

ONTARIO

Land Titles Act

R.S.O. 1990, Chapter L. 5.

IN THE MATTER OF title to land registered in the
Land Registry Office of the Land Titles Division of York Region (No. 65)
as Parcel 19-1, Section 65M-2935, being Lot 19, Plan 65M-2935;
Town of Richmond Hill, Regional Municipality of York,
municipally known as 6 Alessia Court, Richmond Hill, Ontario

AND IN THE MATTER OF the application of NIMITA RAINA,
RAVINDER RAINA and the ROYAL BANK OF CANADA
for compensation out of the Land Titles Assurance Fund

AND IN THE MATTER OF the application of
ILA WEISER and MIDKING INVESTMENTS LIMITED
for compensation out the Land Titles Assurance Fund.

Reasons for Decision

Appearances: Mr. Alan D. Drenfeld, counsel for Nimita Raina and Ravinder Raina,
Mr. Bernard B. Gasee, counsel for the Royal Bank of Canada,
Mr. Sidney H. Troister, counsel for Ila Weiser and Midking Investments Limited.

Hearing dates: October 29, 30, 31, November 2, 2001

The applicants have made a claim for compensation from the Land Titles Assurance Fund. The applicant, Nimita Raina, is the registered owner of the property known municipally as 6 Alessia Court, Richmond Hill, Ontario. The property, a single family dwelling, was acquired in April, 1999. In order to finance the purchase of this property, the owner, Nimita Raina, gave a charge to the Royal Bank of Canada. The applicant, Ravinder Kumar Raina, was and remains her husband. Notwithstanding that title to the property is registered in the name of Nimita Raina, both consider themselves to be joint owners of the home. Counsel filed as an exhibit, a declaration of trust from Nimita Raina dated October 30, 2001, being the second day of this hearing, stating that she held fifty percent of the property as trustee for her husband.

In support of the application, the parties have filed a number of documents relating to the criminal proceedings against one Emanuele Tesoro and produced evidence concerning his financial circumstances. Included in the exhibits are the transcripts of the criminal proceedings, a certified copy of the information indicating guilty pleas to thirty-three counts of fraud-related charges, a restitution order to the victims of those charges and, a statutory declaration from Tesoro admitting to the facts in support of his convictions. Dealing with the financial circumstances of Tesoro, the parties have filed a notarized copy of a receiving order, an execution certificate and an affidavit setting out the results of a search of Tesoro's name in the Teraview Computerized Land Registry system.

As well, I heard extensive sworn testimony from Det. Const. Phil Shrewsbury-Gee of the York Regional Police, the lead investigator into the activities of Emanuele Tesoro. His evidence was based upon the first-hand evidence gathered in the course of his investigations as well as information from confidential police sources which have been proven to be reliable.

On August 8, 2001, Tesoro pleaded guilty to all of the charges. On August 9, 2001, he was sentenced to thirty-eight months' incarceration for his role in frauds involving five properties, including the property which is the subject matter of this hearing.

From the foregoing and from the evidence presented by the applicants, I make the following findings of fact. Unbeknownst to the applicants, the title to the property was transferred to one Emanuele Tesoro in October, 1999. The transfer to Tesoro was fraudulent. Subsequently, the charge to the Royal Bank of Canada was fraudulently discharged. Tesoro then gave a charge to Ila Weiser and Midking Investments Limited for \$350,000.00. The Weiser/Midking charge was also fraudulently discharged in December 1999. In February, 2000, Tesoro gave a charge to Equitable Trust Company in the amount of \$252,500.00. When Weiser and Midking discovered the fraudulent discharge, they registered their duplicate executed charge on title in order to preserve what security they could.

It is clear that the applicant Nimita Raina has suffered a wrongful deprivation of land or interest therein as a result of the fraudulent transfer of the title to the property to Tesoro and the giving of the charges by Tesoro to Weiser/Midking and to Equitable Trust. I am satisfied, based on all of the evidence, that the applicants are unable to recover compensation from Tesoro and that the proceeds of his fraudulent activities cannot be recovered. Based on the provisions of the *Land Titles Act*, R.S.O. 1990, Chap. L.5, I am satisfied that Nimita Raina is entitled to just compensation from the Fund.

I am further satisfied, based on the materials from counsel for Ila Weiser, Midking Investments and Equitable Trust that the two charges taken by these lenders were *bona fide* loans for value without notice of the fraudulent activities and that counsel for the lenders had taken the standard precautions as required of a prudent solicitor.

During the time of these fraudulent activities and up to the time of this hearing, Mr. And Mrs. Raina were living in Lusaka, Zambia. I permitted them to testify at the hearing by way of teleconference.

From their evidence, I find that Mr. and Mrs. Raina, together with their son, Naman Raina, owned and operated a business which exported computer hardware and software from Canada to Zambia. In the two years preceding this hearing, the business expanded. The applicants testified that they were unable take advantage of the lucrative business opportunities as they were unable to finance large shipments of equipment using the equity in the 6 Alessia Court property.

The applicants have also testified as to the stresses caused by the fraudulent activities of Tesoro and the extensive medical treatments that Mrs. Raina has had to undergo.

In addition to a claim for funds sufficient to discharge those two mortgages and a rectification of the title, the applicants have also made a claim for damages and/or compensation for the following:

1. mental anguish as a result of the stress of the fraudulent activities in the range of \$15,000.00 to \$20,000.00 per claimant per year;
2. cost of medical treatment for Nimita Raina in Lusaka in the range of \$10,000.00 to \$12,000.00 US;
3. cost of physiotherapy in the amount of \$25,000.00 US;
4. loss of business opportunities in the amount of \$39,000.00 US;
5. aggravated damages in the amount of \$25,000.00 CAN;
6. costs of communicating with their son and lawyer in Toronto in order to rectify the problem of the title to their home and the time associated therewith in the amount of \$2,500.00 US;
7. travel costs to and from Zambia in the amount of \$5,739.00 US; and,
8. approximately \$33,000.00 CAN of legal costs together with the applicable federal taxes.

For convenience, I will refer to these claims with the exception of the last three items as "damages."

The issue to be decided is whether or not there is authority under the *Land Titles Act* for the Land Titles Assurance Fund to pay damages for claims beyond indemnity for the pecuniary loss which has been suffered as a result of the problem of title. In my opinion, no such authority exists.

The Land Titles Assurance Fund has been established by the *Land Titles Act*. The statutory provisions relating to the Fund must be interpreted within the scheme of the enabling legislation. A reading of the Act clearly demonstrates that the purpose of the Act is to establish the Land Titles system for the registration of interests in real property. The system operates on three principles: the mirror principle, that the register is a perfect mirror of the state of title; the curtain principle, that a purchaser need not investigate the history of past dealings with the land or search behind the title as depicted on the register; and, the principle that the government is prepared to guarantee that no other interests, other than those set out in the register can possibly affect the land subject to the exceptions as set out in the Act and those deficiencies that are actually known.

This system operates in many common law jurisdictions. Common to this system is the maintenance of an assurance fund by the government, which is intended to provide compensation to those persons who suffer loss by reason of errors or omissions of the register. Compensation to those defrauded of their interests in land is also provided by the assurance fund in some circumstances.

The notion of a government assurance fund differs from an insurance policy in that the assurance fund is available to all who have some estate or interest in land at no additional expense so long as she or he retains the estate or interest in the land. In these circumstances, the primary purpose of the assurance fund is to provide a formal guarantee of title whereas the primary purpose of an insurance policy is to protect against possible future losses.

The relevant provisions of the *Land Titles Act* are as follows:

57. (1) A person *wrongfully deprived of land or of some estate or interest therein*, by reason of the land being brought under this Act or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, is entitled to recover what is just, by way of *compensation or damages*, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error.

...
(4) If the person so wrongfully deprived is unable by such means or otherwise to recover just compensation for the person's loss, the person is entitled to have the *compensation* paid out of the Assurance Fund, so far as it is sufficient for that purpose having reference to other charges thereon, if the application is made within six years from the time of having been so deprived or, in the case of a person under the disability of minority, mental incompetency or unsoundness of mind, within six years from the date at which the disability ceased.

(5) A person who suffers damage because of an error in recording an instrument affecting land designated under Part II of the Land Registration Reform Act in the parcel register is entitled to *compensation* from The Land Titles Assurance Fund.

...
(13) Where a registered disposition would be absolutely void if unregistered or where the effect of the error would be to deprive a person of land of which the person is in possession or in receipt of the rents and profits, the Director of Titles may, in the first instance or after a reference to the court, direct the rectification of the register and, in the case of rectification, the person suffering by the rectification is entitled to the *compensation* provided for by this section.

[emphasis added]

In the first instance, s. 57(1) sets out the rights to compensation for any person wrongfully deprived of land or of some estate or interest therein. In my view, the right to compensation

under this provision must be tied to the wrongful deprivation of land or some estate or interest therein. In other words, "just compensation for the ... loss" means indemnity for the pecuniary loss which has been suffered and must be commensurate with and should restore the applicant to the position that she or he would have enjoyed if the act complained of had not been done. However, the restoration of the wrongful deprivation does not include more remote damages.

This section is not intended to limit the right of recovery from any wrong-doer for other damages which may be awarded by the general common law relating to torts or breach of contract. What losses may be reasonably foreseeable and recoverable under the common law is not the subject of this hearing.

Subsection 57(4) provides for the right to have "just compensation" paid from the Fund if the person wrongfully deprived is unable by such means or otherwise to recover compensation from the wrongdoer. Counsel have argued that "just compensation" should be given a large and liberal meaning. In support of the argument, it was pointed out that the Consolidated Revenue Fund had been enriched by the fraudulent activities of Tesoro to the extent of the land transfer taxes paid by this wrongdoer. I merely observe that the quantum of the taxes are directly tied to the value of the property whereas an award for other losses could conceivably exceed the value of the property by a large margin.

I have been provided with a number of legal authorities which have defined compensation in broad terms in a number of contexts. In particular, counsel have cited as an authority the decision of *Kerr v. Ontario (Land Titles Assurance Fund)* [1999] O.J. No. 4647 (Sup.Ct.) in which Cullity J. found that the claimants were not entitled compensation for monetary losses as there was no causal connection between the fraudulent deregistration of their mortgages and the loss of the principal amounts of their loans. Nevertheless, the Court ordered all legal costs and expenses to be paid from the Assurance Fund as "just compensation". I find that the *Kerr* decision deals solely with the payment of costs and is not directly applicable to the issue of remoteness in the compensation payable by the fund.

The phrase "just compensation" in ss. 57(4) must be read together with ss. 57(5) and ss. 57(13). Subsection 57(5) permits the Fund to provide compensation to a person who suffers damage because of an error in recording an instrument affecting land designated under Part II of the Land Registration Reform Act in the parcel register. Subsection 57(13) permits the Director of Titles or her designate to rectify the register and to compensate the person suffering by the rectification of the title. The results would be anomalous if s. 57(4) could permit a wider range of recovery than s. 57(13).

A review of the provisions of the *Registry Act*, R.S.O. 1990 Chap. R.20 which relate to compensation from the Fund appears to lend further support to this proposition. The relevant provisions of the *Registry Act* are as follows:

116: (1) A person wrongfully deprived of land registered under this Act by reason of,
(a) the deletion of an entry under section 56 or 67; or
(b) any error or omission in recording a registered instrument,
is entitled to compensation out of the Land Titles Assurance Fund formed under section 54 of the Land Titles Act.

(2) A person is not entitled to any compensation out of The Land Titles Assurance Fund in respect of land registered under this Act unless,
(a) the person has been wrongfully deprived of land for a reason set out in subsection (1);
(b) the person is unable to recover what is just by way of compensation or damages from any person whose act caused the loss or who was privy to any such act; and
(c) the claim for compensation is made within six years from the time the person discovered or ought reasonably to have discovered the deletion, error or omission.

(5) Section 26, subsections 57(6) to (13), section 58 and subsection 162(3) of the Land Titles Act apply with necessary modifications to claims for compensation under this Part.

The wording under s. 116 of the *Registry Act* makes clear that payment from the Fund is limited to compensation and is tied directly to the wrongful deprivation of land. It would be anomalous if compensation under the provisions of the *Land Titles Act* could be broader than the compensation under the *Registry Act* for the same deprivation.

For these reasons, I find that the Land Titles Assurance Fund is only able to compensate to indemnify for the pecuniary losses which has been suffered and those losses must be commensurate and should restore the applicant to the position that she or he would have enjoyed if the act complained of had not been done. As a matter of law, I am unable to award other damages to the applicants in this matter.

Mr. Raina has based his claim for damages on his beneficial interest in the property held by his wife. Having made the earlier finding concerning the scope of compensation, I decline to rule on whether Mr. Ravinder Kumar Raina is a person "wrongfully deprived of land or of some estate or interest therein" within the meaning of s. 57(1).

I have also been asked by counsel to assess the quantum of damages should damages be payable under these provisions. Section 26 of the Act provides that any appeal from this decision shall be by way of a new trial. I, therefore, decline to make any such finding.

With respect to the issue of claims apart from claims for damages, there are three items numbered 6, 7 and 8 as set out on page 3: the cost of communicating with their son and counsel, travel costs, and legal fees. In my opinion, some of those costs should be paid by the Fund. Given the frequency of telephone calls between Toronto and Lusaka, as described by Naman Raina in his evidence, I find that the travel costs, although desirable from the perspective of the applicants, were not necessary.

Furthermore, I have been provided with no evidence as to the exact cost of the telephone calls and other communications from Lusaka to Toronto. The Fund will pay to Mrs. Raina the sum of \$3,000.00 representing the communication costs associated with this application.

All counsel involved have requested full payment of legal costs and have submitted bills of costs in these proceedings. The *Kerr* decision has been cited for the proposition that the Fund should fully indemnify the applicants for all of the costs involved.

I note that s. 57(8) of the Act permits the Director of Titles to award costs in her or his discretion. Subsection 57(8) states: "The liability of the Assurance Fund for compensation and the amount of compensation shall be determined by the Director of Titles, and the costs of the proceeding are in the discretion of the Director of Titles."

The legislation contemplates a twofold process for the Director of Titles or her designate in proceedings of this nature: firstly, an assessment of the liability of the Fund (both in terms of legal liability and quantum); and, secondly, a discretionary assessment of costs. To award full legal costs and expenses to an unsuccessful litigant in the absence of extraordinary circumstances under the heading of "just compensation" would run directly contrary to this provision.


Therefore, I will direct that a further sum of \$10,000.00 be paid to the Applicant, Nimita Raima, for legal costs inclusive of disbursements and GST.

Counsel for Ila Weiser and Midking Investments Limited has sought nothing for his clients beyond the amounts required to discharge the mortgage and reasonable legal costs. While Mr. Troister appeared in this matter only as counsel to Weiser and Midking, his firm initiated three legal proceedings against Tesoro in an attempt to recover some of proceeds of the frauds and to determine the financial circumstances of Tesoro on behalf of all of the claimants. Mr. Troister also acted as legal advisor to other counsel with respect to issues concerning the enforceability of the new mortgages and negotiating with the new lenders who were anxious to enforce their charges when those charges went into default. Mr. Troister has sought costs in the amount of approximately \$90,000.00 along with disbursements in the amount of \$9,816.03. Although the fees in this matter should more accurately have been charged to a number of matters, I will direct the sum of \$45,000.00 plus disbursements in the amount of \$9,816.03 to be paid to Ila Weiser and Midking Investments Limited on account of these fees, inclusive of GST.

I have been advised by counsel that a discharge of charge has been prepared and provided to counsel in escrow. I have been further advised by counsel that the homeowner will apply funds received on account of the Weiser/Midking and Equitable Trust charges directly to the these chargees. Accordingly, the sum of \$725,498.29 representing the amount required to discharge the two charges calculated as at October 29, 2001 together with interest in the amount of \$149.71 *per diem* commencing October 30, 2001 will be paid to the applicant, Nimita Raina.

Pursuant to s. 57(13) of the Act, I will direct the rectification of the title to ensure that the applicant, Nimita Raina, is shown as the registered owner and to reinstate the Royal Bank charge as the first encumbrance on title.

Dated at Toronto, this 22nd day of February, 2002.



Jean C. H. Lu,
Deputy Director of Titles

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