L".

22. The MGMIC Receiver has received \$556,078.73 from the Dovercourt Receiver with respect to the sale of the Dovercourt Property (the "**Dovercourt Funds**"). The Dovercourt Receiver has been discharged and no additional funds will be received.

Supplemental Motion Record of the Receiver ("**Supplemental Motion Record**"), Tab 1, Supplement to the Third Report of the Receiver dated January 23, 2020, paras. 5-7.

23. The amount outstanding under the MGMIC Mortgage exceeds the amount of the Dovercourt Funds, such that the investors will suffer a shortfall on MGMIC's loan to 254.

Third Report, para. 29.

Claim of A13MG to the Dovercourt Funds

24. 254 was incorporated on November 16, 2016. Payam was originally the sole shareholder of 254. On or about May 24, 2017, 2496050 Ontario Corp. doing business as A13MG ("**A13MG**") acquired 50% of the shares of 254 from Payam.

Third Report, paras. 13 and 40.

25. A13MG acquired the shares in 254 in trust on behalf of Curah Capital Corporation ("**Curah**"). Curah's funds were used to acquire the shares in 254.

Supplemental Motion Record, Tab 2, Transcript of the Cross-Examination of Jonathane Ricci held on December 23, 2019 ("**Transcript**"), qq. 25, and 47-54; Third Report, para. 37.

26. Jonathane Ricci ("**Ricci**") is the sole officer and director of A13MG. Glenn Estrabillo ("**Glenn**") and Dominik Kawa ("**Dominik**") are the directors of Curah. Sai Mohammad ("**Sai**") and James Destephanis ("**James**") are consultants to Curah.

Third Report, paras. 31 and 38; Transcript, qq. 26-29.

27. Prior to A13MG's acquisition of shares in 254, Payam executed a shareholder resolution dated May 15, 2017 (the "**Resolution**"), which amended 254's articles to restrict 254's ability to, among other things, borrow money and encumber the Dovercourt Property without the written consent of all shareholders.

Third Report, para. 35 and Appendix "Q".

28. A13MG alleges that it did not consent to the granting of the MGMIC Mortgage by 254. This allegation is contrary to the evidence before the Court that A13MG/Curah consented to 254 obtaining a second mortgage over the Dovercourt Property, as seen from the following e-mail and cross-examination excerpts:

E-mails

Date	Sender	Recipient(s)	Text
05/10/17	Sai	Payam Glenn Ben	"2nd Mortgage on Dovercourt in favour of MGMIC, using current MGMIC's capital – between $600,000-$700,000 (whatever 85% LTV will be after new appraisal) would be lent to Dovercourt"
05/18/17	James	Payam	"So on the 2nd mortgage we split 50/50 the cash…"
05/19/17	James	Payam	"[w]e will proceed with the Dovercourt transaction…We immediately apply a second mortgage…"
05/23/17	James	Payam	"Hey Payam, JR [Ricci] just waiting on your confirmation of the below"[James' e-mail from 05/19/17]
05/23/17	Ricci	Payam	"please provide details on the 2nd mortgage – who will be acting for this mortgage on both sides?"
06/01/17	Payam	James Ricci	"I'll get working on the 2nd"
06/01/17	James	Payam	"I think what we need to do, is issue the 2nd mortgage, get us the 375 back and liquidate the property"

Transcript

> 61. Q. But you understood that there would be a second mortgage being placed on the property?
>
> A. Yes, there was -- we definitely understood that there would be a second mortgage placed on the property with conditions.

> ...
>
> 74. Q. And -- and this -- based on your knowledge from -- of this arrangement, did you understand that Glen and -- and Sai and -- and kind of James Destephanis, that all the Curah representatives were on board with the second mortgage going on based on the conditions you -- as you understood them?
>
> A. Based on the conditions, yes.
>
> Third Report, paras. 42-49 and Appendices "R" and "W"; Transcript, qq. 61-63 and 74.

29. There is no evidence that A13MG informed 254 and/or Payam in writing that the MGMIC Mortgage was completed without its consent and should be discharged.

30. A13MG alleges that any consent it may have granted was conditional on 254 returning A13MG's investment in 254, which it failed to do.

> Responding Motion Record, Tab 1, Affidavit of Jonathane Ricci sworn December 5, 2019, paras. 7-9.

31. It is not clear what happened to the MGMIC Mortgage funds after they were transferred to 254's bank account. It appears that some of the funds were transferred to 2399029 Ontario Inc. (**"239"**). 239 is allegedly owned by the Katebians and was used in transactions involving Ricci.

> Third Report, paras. 20-23.

32. There is no evidence that A13MG informed 254 and/or Payam in writing that they had breached any agreement with respect to 254's use of the funds advanced by MGMIC and secured by the MGMIC Mortgage.

33. To the contrary, following the registration of the MGMIC Mortgage, the parties discussed a potential refinancing or assignment of the MGMIC Mortgage, and 254 granting a third mortgage

over the Dovercourt Property. Curah was involved in attempting to line up an investor to loan $250,000 to 254 in exchange for a third mortgage over the Dovercourt Property.

> Third Report, para. 48 and Appendix "X"; Transcript, qq. 76-78; Answers to Undertakings.

34. After the issuance of the MGMIC Mortgage, neither A13MG nor Curah took any steps to challenge the validity of the mortgage for an 18-month period until January 2019.

> Third Report, para. 26.

PART III – ISSUES

(a) is the MGMIC Mortgage valid and enforceable such that the Dovercourt Funds should be paid to the Receiver on behalf of MGMIC?

(b) if the MGMIC Mortgage is declared to be invalid, is MGMIC entitled to an equitable mortgage enforceable against the Dovercourt Funds?

PART IV – LAW AND ARGUMENT

A. MGMIC Mortgage is Valid and Enforceable

35. It is undisputed that MGMIC and 254 were parties to the Commitment Letter, MGMIC advanced $611,000 to 254, 254 was the registered owner of the Dovercourt Property and the time the mortgage was granted, and the MGMIC Mortgage was registered on title to the Dovercourt Property.

36. Pursuant to section 93(1) of the *Land Titles Act* (Ontario) (the "***LTA***"), the registered owner of real property may charge the property. Section 93(3) of the *LTA* provides that:

> (3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.
>
> *Land Titles Act*, R.S.O. 1990, c. L.5 ("***LTA***"), s. 93.

37. With respect to the effect of registration of an instrument on title, section 78(4) of the *LTA* provides that:

> **Effect of registration**
>
> (4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.
>
> *LTA*, s. 78(4).

38. The only exception to 78(4) is if the registered instrument is a "fraudulent instrument" under the *LTA*. No allegation has been made that the MGMIC Mortgage is a fraudulent instrument.

> *LTA*, s. 78(4.1).

39. Contrary to A13MG's allegation, the evidence is abundantly clear that Payam and A13MG, as shareholders of 254, consented to 254 borrowing funds and granting a second mortgage over the Dovercourt Property, in accordance with 254's by-laws.

40. A13MG's alternative argument is that its consent was conditional upon 254 using a portion of the MGMIC Mortgage funds to repay its investment. In the event that 254 used the MGMIC Mortgage funds in a manner contrary to what was agreed to, 254's failure cannot serve as the basis for this Court declare the MGMIC Mortgage to be invalid.

41. Any failure by 254 and/or Payam to use the MGMIC Mortgage funds in the manner that had been agreed to is a dispute between shareholders and the company. It does not alter the fact that MGMIC advanced $611,000 to 254 and holds the MGMIC Mortgage.

42. In the event that A13MG/Curah suffered damages as a result of 254's and Payam's actions, their remedy is properly rooted in breach of contract and/or fiduciary duty claims against 254 and Payam. Such breaches cannot serve as the foundation for the Court to declare a mortgage registered on title to property and granted for valid consideration to be unenforceable.

B. MGMIC is entitled to an Equitable Mortgage

43. In the event the Court determines that the MGMIC Mortgage is unenforceable, the MGMIC Receiver submits that MGMIC is entitled to equitable mortgage over the Dovercourt Property.

44. In *Elias Markets Ltd., Re*, the Court of Appeal summarized the nature of an equitable mortgage as being one that:

(a) "creates an equitable charge on the property";

(b) is founded in the equitable maxim "equity looks on that as done which ought to be done";

(c) was used by the courts of equity "to prevent an injustice that would otherwise arise from the strict application of the law"; and

(d) "seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law."

Elias Markets Ltd., Re, 2006 CarswellOnt 5597 (C.A.) ["***Elias Markets***"], paras. 63-65.

45. Equitable charges can be created in a variety of ways including by virtue of the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate although he or she has demonstrated an intention to create security.

Royal Bank of Canada v. Azkia et al, 2019 ONSC 5894, para. 63.

46. The MGMIC Receiver submits that the circumstances of this case warrant the granting of an equitable charge in favour of MGMIC. There was a clear common intention on behalf of 254 and MGMIC to grant a mortgage over the Dovercourt Property. The investors would be unfairly prejudiced in the event that the Court determines that the MGMIC Mortgage was invalid as a result of 254's breach of its by-laws, as Dovercourt Funds would be returned to 254 for the benefit of A13MG and Payam, and the investors will have lost all of their money and paid for a dispute between shareholders.

47. By doing so, the Court's holding would result in Payam having taken $611,000 of investors money and getting the benefit of the equity in the Dovercourt Property to the detriment of the investors.

PART V - ORDER REQUESTED

48. The MGMIC Receiver respectfully requests that the Court order that the Dovercourt Funds be released to the MGMIC Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2020.

Sam Rappos

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Elias Markets Ltd., Re*, 2006 CarswellOnt 5597 (C.A.).

2. *Royal Bank of Canada v. Azkia et al*, 2019 ONSC 5894,

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Land Titles Act, R.S.O. 1990, c. L.5

Effect of registration
78. (4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

Exception
(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.

...

Charges
93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

Statement of principal
(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures.

Effect of charge when registered
(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor’s interest is subject, but free from any unregistered interest in the land.

ONTARIO SECURITIES COMMISSION - and - **MONEY GATE MORTGAGE INVESTMENT CORPORATION**

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