



## Land Titles Act

### R.S.O. 1990 CHAPTER L.5, AS AMENDED

#### DECISION AND ORDER

**IN THE MATTER OF** the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 57(7)

**AND IN THE MATTER OF** the title to land registered in the Land Registry Office for the Land Titles Division of Durham (No.40), as Parcel 7-1, Section 40M-1376, Town of Ajax, Regional Municipality of Durham.

**AND IN THE MATTER OF** an Application by R.A. & J. Family Investment Corporation for payment of compensation out of the Land Titles Assurance Fund in respect of the alleged wrongful deprivation of land by the alleged fraudulent transfer of property.

A pre-hearing in this matter was held on October 12, 2004 and this matter came before me for hearing on May 1, 2008 at which time there appeared before me:

Alan J. Davis  
Howard Fialkov

Counsel for the Applicant  
Officer of R.A. & J. Family Investment Corporation

#### **FACTS**

The Applicant in this case is R.A. & J. Family Investment Corporation ("R.A. & J."). R.A. and J. commenced business dealings with Janice Raven, a mortgage broker, at some point in 1989. Money was advanced to Raven for investment in a number of first mortgages. One such mortgage was registered against 14 Fielding Court in Ajax. R.A. and J. advanced \$100,000.00 to acquire a 40 percent interest in a first mortgage registered against this property. To secure the advance a Transfer of Charge was registered as Instrument No. LT509006 on June 28, 1990. On August 7, 1990 the subject property was transferred to Raven and her husband as joint tenants. By Instrument LT518222 registered on August 13, 1990 the mortgage was discharged. The discharge was fraudulent. On December 10, 1990 a mortgage was granted to the Royal Bank. On October 22, 1993, the mortgage having gone into default, the Bank issued a notice of power of sale. On October 25, 1993 R.A. & J. having learned of the fraudulent discharge, registered a certificate of pending litigation against title to the property. A complicated set of further proceedings occurred arising from the registration of other mortgages and forged discharges creating a dispute as to priorities and the matter was ultimately heard by the Ontario Court of Appeal.

I am satisfied that a fraud occurred and that the Applicant exhausted its remedies for recovery against those responsible for the fraud.

#### **ISSUE**

The only issue about which I am concerned is interest. I am satisfied that at least simple interest is payable. The Applicant submitted that compound interest is payable on the compensation since it was payable under the terms of the mortgage that was

fraudulently discharged. The mortgage provided for an interest rate of 15 percent per annum, calculated monthly. The first payment was due 89/09/01 and the balance was due 90/08/01. The mortgage further provided that the mortgagor, when not in default, would have the privilege of prepaying all of the outstanding principal sum at anytime upon seven days' notice without penalty. It has been submitted that as of May 1, 2008 \$1,402,824.82 (not including costs) is the compensation payable as a result of the loss of the \$100,000 investment.

## **ANALYSIS**

The Applicant relies upon *Bank of America Canada v. Mutual Trust Co.* [2002] 2 S.C.R. 601, [2002] S.C.J. No. 44. This case involved a breach of a loan agreement that provided for compound interest. The trial judge awarded compound pre and post judgment interest. The Court of Appeal affirmed the trial decision with the exception of the award of compound interest. The Supreme Court of Canada allowed the appeal and restored the trial judgment providing for compound interest.

The court held that compound interest better reflects the time value of money. To prevent defendants from exploiting the time-value of money to their advantage by delaying payment of damages so as to capitalize on the time-value of money it was held that courts must be able to award compound interest to return the value acquired by the defendant between the breach of agreement and payment to the plaintiff. If required to pay damages at only a simple interest rate, the defendant breaching a contract providing for compound interest would have earned compound interest on the plaintiff's money while paying only simple interest. The award of compound interest prevents the defendant from profiting from its breach. If the ability to award compound interest did not exist, there would be an incentive to breach contracts.

The court discusses section 128 of the *Courts of Justice Act* which provides for the payment of interest (simple interest) and that section 130 of the *Courts of Justice Act* allows a court, where it considers it just, to award compound interest.

The Land Titles Assurance Fund was created to compensate persons "wrongfully deprived of land (or some estate or interest therein) by reason of the land being brought under the *Land Titles 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 in the register" (Section 57). The Act provides that a person losing an interest in land is entitled to recover just compensation from the person responsible for the loss (subsection 57(1)). Where they are unable to recover from the person responsible for the loss, compensation is available, in certain circumstances. They are entitled to have compensation paid out of the Assurance Fund "...so far as it is sufficient for that purpose having reference to the other charges thereon..." (subsection 57(4)). The amount of compensation is in the discretion of the Director of Titles or her delegate Deputy Director of Titles (subsection 57(8)).

The policy articulated in the *Bank of America* case with respect to the payment of compound interest is not applicable to the statutory scheme established under the *Land Titles Act* to compensate victims of fraud. The award of compound interest, as discussed in *Bank of America*, is warranted to discourage defendants from profiting from their own breach of contract, which would be the case if a court could award only simple interest in cases of breach of contract. The statutory scheme established to compensate victims of fraud in the land registration system differs greatly from a contract dispute between private parties. In this case the "fraudster" is not paying damages, rather the government is paying compensation for fraud with funds coming out of the Consolidated Revenue Fund.

*Zaidan Group Limited v. London (City)*, [1991] 3 S.C.R. 593, aff'g (1990), 71 O.R. (2d) 65 (C.A.) held that where a statute establishes a scheme for compensation, common law rights which might have operated but for the statute cannot be relied upon. Any

common law right to compound interest is not applicable to compensation out of the Land Titles Assurance Fund.

The Applicant also submitted that but for the fraud, the money lost from the fraudulent discharge of mortgage would have been available throughout the years for investment at compound interest rates. That may or may not have been the case. In fact, the money could have been lost. I find this claim to be too speculative. There have been many changes in the real estate market over the years and it is difficult to establish with any certainty the rate of return the Applicant could have received on the invested money.

The Applicant also relied on *Youssef v. Ontario (Ministry of Consumer and Commercial Relations)* [2003] O.J. No. 622. This case was an appeal of a decision of a Deputy Director of Titles concerning an application for compensation out of the Land Titles Assurance Fund involving fraudulent transfers of title and subsequent fraudulent mortgages. Compensation was granted, but the hearing officer refused to award compensation for claims related to the inability to deal with the properties prior to the rectification of title and emotional suffering. Justice Matlow found that the *Land Titles Act* provides for compensation only for the claimant's actual loss, and therefore, non-pecuniary losses are not compensable. As indicated above, the claim for compound interest is speculative and I do not find that it constitutes actual losses.

### COMPENSATION

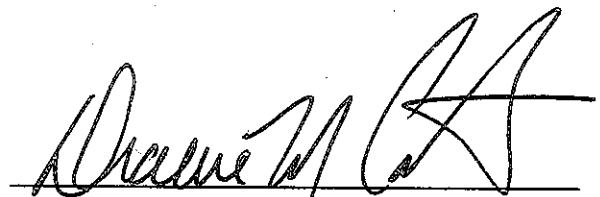
This matter has taken a considerable amount of time to come to resolution and I do find that simple interest is payable from the date of the fraudulent discharge. The prejudgment interest rate under the *Courts of Justice Act* at that time was 13.9 percent and is reasonable in this case.

### DETERMINATION AND ORDER

**I HEREBY DETERMINE THAT** the Applicant, R.A. & J. Family Investment Corporation be paid Fifty thousand dollars (\$50,000.00) in costs for legal and related costs for legal proceedings and the cost of pursuing the claim for compensation.

**I HEREBY DETERMINE THAT** the Applicant, R.A. & J. Family Investment Corporation, be paid the sum of **\$398,240.33 (Three hundred ninety-eight thousand, two hundred and forty dollars and thirty three cents)** in full satisfaction of the application for compensation from the Land Titles Assurance Fund which sum includes the costs of this proceeding.

Dated at Toronto this 16th day of June, 2008.



Dianne M. Carter  
Deputy Director of Titles

**TO:** R.A. & J. Family Investment Corp.  
c/o Alan J. Davis  
Davis & Associate  
Barristers and Solicitors  
330 Bay Street, Suite 1401  
Toronto, Ontario  
M5H 2S8



# *Land Titles Act*

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


**NOTICE OF DETERMINATION OF LIABILITY  
OF THE LAND TITLES ASSURANCE FUND  
(Subsection 57(8) of the Act)**

**IN THE MATTER OF** the title to land registered in the Land Registry Office for the Land Titles Division of Durham (No. 40), as Parcel 7-1, Section 40M-1376, Town of Ajax, Regional Municipality of Durham (the Property”);

**AND IN THE MATTER OF** an application by R.A. & J. Family Investment Corporation, pursuant to section 57 of the *Land Titles Act*, for payment of compensation out of the Land Titles Assurance Fund in respect of the wrongful deprivation of land by the alleged fraudulent discharge of a mortgage of the Property of which it held a forty percent (40%) interest and the subsequent transfer of the Property.

**I HEREBY DETERMINE** that the applicant, R.A. & J. Family Investment Corporation, be paid the sum of Four Hundred and Seventy Five Thousand Dollars (\$475,000) in full satisfaction of the application for compensation, which sum includes the costs of the proceedings.

DATED at Toronto, Ontario, this 15<sup>th</sup> day of December, 2008.

  
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Carolyn Rosenstein  
Deputy Director of Titles