COURT FILE NUMBERS	**B201-979735 / 25-2979735**
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTERS	**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, OF GRIFFON PARTNERS OPERATION CORP., GRIFFON PARTNERS HOLDING CORP., GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., SPICELO LIMITED, STELLION LIMITED, 2437799 ALBERTA LTD., 2437801 ALBERTA LTD. and 2437815 ALBERTA LTD.**
DOCUMENT	**BENCH BRIEF OF TAMARACK VALLEY ENERGY LTD.**

MATTI LEMMENS
STIKEMAN ELLIOTT LLP
Barristers & Solicitors
4200 Bankers Hall West
888 - 3rd Street S.W.
Calgary, AB T2P 5C5 Canada

Tel: (403) 266 9064
Fax: 403 266 9034

Counsel for Tamarack Valley Energy Ltd.

Hearing via Webex before the Honourable Justice Johnston
on the Calgary Commercial List, on February 6, 2024, commencing at 3:00 p.m.

TABLE OF CONTENTS

I. INTRODUCTION

1. Tamarack Valley Energy Ltd. ("**TVE**") is the second subordinate secured creditor of Griffon Partners Operation Corp. ("**GPOC**") pursuant to a Subordinated Secured Promissory Note in the amount of $20 million plus interest granted by GPOC in favour of TVE (the "**TVE Promissory Note**").

2. TVE is supportive of the sale of all of the assets of Spicelo Limited ("**Spicelo**") namely all of the common shares of it holds in Greenfire Resources Ltd. (the "**Pledged Shares**"), either by way of the application of Trafigura Canada Limited and Signal Alpha C4 Limited (collectively, the "**Lenders**"), the senior secured creditors of GPOC and Spicelo, to terminate the within Notice of Intention to Make a Proposal proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**NOI Proceedings**") with respect to Spicelo and to appoint Grant Thornton Limited as receiver of all of Spicelo's assets (the "**Receivership Application**"), or by way of GPOC and Spicelo's application to continue the within NOI Proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, and to appoint Alvarez & Marsal Canada Inc. as monitor (the "**Proposed CCAA Proceedings**").

3. TVE respectfully submits that:

   (a) the doctrine of marshalling requires the Lenders to realize upon the entirety of Spicelo's Pledged Shares pursuant to the Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 (the "**Share Pledge**") between it and the Lenders prior to realizing upon any of proceeds from the sale of all or any portion of GPOC's assets pursuant to the ongoing sale and investment solicitation process (the "**SISP**") in these NOI Proceedings or the Proposed CCAA Proceedings; and

   (b) a determination as to whether Spicelo has any right of subrogation as against GPOC shall be made at the time when proceeds from the sale of the Pledge Shares and the SISP are available for distribution.

II. FACTS

4. The full factual matrix of the NOI Proceedings and the Receivership Application are set forth in detail in the affidavit of David Gallagher, sworn January 29, 2024 and the Lenders' Bench Brief.

5. With respect to TVE's submissions, the relevant facts are as follows:

(a) The Lenders are the senior secured creditors of GPOC pursuant to a Loan Agreement between the parties dated July 21, 2022 (the "**Loan Agreement**").

(b) As security for payment of performance of GPOC's obligations under the Loan Agreement, Spicelo and the Lenders entered into the Share Pledge.

(c) The Lenders are presently owed C$51,413,652.14 by GPOC and have recourse to recover this debt from two sources: the proceeds from the sale of GPOC's assets under the SISP in the NOI Proceedings, and/or by realizing upon Spicelo's Pledged Shares.

(d) TVE is the second subordinate secured creditor of GPOC pursuant to the TVE Promissory Note. TVE is owed C$23,478,356 by GPOC. TVE is not a party to any share pledge agreement with Spicelo and does not have any recourse for recovery of amounts owing by GPOC against Spicelo or any other guarantor.

(e) As such, TVE's sole source of recovery of the amount owing by GPOC under the TVE Promissory Note is from the proceeds of the SISP.

III. ISSUE

6. Whether the doctrine of marshalling requires the Lenders to realize upon the Pledged Shares.

IV. LAW AND ARGUMENT

7. The equitable doctrine of marshalling dictates that if a creditor has two funds to draw upon to satisfy a debt, the court will require it to take satisfaction from that fund upon which another creditor has no security.[1]

[1] *Gerrow v. Dorais*, 2010 ABQB 560 at para. 21.

8. In *Condominium Corp. No. 082 6970 v. 1117398 Alberta Ltd.* ("***111 Alberta Ltd***"), this Court stated the following with respect to the doctrine of marshalling and the requirements for its application:[2]

> Marshalling is a doctrine rooted in a longstanding principle of equity which essentially provides that a "senior" creditor, or a creditor with access to multiple funds to satisfy its debt, should marshal its enforcement in such a way as to cause as little harm as possible to a "junior" creditor, or a creditor with access to only one of the same funds. Equity directs that the senior creditor look first to those funds that the junior creditor does not have access to, in order to avoid needlessly wiping out the junior creditor's security.
>
> Marshalling requires that there be more than one fund to which the senior creditor has recourse, and these funds either belong to the same debtor or relate to the same debt.

9. Marshalling has been applied in situations where two funds available are from a principle debtor and a guarantor.[3]

10. In the present matter, the Lenders have access to both the Pledged Shares and the proceeds from the sale of GPOC's assets under the SISP, whereas TVE only has access to the latter.

11. TVE understands that the total value of GPOC's assets will not be sufficient to satisfy the amount owing to the Lenders. As such, it is highly probable that there will be no funds available to TVE in the event the Lenders exercise their first priority security and realize upon all of the proceeds from the SISP.

12. As of February 2, 2024, the Pledged Shares were trading at $5.74 per share, for a value of $31,567,164. Spicelo is also owed a dividend of $6.6 million, and therefore the total amount of collateral available to the Lenders under the Share Pledge is $38,167,164.

13. If the Lenders were to realize upon the Pledged Shares in full and were to recover the remaining balance of the debt owed to it by GPOC from the proceeds of the SISP, there would potentially be funds available to TVE and other unsecured creditors of GPOC.

---

[2] *Condominium Corp. No. 082 6970 v. 1117398 Alberta Ltd.*, 2012 ABQB 233 at paras 10 and 11.
[3] *Brown v. Canadian Imperial Bank of Commerce*, 1985 CarswellOnt 729 (Ont HC); *Ibid*, at para 30.

14. Under the doctrine of marshalling, as this Court stated in *111 Alberta Ltd.*, "[e]quity directs that the senior creditor look first to those funds that the junior creditor does not have access to, in order to avoid needlessly wiping out the junior creditor's security."

15. As such, TVE submits that marshalling requires that the Lenders realize upon the Pledged Shares in full, followed by a determination of how the proceeds from the Pledged Shares and the SISP should be marshalled and whether Spicelo has any right of subrogation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 2nd day of February, 2024.

STIKEMAN ELLIOTT LLP
Per:

for **Matti Lemmens**

Counsel to Tamarack Valley Energy Ltd.

V. TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	*Gerrow v. Dorais*, 2010 ABQB 560
2.	*Condominium Corp. No. 082 6970 v. 1117398 Alberta Ltd.*, 2012 ABQB 233
3.	*Brown v. Canadian Imperial Bank of Commerce*, 1985 CarswellOnt 729 (Ont HC)

Court of Queen's Bench of Alberta

Citation: Gerrow v. Dorais, 2010 ABQB 560

Date: 20100903
Docket: 0903 13412
Registry: Edmonton

Between:

Anthony Ford Gerrow

Plaintiff

- and -

Michel Joseph Dorais, Hinton Pine Holdings Inc., Hinton Leaf Holdings Inc., 1033543 Alberta Ltd., Hinton Sky Inc., Green Holdings Inc., Hinton Green Inc., Growth Partners Inc., Capitalplus Financial Inc., Zenith Capital Investment Corp., and Dorais Financial Inc.

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice Don J. Manderscheid

I. Introduction

[1] This matter arises out of three Notices of Motion involving the respective rights of a Court appointed receiver and various secured creditors and the equitable doctrines of marshalling, apportionment and subrogation. As well, this matter involves the application of the *Statute of Elizabeth (Fraudulent Conveyances Act)*, 1571 (13 Eliz. 1) c. 5, and the *Personal Property Security Act*, R.S.A. 2000, p-20. Counsel for 805251 Alberta Ltd. advised the Court that his client was not proceeding with their claim under the *Fraudulent Preferences Act*, R.S.A. 2000, F-24.

[19] Furthermore, “under the doctrine of subrogation, all of the circumstances must be balanced, and the Court must be satisfied that no injustice will be done through the substitution of one party in the place of another via a subrogation arrangement”, ***Alberta (Treasury Branches) v. Alberta (Public Trustee)***, at para. 50, Cairns J., quoting ***Brown v. McLean***, (1889), 18 O.R. 533 (H.C.J.), at 536.

[20] Lastly, in ***Coupland Acceptance Ltd. v. Walsh***, [1954] S.C.R. 90, [1954] 2 D.L.R. 129, the Supreme Court of Canada confirmed that the doctrine of subrogation is not confined to matters of priority between mortgages, but applies as well to the relationships between mortgages and other prejudicial instruments such as builders' liens and executions. In this respect, Kellock J., stated (at para. 6):

> While s. 13(1) of *The Mechanics Lien Act* , R.S.O., 1950, c. 227, gives priority to the lien over all payments or advances made under a mortgage after registration of the lien, the section is not to be construed as affecting the right relied upon here by the appellant. The appellant does not rely upon its mortgage for priority as to the moneys here in question but upon the equitable right to stand in the place of the Kerbel mortgagees whose priority to the lien is unquestionable. The position of the lienholder remains the same as it was before the appellant intervened and it would, in my opinion, require more than is to be found in the section to bring about a result so unjust that it would, to paraphrase the language of Parker J., in the ***Crosbie-Hill*** case, permit the lienholder, by a mere accident, to obtain priority at the expense of people who never intended to benefit him. Had the appellant been in fact aware of the registration of the lien, it could have purchased the Kerbel mortgage, in which event no possible question could have arisen.

2. Marshalling

[21] In its simplest form the doctrine of marshalling dictates that if a creditor has two funds to draw upon to satisfy the debt, the Court will require him to take satisfaction from that fund upon which another creditor has no security. In Alberta, the seminal case on the doctrine of marshalling is ***First Investors Corp. v. Veeradon Developments Ltd.*** (1988), 84 A.R. 364, 47 D.L.R. (4th) 446 (Alta. C.A.). In that case, Belzil J.A., in explaining the doctrine of marshalling, noted that the leading formulation of the doctrine of marshalling as a principle of equity is that of Lord Hardwicke in ***Lanoy v. The Duke and Dutchess of Athol*** (1742), 2 Atk. 444. At p. 669 Lord Hardwicke held that if a creditor has two funds, he must take his satisfaction from the fund that has no lien by another creditor. He went on:

> Suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgage, have directed the first to take his satisfaction out of the estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room

> for the second mortgage, even though the estates descended to two different persons.

[22] Belzil J.A. went on to adopt the formulation in *Snell's Principles of Equity*, (28th Ed), by P.V. Baker and P. St.J. Langan (London : Sweet and Maxwell, 1982) at p. 416, which provides that where there are two creditors of the same debtor, and one creditor has a right to resort to two funds for payment of his debt, and the other a right to resort to one fund only, the court will 'marshal' or arrange the funds so that both creditors are paid as far as possible. The authors of *Snell's* noted that the doctrine has several applications, but marshalling as between mortgagees is perhaps the most usual. *Snell's* continues that the doctrine of marshalling is not allowed to prejudice the first mortgagee. Relying on the Blackacre/ Whiteacre forumla, *Snell's* noted:

> If, for instance, a person having two estates, Blackacre and Whiteacre, mortgages both estates to A, and afterwards mortgages only Blackacre to B, either with or without notice of A's mortgage, the proper course is for A to realise his debt first out of Whiteacre and to take only the balance out of Blackacre, in order to leave as much as possible of Blackacre to satisfy B... A can therefore realise his securities as he pleases, for A is not a trustee for B. But if A pays himself out of Blackacre, B is allowed to resort to Whiteacre to the extent to which Blackacre has been exhausted by A, and to have the same priority against Whiteacre as A had.
>
> ...In the above example, B's right to marshal will be enforced not only against the original mortgagor but also against all persons claiming through him as volunteers, as where the mortgagor dies and Blackacre and Whiteacre pass to different persons. But it is not allowed to prejudice purchasers or mortgagees of one of the estates. Thus if in the above example the mortgagor had created another mortgage of Whiteacre in favour of C. B would have no equity to throw the whole of A's mortgage on Whiteacre, and so destroy C's security."

[23] Belzil J.A. also accepted the definition of marshalling from the judgment of Orde, J. in ***Ernst Brothers Co. v. Canada Permanent Mortgage Corporation*** (1920), 47 O.L.R. 362, affirmed 48, O.L.R., 57 D.L.R. 500 (C.A.) that include the following qualification at para. 22:

> ... This right is always subject to two important qualifications: first, that nothing will be done to interfere with the paramount right of the first mortgagee to pursue his remedy against either of the two estates; and, second, that the doctrine will not be applied to the prejudice of third parties.

[24] Belzil J.A. further noted that these definitions speak of "satisfaction" or "payment of the first mortgage debt out of marshalled "funds". In ***Canada Permanent Trust Company v. King Art Developments Ltd. et al.*** [1984], 4 W.W.R. 587, 54 A.R. 172 (CA) Laycraft, J.A. at para. 45 adopted the following definition of "satisfaction" in *Black's Law Dictionary* (at p. 643):

> ... the discharge of an obligation by paying a party what is due to him (as on a mortgage, lien or contract), or what is awarded to him by the judgment of a court or otherwise.

[25] The most important qualification in these definitions is that the application of marshalling cannot prejudice the "paramount" right of the first mortgagee to realize its securities and pursue its remedies as it pleases. That primary right to receive and enforce payment of its debt in money is at its election. The first mortgagee thus may seek a "Rice" order, take the land by final foreclosure, or pursue other courses of action such as simply leaving its security in force. Belzil J.A. noted in ***First Investors Corp. v. Veeradon Developments Ltd.*** that the consequence of this is that if the right is not to be prejudiced, it follows that the prerequisite to applying marshalling to mortgages is that first mortgage properties have all been sold and converted to money funds exceeding the amount due under the first mortgage. He continues:

> In those circumstances, the first mortgagee must pay itself firstly out of the funds derived from the properties not covered by the second mortgage. Equity will not allow the first mortgage to needlessly wipe out the second mortgage by paying itself firstly out of funds derived from the properties covered by both mortgages. The first mortgagee must leave as much as possible for the second mortgagee out of funds derived from properties covered also by the second mortgage. In modern practice, the funds derived from sale will be under control of the court, and the court will marshall by simply directing payment accordingly.

[26] Belzil J.A. further noted that the underlying issue is really between the second mortgagee and the mortgagor and its assigns and there is really no contest between the first and second mortgagees, citing ***Gibson v. Seagrim*** (1855), 20 Beav. 614. The first mortgagee's sole interest is in receiving the money owed to it, and marshalling does not affect that interest. It does not matter to the first mortgagee which fund it receives its money from. Equity, Belzil J.A. says, assumes that a reasonable first mortgagee would want to act honourably, and not capriciously, by leaving as much as possible for the second mortgagee. He quotes North, J. in ***Re Loder's Trusts (a)*** [1886], The Law Times, Vol LV., N.S. 582:

> This is the course which a straightforward man would take.

[27] The doctrine of marshalling is not applied only to mortgagees, and accordingly, I know of no reason why the holder of a builders' lien cannot have resort to the doctrine of marshalling: ***Narduzzi v. Richardson***, 2009 BCSC 588, 54 C.B.R. (5th) 1 (at para. 29 and the cases cited therein at paras. 25-28).

[28] Of further consideration is the principle which is called "marshalling by apportionment". This particular strain of the doctrine of marshaling was aptly explained by Scarth J., in ***Bancorp Investments (Fund 2) Ltd. v. Bhugra Holdings Ltd.***, 2006 BCSC 893, 23 C.B.R. (5th) 108, at para. 25 as follows:

With respect to Apportionment Mr. Justice Burnyeat writes the following at [paragraph] 12:

> Apportionment
>
> 12 In a situation where an owner mortgages both properties in favour of the same first mortgagee but then mortgages the first property to "B" and the second property to "C", the doctrine of "marshalling by apportionment" applies:
>
> > ... where each of the two funds has been assigned or charged by the debtor to a different subsequent claimant, equity interposes so as to secure that the claim of the first claimant is borne by the two funds rateably.
>
> [Halsbury's (4th ed) Vol. 16, p. 785, para. 876.]
>
> As between "B" and "C" in the example noted above, the loss will not lie where the first mortgagee makes it lie. The charge of the first mortgagee will be apportioned rateably between the two properties (according to their value) so that the competing interests of "B" and "C" can be adjusted.

[29] Marshalling by apportionment was further explained in ***Victor Investment Corp. v. Fidelity Trust Co.***, [1975] 1 S.C.R. 251, 41 D.L.R. (3d) 65 as arising in relation to two properties held in separate hands, but subject to the one mortgage debt covering both of them. Thus under apportionment the debt was prorated according to the respective values of the two properties, in the absence of any stipulation that one of the properties would bear the burden or bear it primarily as between the two holders of the equities of redemption.

3. Statute of Elizabeth

[30] 805 submits that this case also involves the principles raised by the *Statute of Elizabeth*. It is clear from the judicial authorities that the *Statute of Elizabeth* is in force in Alberta, ***Goyan v. Kinash***, [1945] 2 D.L.R. 749, [1945] 1 W.W.R. 291 (Alta. S.C.) at 753 in D L.R.

[31] Romaine J. in ***Krumm v. McKay***, 2003 ABQB 437, 342 A.R. 169 provided a concise overview of the application of the ***Statute of Elizabeth***, noting that the purpose of the statute and of the *Fraudulent Preferences Act* is to strike down any conveyances made with the intention to defeat creditors, except for conveyances made for good consideration and *bona fides* to persons not having notice of fraud. She noted that the legislation must be interpreted liberally, and includes any kind of transfers or conveyances made with the requisite intent no matter what the

Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 082 6970 v 1117398 Alberta Ltd., 2012 ABQB 233

Date: 20120411
Docket: 1003 15475
Registry: Edmonton

Between:

Condominium Corporation No. 082 6970

Plaintiff

- and -

1117398 Alberta Ltd., Second Wind Enterprises Inc., Everest Builders Ltd., Becker Elzein & Associates Ltd., Omar Elzein, R. Saunder Architects Ltd., Raj Saunder, W. Jappsen Architect Ltd., Werner Japsen, Apem Engineering Ltd., S.K. Metha, the National Home Warranty Programs Ltd. Carrying on Business As National Home Warranty Program and David Ross Ives, Everest Builders Ltd.

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee

---

[1] Condominium Corporation No. 0826970 (the "Condominium Corporation") is the Respondent in the present appeal of 1117398 Alberta Ltd. ("111") and 1209900 Alberta Ltd. ("120") who seek to appeal the decision of the Master who on January 13, 2012, granted an order allowing the attachment order registered against the condominium units owned by 111 in Condominium Plan 082 6970 to be discharged upon closing of an Offer to Purchase and registered the attachment order to be registered against units owned by 120 in Condominium Plan 091 0178.

Background Facts and Procedural History

[2] On July 6, 2011, an attachment order was granted in favour of the Condominium Corporation on a without notice basis.

[3] The Condominium Corporation then brought an application on notice to 111 to continue the attachment order. The application was heard on July 21, 2011 and was adjourned to allow questioning on the affidavit of David Ross Ives.

[4] On August 26, 2011, an application was heard to continue the attachment order and Master Breitkreuz granted the extension as he was of the opinion that the matter had already been decided.

[5] 111 brought an application to set aside the attachment order and address the issue as to whether the equitable doctrine of marshalling was appropriate in relation to the proceeds from the foreclosure by the first mortgagee, Lanyard Holdings Inc. ("Lanyard"), on the units owned by 111.

[6] A special application was heard before the Master on November 29, 2011, where written submissions were submitted. The Master was again of the opinion that the validity of the attachment order was already decided and adjourned the marshalling issues *sine die*.

[7] The Condominium Corporation learned that the units owned by 111 were sold with a closing date of January 13, 2012. There was evidence that the first mortgagee, Lanyard also held security over a condominium project in Okotoks owned by 120, and the Condominium Corporation sought a direction that the equitable doctrine of marshalling be applied to those units. The January 13, 2012, Order of the Master directs that the attachment order be registered on those Okotoks units owned by 120.

Issues

[8] The present appeal raises the following issue:

(a) Has there been an appropriate direction of "marshalling" with respect to the proceeds from the Lanyard foreclosure by the attachment orders issued herein?

Analysis

[9] The Appellants submit that the Master erred in concluding that "marshalling" applied to th Okotoks units owned by 120, after having previously granted an already extraordinary prejudgment attachment Order against 111 in another Condominium Plan.

[10] Marshalling is a doctrine rooted in a longstanding principle of equity which essentially provides that a "senior" creditor, or a creditor with access to multiple funds to satisfy its debt, should marshal its enforcement in such a way as to cause as little harm as possible to a "junior" creditor, or a creditor with access to only one of the same funds. Equity directs that the senior creditor look first to those funds that the junior creditor does not have access to, in order to avoid needlessly wiping out the junior creditor's security.

[11] Marshalling requires that there be more than one fund to which the senior creditor has recourse, and these funds either belong to the same debtor or relate to the same debt. Marshalling is not available where prejudice may be done to other junior creditors, to third parties, or to the senior creditor's paramount right to recover its debt.

[12] 111 submits that as a matter of law, marshalling is not available to creditors other than mortgagees, and is not available where there is more than one debtor in respect of the same debt.

[13] 111 also submits that marshalling in the present circumstances would cause "prejudice".

[14] A definition of marshalling is found in the decisions of Prothonotary Hargrave in ***Scott Steel Ltd. v Alarissa (The)***, [1996] 2 F.C. 883, 1996 CarswellNat 519 and in ***Bank of Scotland v Nel (The)***, [1998] 4 F.C. 388, 1998 CarswellNat 1409 In both decisions, Hargrave P. cites the definition from *Tetley on Maritime Liens and Claims, Business Law Communications Ltd.*, 2nd edition, 1998 at para. 100:–

> Marshalling is the equitable process, whereby the Marshall or the court orders a creditor who has a secured right on more than one res or more than one fund belonging to the debtor, or security from two or more debtors for the same debt, to exercise his right on the security in a manner which will be in the best interests of all creditors. The Marshal or court must also take into consideration the best interests of third parties and even of the debtor.

[15] The doctrine of marshalling was also discussed in ***First Investors Corp. v Veeradon Developments Ltd.*** (1988), 84 A.R. 364, 1988 CarswellAlta 9 (C.A.) ("***Veeradon***"). ***Veeradon*** is a 1988 decision by three different Justices of Appeal, who concurred in the result but not in their reasons for judgment. 111 relies on a number of statements from ***Veeradon***.

[16] ***Veeradon*** concerned a senior creditor, First Investors, who held a first mortgage over properties described as "A" and "B" in the Reasons for Judgment. A junior creditor, Butler, held a second mortgage on property "B" and no security on property "A". This was described by Beizil J.A. in his reasons as "the classic textbook foundation for marshalling between mortgagees."

[17] In ***Veeradon***, Butler had sought to convince the Court that First Investors should have to accept a higher, appraised value for the properties, as opposed to an apparent lower actual value. Butler then argued that the Court could not simply order the properties for sale, but under the

doctrine of marshalling First Investors had to purchase property "A" at the higher appraised value (referred to in the Reasons as a "Rice" order), and then allow Butler to redeem the shortfall in the mortgage amount to First Investors, at which point Butler would receive Title to property "B" free and clear.

[18] 111 offers ***Veeradon*** as authority for the proposition that "nothing [may] interfere with the primary mortgagee's choice to enforce against either estate", and that marshalling would cause "interference with Lanyard's choice of which property to enforce against."

[19] In ***Veeradon***, BeIzil J.A. held that the principle of marshalling could not have effect because the order sought by Butler would force First Investors to accept a remedy it had not sought: namely the "Rice" order. Harradence J.A. and Hetherington J.A. both concurred with this point as this offended the "paramount right" of the first mortgagee to realize its securities and pursue its remedies "as it pleases."

[20] It is clear from Belzil J.A.'s reasons that the quote from Orde J. in ***Ernest Brothers Co. v Canada Permanent Mortgage Corporation*** 192047 O.L.R. 362 affirmed 48 O.L.R. 407, 57 D.L.R. 500 (C.A.) was presented in ***Veeradon*** in order to explore the definition of what "satisfaction" the first mortgagee was entitled to, in exercising its "paramount right'. Adopting the definition of "satisfaction" by Laycraft J.A. (as he then was) in ***Can. Permanent Trust Co. v King Art Dev. Ltd.*** (1984), 54A.R. 172 (CA.), Belzil J.A. goes on to point out that the "paramount right" of the first mortgagee was to be repaid in money.

[21] The term "as it pleases", relating to this "paramount right" of the first mortgagee, refers to how the right is to be enforced, not against whom, as Belzil J.A. explained at para. 16:–

> The important qualification to marshalling which appears in the authorities cited, and was apparently overlooked below, is that its application is not to prejudice the "paramount" right of the first mortgagee to realize its securities and pursue its remedies as it pleases. Its primary right is to receive and enforce payment of its debt in money. It is its election, and its alone, to seek a 'Rice" order upon terms satisfactory to it, to take the land by final foreclosure or pursue other courses of action such as simply leaving its security in force.
>
> [emphasis added]

[22] 111 says that it is a qualification of the doctrine of marshalling that a primary mortgagee may enforce against any fund "as it pleases", without regard for subsequent encumbrancers. However, Belzil J.A.'s reasons state that a subsequent encumbrancer may not apply the doctrine of marshalling to force the first encumbrancer to accept a method of realization that it did not seek.

[23] Belzil J.A. proceeded to explain at paras. 17 and 18 the situation in which marshalling would be appropriate:

> Equity will not allow the first mortgage to needlessly wipe out the second mortgage by paying itself firstly out of funds derived from the properties covered by both mortgages. The first mortgagee must leave as much as possible for the second mortgagee out of funds derived from properties covered also by the second mortgage. In modern practice, the funds derived from sale will be under control of the court, and the court will marshall by simply directing payment accordingly.
>
> When marshalling applies, there is really no contest between the first and second mortgagees. The underlying issue is between the second mortgagee and the mortgagor and its assigns... The sole interest of the first mortgagee is in receiving the money due to it, and marshalling will not affect that interest. It is immaterial to the first mortgagee whether it gets its money from one fund or the other. Equity assumes that any reasonable first mortgagee would want to act honourably, and not capriciously, by leaving as much as possible for the second mortgagee....
>
> [emphasis added]

Marshalling Is Available Where There Is More than One Debtor, and to Creditors Other than Mortgagees

[24] 111 also relies on the British Columbia decision of ***Bancorp Investments (Fund 2) Ltd. v Bhugra Holdings Ltd.***, 2006 BCSC 893 ["***Bancorp***"], in arguing both:

a) that marshalling may not be applied to a situation where (as here) there are two debtors granting security for the same debt; and

b) that marshalling is not available to "creditors with unproven claims" or those "whose interest in land arises by statutory charge."

[25] 111 cites and quotes from the two B.C. cases underpinning the reasoning in ***Bancorp***: ***Hirsh v 467145 B.C. Ltd.***, [1996] B.C.J. No. 1901 (S.C.) ["***Hirsh***"]; and ***Goodman v Parkhurst***, [1980] 6W.W.R. 601 (B.C.S.C.) ["***Goodman***"]. None of ***Bancorp***, ***Hirsh***, or ***Goodman*** is binding on this Court.

[26] In ***Narduzzi v Richardson***, 2009 BCSC 588 the B.C. Supreme Court dealt with an application for marshalling brought by a Builders Lien claimant. The owner of the property objected that the claimant was not entitled to marshalling, relying on ***Bancorp*** (there referred to as "***Bhugra***"), ***Hirsh***, and ***Goodman***. Burnyeat J. reviewed those cases and their reasoning and found at paras. 20, 23 and 24:–

> Regarding the decision in ***Goodman***, *supra*, it should be noted that no explanation is given by Hutcheon, J., as he then was, as to why he had "many doubts' whether

> the doctrine of marshalling applies to a person who has a charge against land created by statute. It should also be noted that the application was dismissed because the second property which the applicant sought to marshal was in Ontario, and there was insufficient evidence on the connection between the parties to confer jurisdiction on the B.C. Court. Accordingly, the decision in Goodman, supra, can be distinguished on the basis that the jurisdiction of the Court was not established.
>
> Regarding the decision in ***Hirsch**, supra*, it should be noted that Master Bishop relied on the decision in ***Goodman**, supra*, and followed that decision on the basis that the lienholders merely had claims for an undetermined amount of money on the property, whereas a mortgagee was a secured creditor for monies actually advanced from time to time on its mortgage. In addition to being satisfied that the decision in ***Hirsch***, *supra*, is not binding on me, I am also satisfied that the Learned Master was in error in assuming that a lienholder is not in the same position as a mortgagee with respect to the doctrine of marshalling.
>
> Regarding the decision in ***Bhugra**, supra*, it should be noted that there was a finding that apportionment rather than marshalling was applicable and that the doctrine of marshalling did not apply. In that regard, apportionment can be described as a situation where an owner mortgages two properties in favour of the same first mortgagee, but then mortgages the first property to "8" and the second property to "C". In that situation, the doctrine of "marshalling by apportionment" applies as equity interposes to provide that the claim of the first claimant is borne by two funds rateably: *Halsbuy's* (4th ed) Vol. 16, p. 785, at para. 876. The decision in ***Bhugra**, supra*, was that marshalling by apportionment did not apply as there were two properties owned by separate parties. Accordingly, the statements regarding whether marshalling or marshalling by apportionment was available to a lien holder were obiter dicta.
>
> [Emphasis added]

[27] In ***Narduzzi***, Burnyeat J. concluded that marshalling was available to the lien holder.

[28] ***Narduzzi*** was followed by this Court in ***Gerrow v Dorais***, 2010 ABQB 560. In ***Gerrow***, Manderscheid J. considered the reasoning in ***Veeradon***, ***Bancorp***, and ***Narduzzi*** in granting judgment, directing marshalling with apportionment. He found (citing ***Narduzzi***) at para. 27 that "[t]he doctrine of marshalling is not applied only to mortgagees, and accordingly, I know of no reason why the holder of a builders' lien cannot have resort to the doctrine of marshalling".

[29] It is of note that ***Gerrow*** adopts and applies the reasoning of Laskin J. (as he then was) in ***Victor Investment Corp. Ltd. et at v Fidelity Trust Co.***, [1975] 1 SCR 251, 41 D.L.R. (3d) 65 to the effect that marshalling by apportionment arises in relation to two properties held in separate hands, but subject to one mortgage debt covering both of them. The Applicant notes that

Bancorp distinguished these comments by Justice Laskin as being obiter dicta, however, Laskin, J.'s reasons have now been adopted as the *ratio decidendi* in ***Gerrow***.

[30] Both ***Gerrow*** and ***Victor*** follow the principle of law and equity discussed and applied in ***Brown v Canadian Imperial Bank of Commerce***, (1985), 50 O.R. (3d) 420 (H.C.J.) in which Southey J. found 'that ***Quay v Sculthorpe*** (1869), 16 Gr. 449 [a decision of the Upper Canada Court of Chancery, also reported at [1869] O.J. No. 246 [QL]] is authority for applying the doctrine of marshalling, even though there is no common debtor." Hargrave P. in both ***Nel*** and ***Alarissa***, *supra*, follows the same principle.

[31] 111 further submits that Prothonotary Hargrave in ***Nel*** concluded that Canadian authorities limit marshalling relief to those with "in rem" interests, based on the case of ***Williamson v Loonstra***, (1973), 34 D.L.R. (3d) 275 (B.C.S.C.).

[32] ***Williamson v Loonstra***, and a number of other cases, had been advanced in ***Nel*** by the Bank of Scotland in opposition to the application of marshalling. Prothonotary Hargrave reviewed the authorities and the legal principles and declined to follow the reasoning in the cases advanced by the Bank of Scotland, stating at paras. 20 and 21:–

> This present dispute over the right to marshal is an issue on which current precedent ought not to be followed blindly, particularly given the law surrounding the equitable roots of marshalling. However the cases cited on behalf of the Sank of Scotland can also be dealt with in another way, by limiting them to their facts.
>
> The ***Loonstra*** case (*supra*) may be distinguished as the interest of the creditors, in that instance, through the mortgagor, that is, a pure in personam claim. In the present instance the creditors have an in *rem* interest. This rationalization does no violence to the original concept of marshalling, which clearly extended to contractual creditors, yet does not disturb either ***Loonstra*** or ***Breadman Inc., Re***, which is based on ***Loonstra***.

[33] It is of note that "the creditors" referred to in ***Nel*** included lien claimants, as did the creditors in ***Narduzzi***, in which Burnyeat J. found the ***Loonstra*** case to be outdated and unhelpful, on the basis that it had been decided before amendments had been made to legislation respecting the registration of judgments against property.

Does Marshalling Cause "Prejudice" in the Present Matter

[34] 111 submits that third parties would be prejudiced by marshalling in this case, although the only "third parties" referred to by the Applicant are ***Lanyard***, 120, and 111.

[35] I conclude that there is no prejudice in applying the doctrine of marshalling with respect to the security held by Lanyard. Lanyard's "sole interest' is to receive the money due to it under

the Mortgage. It is immaterial to Lanyard which fund it looks to in order to do so. Equity dictates that Lanyard "must leave as much as possible for the second mortgagee out of funds derived from properties covered also by the second mortgage", so as to avoid needlessly wiping out of the second mortgagee's security.

[36] The Condominium Corporation does not ask for an order compelling Lanyard to enforce its security in any particular way, or at all. The Plaintiff has simply asked for, and been granted, an attachment order protecting its security against Title to the lands at issue, and wishes only for the Court marshal the prior securities in such a way that their enforcement will not "needlessly wipe out" that attachment order.

[37] 111 submits that it and 120 are 'third parties" who would be "prejudiced" by marshalling. 120 and 111 are the owners of Sheep Creek and Station 33rd, respectively. They are both debtors to Lanyard, and both stand in the same place as did the two owners before Manderscheid J. in ***Gerrow***, Laskin J. (as he then was) in ***Victor***, and Southey J. in ***Brown***.

[38] That the doctrine of marshalling is applied to require a first encumbrancer to realize first against one owner before the other, cannot be prejudical to the owners, or else the doctrine would be rendered meaningless. The "prejudice" referred to in ***Veeradon*** is explained by Belzil J.A., quoting from *Sneil's Principles of Equity*, 28th ed. (1982), p. 416:

> In the above example, B's right to marshal will be enforced not only against the original mortgagor but also against all persons claiming through him as volunteers, as where the mortgagor dies and Blackacre and Whiteacre pass to different persons. But it is not allowed to prejudice purchasers or mortgagees of one of the estates. Thus if in the above example the mortgagor had created another mortgage of Whiteacre in favour of C, B would have no equity to throw the whole of A's mortgage on Whiteacre, and so destroy C's security.
>
> [emphasis added]

[39] No such similar "prejudice" to party "C" exists in this case.

[40] 111 submits that there is prejudice against 120 or 111 as against each other, however there is no evidence or explanation for why 120 and 111 would have security rights against one another, or would be subsequent claimants against the Titles held by one another. Nor is there any evidence or explanation advanced about a potential breach of contract between 111 and 120.

[41] The fact that Lanyard enforces against Sheep Creek first and against Station 33rd second, so as to avoid extinguishing the Plaintiff's security on Station 33rd, is not prejudicial to the Appellants. "Prejudice" does not mean the loss of an opportunity to defeat the claim of a creditor by taking advantage of the actions of another creditor.

Conclusion

[42] Marshalling as a concept means that: if a senior creditor has recourse to two funds, “A” and “B”, for satisfaction of its debt, and a junior creditor ranking below has recourse to only fund “B”, then equity directs that the senior creditor recover first from fund “A” as far as possible, so as to avoid needlessly extinguishing the junior creditor’s recourse to fund “B”.

[43] Marshalling applies where the funds belong to the same debtor, or to two or more debtors with respect to the same debt.

[44] Marshalling will not allow prejudice to another junior creditor, such as where there is a third creditor with recourse only to fund “A”. Nor will marshalling allow prejudice to the senior creditor’s “paramount right” to be repaid in accordance with its debt agreement. However, the fact that marshalling requires the senior creditor to look to one fund versus the other is not prejudice: its only interest is in being repaid and it is immaterial which fund it is repaid from.

[45] In this situation, and absent demonstrated prejudice, equity dictates that marshalling should apply for the protection of the Condominium Corporation, requiring Lanyard to satisfy itself first from the fund available to it but not to the Condominium Corporation (Sheep Creek), so as to avoid needlessly extinguishing the Plaintiff’s security over the other fund (Station 33).

[46] In the result, I dismiss the appeal of 111 and 120, and uphold the Attachment Orders of the Master.

Heard on the 4th day of April, 2012.
Dated at the City of Edmonton, Alberta this 11th day of April, 2012.

Donald Lee
J.C.Q.B.A.

Appearances:

Jerritt R. Pawylk
Bishop & McKenzie LLP
for Condominium Corporation No. 082 6970

James Thorlakson
Miller Thomson LLP
for 120990 Alberta Ltd.

Lanny G. James
Biamonte, Cairo & Shortreed LLP
for 1117396 Alberta Ltd.

1985 CarswellOnt 729
Ontario Supreme Court, High Court of Justice

Brown v. Canadian Imperial Bank of Commerce

1985 CarswellOnt 729, 30 A.C.W.S. (2d) 468, 37 R.P.R. 128, 50 O.R. (2d) 420

BROWN v. CANADIAN IMPERIAL BANK OF COMMERCE et al.

Southey J.

Heard: March 4 and 5, 1985
Judgment: April 22, 1985
Docket: No. 12802/83

Counsel: *C.C. Mark, Q.C.* and *M.P. Thompson*, for plaintiff.
Kenneth Rosenberg, for defendant Canadian Imperial Bank of Commerce.
Stephen Bale, for defendants Constantine and Julie Amourgis and Strawrene Ltd.

Subject: Property; Corporate and Commercial

Headnote

Mortgages --- Priorities — Between types of creditors — Registered mortgagees — Marshalling

Marshalling — Debtor being surety debtor for one creditor, principal debtor for another — Debts of surety creditor and other creditor secured by mortgages on same property — Surety creditor having additional security for same debt — Surety creditor being paid out of proceeds of sale of mortgaged property — Applicability of doctrine of marshalling.

Plaintiff, as trustee, was mortgagee under a third mortgage given by J.A. against a property on D Road. The result of proceedings brought by plaintiff to enforce that mortgage was the sale of the property to one S. The full amount of the proceeds from that sale was used to pay prior encumbrancers, including the second mortgagee, Canadian Bank of Commerce (C.I.B.C.).

C.I.B.C.'s second mortgage on the D Road property was collateral security to the guarantee of J.A. for the indebtedness of one Strawrene Ltd. to C.I.B.C. C.I.B.C. also held a second mortgage, securing the same debt, against an S Street property owned by Strawrene Ltd. There were three subsequent mortgages on that property. C.I.B.C. also had taken an assignment of a chattel mortgage in favour of Strawrene Ltd. as security for the same debt.

As the result of enforcement proceedings previously taken against the S Street property and under the chattel mortgage, there were two funds that, pending the determination of certain outstanding issues, were available to C.I.B.C. to discharge the indebtedness of the principal debtor, Strawrene Ltd., and of its surety, J.A. Plaintiff sued for an order requiring C.I.B.C. to marshal its debts. Plaintiff requested that it be subrogated to C.I.B.C.'s interest in the two funds. C.I.B.C. appeared but did not defend.

Held:

The fund originating in the S Street property was not subject to the doctrine of marshalling. The fund originating in the chattel mortgage was subject to the doctrine of marshalling and plaintiff was entitled, therefore, to a transfer of C.I.B.C.'s interest therein.

The doctrine of marshalling is intended to achieve fairness. It was not an objection to its application in this case that C.I.B.C.'s debt had been paid voluntarily by plaintiff out of the sale proceeds of the D Road property. In that respect, plaintiff had no real choice but to pay C.I.B.C. as the holder of a prior mortgage which S, its purchaser, was not willing to accept. Nor was it an objection that J.A. was only the surety of the C.I.B.C. debt and the principal debtor on plaintiff's debt.

Allowing plaintiff to be subrogated to C.I.B.C.'s claim in the fund originating in the S Street property would prejudice the position of the subsequent encumbrancers of that property. On that basis, the doctrine of marshalling could not be applied to that fund. It could be applied only to the chattel security fund.

APPLICATION for order to marshall funds.

***Southey J.*:**

1 The plaintiff, as trustee, was mortgagee under a third mortgage given by the defendant Julie Amourgis against a property at 24 Dunloe Road in Toronto. The result of proceedings brought by the plaintiff to enforce that mortgage was the sale of the property to one Stieglitz for $435,000. The full amount of the purchase price was used to pay the costs of the sale and the claims of first and second mortgagees and execution creditors whose claims had priority over that of the plaintiff. The second mortgage was in favour of the defendant Canadian Imperial Bank of Commerce; $174,937.50 was paid to discharge it. The bank had claims against two other funds for satisfaction of the indebtedness for which the second mortgage against 24 Dunloe was security. The issue in the case is whether the plaintiff can invoke the equitable doctrine of marshalling to require the bank to transfer to the plaintiff its rights against the two other funds so that the plaintiff can recoup therefrom the said sum of $174,937.50.

2 The bank took no position on the issue. Counsel agreed at the opening of trial that the costs of the bank should be fixed at $500, and that that sum should be paid first out of any fund to which the plaintiff was found to have access. Counsel for the bank was then excused.

3 The doctrine of marshalling is stated thus in 16 Hals. (4th ed.,) p. 962:

> Where one claimant, A, has two funds, X and Y, to which he can resort for satisfaction of his claim, whether legal or equitable, and another claimant, B, can resort to only one of these funds, Y, equity interposes so as to secure that A shall not by resorting to Y disappoint B. Consequently, if the matter is under the court's control, A will be required in the first place to satisfy himself out of X, and only to resort to Y in case of deficiency; and if A has already been paid out of Y, it will allow B to stand in his place as against X. This is known as the doctrine of marshalling, and is adopted in order to prevent one claimant depriving another claimant of his security. The doctrine is applied chiefly in regard to securities and to the administration of assets.

4 The authors go on in the next paragraph to state 3 conditions that are generally necessary for the application of the doctrine. The first of these is relevant to this case, as is a condition respecting third persons. The text reads as follows on pp. 962-963:

> Generally, three conditions must be satisfied in order that the doctrine of marshalling may be applied as regards claims by creditors. First, the claims must be against a single debtor. If one creditor has a claim against C and D, and another creditor has a claim against D only, the latter creditor cannot require the former to resort to C unless the liability is such that D could throw the primary liability on C, for example where C and D are principal and surety. ..... The doctrine will not be applied to the prejudice of third persons, even if they are volunteers; .....

The Facts

5 It is not clear from the authorities whether the doctrine of marshalling applies in this case, and I must describe in some detail the mortgages given on two properties, 24 Dunloe Road and 63 Shuter Street in Toronto, and the origin of two funds from which the bank claimed the right to payment of the debts of the defendant Strawrene Limited. The payment to the bank of the said sum of $174,937.50 out of the proceeds of the sale of 24 Dunloe was in satisfaction of the indebtedness of Strawrene to the bank, which had been guaranteed by both of the defendants Amourgis. The two other funds resulted from orders of Houlden J.A. dated November 26, 1982, and of John Holland J. dated April 29, 1983. The former contained about $77,250, with additional interest; the latter now stands at about $103,000, with further amounts totalling about $50,000 to be paid into it.

Title to 24 Dunloe Road

6 Julie Amourgis acquired title to 24 Dunloe as trustee on September 14, 1973. At the time of the sale to Stieglitz in November 1983, the property was subject to the following:

> (1) a first mortgage to Harold Kay, as trustee, on which $179,577.42 was owing at the date of closing of the Stieglitz sale.

(2) A second mortgage to the defendant bank which was discharged on the closing of the Stieglitz sale by payment of $174,937.50. This mortgage was collateral security for the liability of Julie Amourgis on a guarantee of the indebtedness of Strawrene to the bank. Such indebtedness was paid in full by the said sum of $174,937.50.

(3) A third mortgage to the plaintiff as trustee, for $350,000, which was collateral security for the 3rd, 4th and 5th mortgages given by Strawrene on 63 Shuter to Nugate Holdings, May Ekstein, and Rose and Bernard Fluxgold. Those mortgages are referred to in paras. (iii), (iv) and (v) below. When this 3rd mortgage on 24 Dunloe fell into arrears, the plaintiff commenced foreclosure proceedings early in 1982. Julie and Constantine Amourgis defended the action, and on December 14, 1982, Master Sandler gave judgment against them for $351,132.05, being the amount owing on the mortgage with costs, and directed that the property be sold with the approbation of the Master at Toronto unless that sum was paid into court by June 14, 1983. The sum was not paid, and the sale to Stieglitz for $435,000 resulted in November, 1983.

Title to 63 Shuter Street

7 Strawrene Limited, in Trust, acquired 63 Shuter Street in May, 1978. The following mortgages were outstanding against the property, in the following priority, as of January 1982:

(i) Mortgage for $450,000 in favour of Harold Kay as trustee, dated 12th March, 1979. Constantine and Julie Amourgis joined in this mortgage as covenantors and principal debtors.

(ii) Mortgage for $250,000 in favour of the bank, dated March 13, 1979.

(iii) Mortgage for $70,000 in favour of Nugate Holdings Limited dated 9th May, 1978. Constantine and Julie Amourgis joined in this mortgage as covenantors and principal debtors.

(iv) Mortgage for $50,000 in favour of May Ekstein, dated 7th July, 1981.

(v) Mortgage for $150,000 in favour of Rose and Bernard Fluxgold, dated 7th July, 1981.

Fund resulting from order of Houlden J.A., November 26, 1982

8 Harold Kay proceeded under the power of sale contained in the mortgage to him of 63 Shuter Street. By deed dated January 15, 1982, he conveyed the property to Ming Sun Holdings Inc. Strawrene brought an action to set aside the conveyance on the ground that the power of sale was improperly exercised, and registered a lis pendens against the property. Montgomery J. dismissed the action and vacated the lis pendens by order dated October 19, 1982. The order dismissing the action was set aside on appeal, but not the order vacating the lis pendens. Instead, by order of Houlden J.A. dated November 26, 1982, Messrs. Hall, Baker, Goodman, the then solicitors for Harold Kay, as Trustee, were directed to continue to hold in trust in interest bearing certificates of deposit the surplus available for distribution to subsequent encumbrancers upon the sale under the power of sale, and that the surplus should not be distributed except upon a further order of the Court made upon notice to all subsequent encumbrancers. Strawrene has not proceeded with the action. The said surplus is presently being held in trust by the law firm of Saunders and Spring, which is the firm with which Mr. Harold Spring is now associated. He was associated with Hall, Baker, Goodman at the time of the order of Houlden J.A. The fund now amounts to about $77,250 together with accrued interest.

9 The indebtedness of Strawrene to the bank, for which the second mortgage on 63 Shuter was security, has been satisfied by payment of the sum of $174,937.50 out of the proceeds of the sale of 24 Dunloe. That payment resulted in the discharge of the second mortgage on 24 Dunloe. The plaintiff claims in this action under the doctrine of marshalling the right to have transferred to him the bank's rights against the surplus held by Harold Spring's firm as a subsequent encumbrancer under its second mortgage on 63 Shuter Street. Unless Strawrene is successful in its action to set aside the sale of 63 Shuter Street under the first mortgage, the plaintiff, if entitled to stand in the position of the bank, would be entitled to the whole of the said surplus, if marshalling is permitted.

Fund resulting from order of John Holland J., April 29, 1983.

10 By indenture dated December 15, 1978, the bank received an assignment from Strawrene of a chattel mortgage that had been given by a numbered company, 383782 Ontario Limited, to Strawrene on 13 June, 1978, and which was guaranteed by Edward A. Lai. The assignment was collateral security for the indebtedness of Strawrene to the bank. Strawrene and the bank sued Lai on the guarantee, and the action was settled by minutes of settlement dated November 9, 1982, in which Lai agreed to pay to or at the direction of the plaintiffs the sum of $145,616.25 in a series of payments over a period of time. Because of a dispute between the bank and Strawrene as to the disposition of payments from Lai, John Holland J. made an order on April 29, 1983, that all payments under the settlement be made into court. The amount paid into court as of December 13, 1984, with interest, was $103,512.21. A further sum of about $50,000 remains to be paid into court under the minutes of settlement.

Application of the doctrine of marshalling

11 The result of the foregoing is that the bank, when it received payment from the plaintiff of the sum of $174,937.50 in satisfaction of the indebtedness of Strawrene to the bank and of the indebtedness of Julie Amourgis under the second mortgage on 24 Dunloe, had, in addition to that second mortgage, two other funds from which it could claim payment of the indebtedness of Strawrene. The plaintiff, on the other hand, had only the security of his third mortgage on 24 Dunloe in respect of his claims against Julie Amourgis. The funds arose out of the debts of Strawrene, while the second mortgage on 24 Dunloe was a liability of Julie Amourgis, so that the claims of the creditors, the bank and the plaintiff, were not against a single debtor. But the second mortgage on 24 Dunloe was given by Julie Amourgis as collateral security for her guarantee of the debt of Strawrene to the bank. To use the words in the passage from Halsbury quoted above, Julie Amourgis was the surety and Strawrene was the principal (i.e. principal debtor), so that she could throw the primary liability on Strawrene. The exception to the general rule that there must be a single debtor for marshalling was therefore fulfilled.

12 I think Mr. Mark was right in his submission that Quay v. Sculthorpe (1869), 16 Gr. 449 (Ont. C.A.), is authority for applying the docrine of marshalling in this case, even though there is no common debtor. Van Koughnet C., with whom Mowat V.C. concurred, quoted at p. 456 and applied the following passage from the decision of Bell J., delivering the judgment of the Supreme Court of Pennsylvania in Neff v. Miller, 8 Barr 347:

> Here is a surety, whose money has been applied in payment of the debt of his principal, to the exclusion of his own proper creditors. That he would be entitled to come in, by way of substitution, upon the estate of the principal, is every-day equity; and I think it equally clear that his creditor, who has suffered by the appropriation of a fund which otherwise would have been available for the discharge of his claim, may well ask to stand upon this equity, to the extent of the deprivation to which he has been subjected.

13 The decision of Haines J. in G. Ruso Const. Ltd. v. Laviola (1976), 27 Chitty's L.J. 136 (Ont. H.C.), on which Mr. Bale relied, is clearly distinguishable, in my view, because there the debtor whose property was taken had no right to require the other debtor to pay in the first instance.

14 Mr. Bale further submitted that there should be no marshalling in this case, because the doubly secured creditor (the bank) had not taken proceedings to enforce its mortgage against 24 Dunloe. Those proceedings were brought by the singly secured creditor (the plaintiff), who then paid off the bank in order to obtain a discharge of the second mortgage against 24 Dunloe, when he was under no obligation to do so. Mr. Bale argued that the plaintiff could have sold the property to Stieglitz without paying off the second mortgage, and that, in fact, it was Steiglitz, not the plaintiff, who paid off the bank's indebtedness.

15 Although the doctrine of marshalling is usually relied upon in proceedings brought by the doubly secured creditor, I do not think it should be limited to such cases. There was evidence in the case at Bar that Julie Amourgis was in breach of her obligation under the third mortgage to pay the taxes on 24 Dunloe. I do not think the singly secured creditor should be required to stand by and watch his security deteriorate. Nor do I think the plaintiff had any real choice but to pay off the second mortgage to the bank. It would be most unlikely that the purchaser, Stieglitz, would have been willing to assume it, in view of the fact that it was a collateral mortgage. Had he done so, he would have become involved in the dealings between the bank and its debtor, Strawrene.

16 The doctrine of marshalling is intended to achieve fairness. In the absence of any authority to the contrary, I can see no reason why marshalling should be denied in this case simply because the proceedings were brought by the singly secured creditor, and he paid off the doubly secured creditor out of a practical necessity to do so, but without any legal obligation.

17 There is only one other point raised by Mr. Bale that I think should be mentioned, but it provides a complete defence to the claim for marshalling in respect of the fund created by the order of Houlden J.A. It is the equitable rule that marshalling will not be applied to the prejudice of third persons.

18 If the plaintiff is not permitted to be subrogated to the bank's rights against the surplus realized on the sale of 63 Shuter Street by power of sale under the first mortgage, then that surplus would be paid successively to the 3rd, 4th and 5th mortgagees. Most of it would be used to satisfy the 3rd mortgage for $70,000 to Nugate Holdings Limited. Although I was told by counsel that the plaintiff holds the 3rd mortgage on 24 Dunloe as trustee for the mortgagees under the 3rd, 4th and 5th mortgages on 63 Shuter, there was no evidence that the benefits to them of marshalling would be identical with the benefits they would enjoy from having the surplus applied to one or more of their mortgages. If such benefits were not identical, marshalling, in respect of such surplus, would have the effect in this case of prejudicing the rights of third parties.

19 I do not think it is any answer to this last point to say, as did Mr. Thompson, that the 3rd, 4th and 5th mortgagees would not be prejudiced by marshalling, because they never expected to be given priority over the claim of the bank against 63 Shuter Street under the 2nd mortgage. As it turned out, if marshalling is not permitted, they would be permitted to share the surplus as though they had priority over the bank's 2nd mortgage. It has not been shown that marshalling would not prejudice the rights of some of the 3rd, 4th and 5th mortgagees.

20 There do not appear to be any third parties whose rights would or might be prejudiced by marshalling in respect of the funds accumulated in court under the order of John Holland J. The action will succeed in respect of that fund, but not in respect of the fund held pursuant to the order of Houlden J.A.

21 There will be an order directing that the sum of $500 be paid forthwith to the bank in respect of its costs in this action out of the moneys paid into court pursuant to the order of John Holland J. dated April 29, 1983. The order will further direct that the bank transfer to the plaintiff its interest in the balance of the moneys paid into court pursuant to the said order of John Holland J., and that the plaintiff be entitled to realize the sum of $174,937.50 together with interest on that amount from the date of the order at the rate presently being paid for post judgment interest. The defendants Constantine Amourgis, Julie Amourgis and Strawrene Limited will pay to the plaintiff his costs of the action after taxation thereof, and the plaintiff may realize the amount of those costs out of the bank's interest in the funds in court pursuant to the said order of John Holland J., if the funds are sufficient for that purpose.

Order accordingly.

End of Document