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COURT OF APPEAL FOR BRITISH COLUMBIA

IN THE MATTER OF THE BANKRUPTCY OF D.C. PROPERTIES LTD.	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CUMMING

Before: The Honourable Mr. Justice Hutcheon
The Honourable Mr. Justice Legg
The Honourable Mr. Justice Cumming

Counsel for the Appellant: Frank G. Potts
(Trustee of the Estate of D.C. Properties Ltd.)

Counsel for the Respondent: David A. Gooderham
(1100 Properties Ltd.)

Place and Dates of Hearing: Vancouver, April 5 and 6, 1990

Place and Date of Judgment: Vancouver, June 27, 1990

FOR THE COURT

This is an appeal from the judgment of Madam Justice Prowse who dismissed an application brought by the trustee in bankruptcy of D.C. Properties Ltd. ("D.C.") for a declaration that a mortgage made between D.C. and 1100 Properties Ltd. ("1100") requires the payment of interest at a criminal rate and that certain provisions in the mortgage should therefore be severed, and that the trustees should be entitled to recover the full amount of interest paid by D.C. under the mortgage.

Counsel conceded that the success of his appeal stood upon persuading this Court that the second mortgage between 1100 and D.C. stood alone and that the discharge fees are interest. If he was unsuccessful in persuading us on either of those issues, this appeal must fail.

The judgment is reported at (1989), 34 B.C.L.R. (2d) 371 and [1989] 4 W.W.R. 254. The facts are fully set out in the judgment and I cannot do better than repeat them.

In early 1986, Mr. Udy, a principal of D.C., was seeking financing for a 38-unit strata title development in Langley. Through a mortgage broker, Mr. Thom, Mr. Udy was put in touch with Mr. Kennedy, the mortgage investment manager for Yorkshire. Mr. Udy was seeking 100% financing for the development in the amount of $2,100,000.00. Yorkshire was interested in getting involved in the development but was prohibited by provincial and federal legislation from lending more than 75% of the value of the development. Mr. Kennedy, therefore, suggested that Yorkshire would lend 75% of the financing, being $1,680,000.00, and that Yorkshire would cause its wholly-owned subsidiary, 1100, to loan the balance of 25%, or $420,000.00. It was to be an "all or nothing" deal for the full 100% financing, with Yorkshire to be granted a first mortgage on the land as security, and 1100 to be granted a second mortgage.

D.C. submits that it was a condition precedent to Yorkshire or 1100 agreeing to provide financing that D.C. would provide proof of pre-sales of eight units in the development. Both Mr. Thom and Mr. Udy referred to the pre-sales as being a condition precedent to the lending of the money. Mr. Kennedy deposes that he asked for confirmation of pre-sales, and that pre-sales would "assist Yorkshire in the approval process for the loan" but denies that pre-sales were a condition precedent to financing. The fact of the matter is that no commitment letter for either the first or second mortgage was forthcoming until proof of eight pre-sales had been provided. Whatever Mr. Kennedy may have called this precaution, I am satisfied that Mr. Udy and Mr. Thom correctly described it as being a condition precedent to financing. This fact assumes some significance in light of later developments.

On March 19, 1986, Mr. Udy made application to Yorkshire for a $1,680,000.00 loan, and an application for a $420,000.00 loan to "Yorkshire or nominee". On April 7, 1986, Mr. Kennedy was provided with proof of eight pre-sales. On April 8, 1986, a commitment letter was issued from Yorkshire to D.C., and a second commitment letter was issued from 1100 to D.C. Both commitment letters were executed by D.C. on April 8, 1986.

The relevant terms of the Yorkshire commitment letter included approval of a loan to a maximum of $1,680,000.00 to be secured by a first mortgage, with a variable interest rate at 2% over the Toronto-dominion prime rate; a one-year term expiring May 1st, 1987; the borrower to be entitled to partial discharges of mortgage on the individual strata lots when sold upon payment to Yorkshire of the greater of 80% of the sale proceeds of the units, less $4,000.00 per unit for marketing costs, or $51,200.00 per unit, together with all accrued interest to the date of payment. There was also to be a loan-processing fee, inspection fee, and assignment of rents.

The commitment letter from 1100 to D.C. provided for loan approval to a maximum of $420,000.00 to be secured by a second mortgage, which was to be drawn upon only after full advance under the Yorkshire mortgage, and then only on a cost-to-complete basis. The term and interest rate were the same as for the first mortgage to Yorkshire, and the borrower was entitled to partial discharges of mortgage in respect of individual strata lots when sold upon payment of the greater of 20% of the sale proceeds or payment of $12,800.00 per unit together with all accrued interest to the date of payment, plus a partial discharge fee of $4,000.00 per unit, and other fees. No reference was made in either commitment letter to the other commitment letter.

On April 14, 1986, first and second mortgages in accordance with the commitment letters were executed, as was an assignment of rents.

The terms of the second mortgage between 1100 and D.C. provided, among other things, that 1100, although not bound to advance any funds, would advance up to $420,000.00, that interest only was payable, that all monies owing under the mortgage were due and payable and the mortgage would expire on May 1, 1987, and that any illegal provisions under the mortgage could be severed. It also

incorporated the terms of the commitment letter from 1100 set out above, including the provision for payment of partial discharge fees.

All payments with respect to both mortgages were to be made at 1100 Melville Street, which is the address of Yorkshire, 1100 having no independent address. It has been pointed that Yorkshire and 1100 have one common director and two common officers; Yorkshire and 1100 are separate legal entities, but only Yorkshire is subject to federal and provincial regulation; 1100 has no employees of its own, but employees of Yorkshire were authorized to act on behalf of 1100.

All monies were advanced under the Yorkshire mortgage on or before October 31, 1986. Thereafter, total advances were made under the 1100 mortgage in the amount of $370,000.00, of which $348,087.12 was provided to D.C., and the balance of $21,912.88 was retained by 1100 on account of fees and interest on the 1100 mortgage, and interest on the Yorkshire mortgage. The final $50,000.00 under the 1100 mortgage was never advanced.

As mortgage draws were made, they were apportioned between Yorkshire and 1100. In December, 1986, eight units were sold and the purchase price was allocated between Yorkshire and 1100 by applying a portion to principal and interest on the Yorkshire mortgage, and a portion to principal, interest, and discharge fees on the 1100 second mortgage.

By this time, D.C. was running into some financial difficulties, and was seeking refinancing. On January 15, 1987, D.C. obtained a commitment letter from First Heritage Savings Credit Union ("First Heritage") for sufficient funds to pay out Yorkshire and 1100 for 19 of the remaining 27 units on condition that discharge fees would be waived. 1100 refused to waive the discharge fees and the financing did not complete.

By May 1, 1987, D.C. was in default under its mortgage, but no proceedings in default were taken. On August 28, 1987, a petition in bankruptcy against D.C. was filed. On September 15, 1987, D.C. paid all bonus, principal and interest owing under the 1100 mortgage. Despite the fact, 1100 refused to provide a discharge of its mortgage on the basis that it was entitled to discharge fees for the remaining nine unsold units. On September 18, 1987, a receiving order was made against D.C., and Peat Marwick was appointed Trustee. In January, 1988, the Trustee demanded a discharge of the 1100 mortgage, and 1100 relied on paragraph 24 of the mortgage as entitling it to discharge fees. It is common ground that 1100 was not in fact entitled to discharge fees for any units sold after September 17, 1987, the date upon which the principal and interest under the 1100 mortgage were paid in full.

On February 23, 1988, the Trustee commenced this proceedings, and in March, 1988, an agreement was reached whereby discharge fees were to be paid into trust, and partial discharges of mortgage were to be provided to enable the sales of the final units to complete. On November 29, 1988, 1100 returned the sum of $38,050.14 to the Trustee, representing the discharge fees and interest for all units sold after September 17, 1987. 1100 acknowledges that these fees had been wrongfully withheld from D.C. These monies were accepted by the Trustee for D.C. "without prejudice" to the Trustee's right to argue that D.C. had been prejudiced by the actions of 1100 in insisting that these fees be paid even after the full principal and interest under the 1100 mortgage had been paid.

In addition to those facts set out in the judgment, counsel for the appellant relies upon the following additional facts:

(a) 1100 was not prepared, in any event, to waive discharge fees;

(b) Both the commitment letter and the mortgage prohibited sale of any of the lots without either the consent of Yorkshire Trust Co. Ltd. or 1100.

(c) In the event of a partial sale, the remaining lots stood charged with the balance owing under the mortgage.

The application was originally filed on February 23, 1988. On November

17, 1988 the motion was set down by Court order peremptorily for hearing on December 2, 1988. On November 29, 1988, 1100 returned the sum of $38,050.14, being the amount of discharge fees and interest for all units sold after September 17, 1987.

At the hearing, counsel for 1100 conceded that unless D.C. Properties Ltd. had agreed to the provisions in the mortgage and commitment letter relating to the payment of discharge fees, no monies would have been advanced by 1100.

THE CRIMINAL CODE

The relevant provisions of s. 347 of the ***Criminal Code*** are as follows:

Criminal Interest Rate

347. (1) Notwithstanding any Act of Parliament, every one who

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or

(b) receives a payment of partial payment of interest at a criminal rate,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

'credit advanced' means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

'criminal rate' means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

. . .

'interest' means the aggregate of all charges and expense, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

'official fee' means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

. . .

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment that it was received at

a criminal rate.

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate."

JUDGMENT OF THE TRIAL JUDGE

The Judge rejected a submission made by counsel for 1100 that in determining the question as to whether s. 347 of the ***Criminal Code*** applied, the agreement to be examined was not simply the second mortgage made between D.C. and 1100, but the broader arrangement between D.C. and 1100 and Yorkshire, which involved the financing of 100% financing of the $2,100,000.00 required by D.C. for its proposed development, should be considered. It was common ground both at the trial and on this appeal that if that approach were to be taken, and is the proper approach, the cumulative interest (assuming the inclusion of the partial discharge fees) would not amount to a criminal rate of interest.

The trial judge considered even if there were an arrangement between Yorkshire and 1100, as lenders, and D.C., as borrower, for the 100% financing of D.C.'s project, the arrangement was carried into effect by independent agreements entered into between Yorkshire and D.C. on the one hand, and 1100 and D.C. on the other. It did not save the transaction to call it an "arrangement" if, in fact, the arrangement is carried into effect by an agreement or agreements which contravened s. 347 of the ***Criminal Code***.

The judge said:

. . . Here, 1100 submits that the real cost of borrowing must relate to 100% of the amount financed by Yorkshire and 1100, and not only to the $370,000.00 advanced by 1100. But this begs the question, since the arrangement also provided that the financing be carried out through two different companies and two different agreements, namely the mortgages. What 1100 is really seeking to do is to have the arrangement interpreted in the broadest way possible so as to avoid the interest being broken down between the two arrangements. The arrangement itself was not that vague. Rather, the arrangement was evidenced by commitment letters which are very specific as to how the financing should be apportioned between Yorkshire and 1100. In other words, the agreements are consistent with the arrangement, and subject to the same attack, namely, that a portion of the arrangement, the 1100 mortgage, provided for a criminal interest rate.

I conclude that the Court should look at the mortgage between 1100 and D.C. as a separate agreement subject to individual analysis to determine whether it offends the provisions of s.347 of the Criminal Code.

The Judge then examined the question of whether the discharge fees constituted "interest", and looked particularly at the definitions of "credit advanced" and "interest" in s. 347. She referred to***Mira Design Co. Ltd. and Donmus Design Company Limited v. Seascape Holdings Ltd.*** (1987), 34 B.C.L.R. 56 (B.C.S.C.) where Madam Justice Huddart said at p.60:

"The thrust of the definitions of 'credit advanced' and 'interest' is to cover all possible aspects of any transaction to ensure that the cost of using someone else's money never exceeds the criminal rate. Thus, they focus on the actual benefit given to the borrower and the real cost of borrowing. The actual benefit is the real amount in the borrower's hands minus all the penalties, commission and other costs incurred. The cost of borrowing is also widely defined. Clearly the intention of the Legislature was to concentrate on the substance of the transaction, not on its mechanics or form."

and, as well, to ***Creswell and Gabay v. Raven Bay Holdings Ltd.*** (1984), 53 B.C.L.R. 183 (B.C.S.C.), at p.192 where Mackoff J. stated:

"It is not every fee which is deducted from the money advanced to arrive at the amount of the 'credit advanced'. It would not, for example, apply to the fee paid by the borrower to his lawyer. The 'fee' mentioned in the above definitions must be a fee which is not ordinarily payable by a borrower and which directly or indirectly results in a benefit to the lender personally or to someone whom he designates. Further, it must be a condition of the agreement, imposed by the lender, that he will lend only if the borrower agrees to pay that fee or that the borrower will agree to enter into a collateral agreement o pay the fee. The payment of such a fee or fees is an additional cost of borrowing money and is by the definition considered to be interest paid or payable for the advancement of the loan. Parliament obviously defined 'interest' and 'credit advanced', as above set out, in order to prevent unscrupulous lenders from circumventing the provisions of s.305.1 (now s.347) by means of making the payment of such fees a condition of lending money."

The Judge then considered a submission of counsel for 1100 that the partial discharge fees are not payable for the "advancing of credit" but for the privilege of prepaying a portion of the mortgage and obtaining a partial discharge of the mortgage. He relied upon paragraph 24 of the mortgage which reads as follows:

" 24. PROVIDED however that the Mortgagor not being in default hereunder shall be entitled to receive partial discharges of this Mortgage in respect of the individual strata lot units, upon stratification of the property, upon a bona fide arms length sale of such strata lot unit, upon payment to the Mortgagee of all accrued interest to the date of such payment, and the greater of:-

(a) Twenty (20%) Percent of the sale proceeds of the unit for which a partial discharge is requested, or

(b) the sum of $12,800.00 for each unit for which a partial discharge is requested.

together with a discharge fee of $4,000.00 for each unit for which a partial discharge is requested."

The Judge stated:

I agree with counsel for 1100 that paragraph 24 of the mortgage, in and of itself, does not require any form of payment to be made by D.C. to 1100. It is framed as a term of prepayment to be exercised at the option of D.C. Arguably, D.C. could have made payments of interest only on the mortgage for the term of the mortgage either by not selling any units and/or by selling units but not applying for a partial discharge of mortgage with respect to those units. It seems unlikely, however, that this was what was contemplated by the parties at the time the mortgage was entered into, especially given the fact that eight units had been pre-sold, and the faster the units were sold, the more quickly 1100 could expect to receive its money. I conclude that it was contemplated by both parties at the time they entered into the mortgage that further payments in addition to interest, would be forthcoming as a result of sales during the term of the mortgage. Because of the wording of the mortgage, however, I conclude that payments other than interest were not required during its term and that, in particular, partial discharge fees were not required to be paid pursuant to paragraph 24 or otherwise, except at the election of D.C.

She cited in support of her conclusion the decision of this Court in ***Nelson, Nelson and Nationwide Auto Leasing Ltd. v. C.T.C. Mortgage Corporation*** (1984), 59 B.C.L.R. 221 (upheld on appeal to the Supreme Court of Canada, without reasons). In that case the plaintiffs granted a mortgage to the defendant, the terms of which required interest to be paid at prime plus 6% on an amount to be repaid in six months. The plaintiffs prepaid the mortgage within approximately two and one-half months. The effect of that prepayment was to place the rate of

interest actually received by the defendants over the criminal rate for the shortened term. However, if the interest was calculated on the full six-month term, it fell below the criminal rate. The trial judge held that the "effective rate of interest" was to be ascertained by looking at what the mortgage document required, and not according to a prepayment date chosen by the plaintiffs. In upholding this decision Mr. Justice Anderson, speaking for the court, said at pp.226-27:

> " (5) The construction proposed by the appellants that the 'effective annual rate of interest' be calculated over the period of time that the mortgage is outstanding would mean that the meaning of 'criminal rate' in s.305.1(1)(a) would be different from the meaning of 'criminal rate' in s.305.1(1)(a) was to receive interest at a legal rate (interest over the term of the mortgage). If, however, the mortgage was prepaid prior to the end of term, as here, the respondent would be receiving a "Payment of interest at a criminal rate". Parliament cannot have intended that the words 'criminal rate' have two different meanings, within the same section or that an innocent mortgagee who has entered into a perfectly lawful agreement should as the result of the voluntary act of the mortgagor in prepaying the mortgage become guilty of an offence under s.305.1(1)(b).
>
> The purpose of s.305.1 was to make unlawful agreements or arrangements which require the borrower to pay interest at a 'criminal' rate. The mortgage here does not require payment of interest at an unlawful rate. The exercise of an option by a borrower does not, therefore, fall within s.305.1(1)(a) or (b).
>
> Section 305.1(b) was intended to catch those persons receiving 'interest at a criminal rate' where the agreement required the borrower to pay 'interest at a criminal rate' and thus the words 'criminal rate' have the same meaning in both subsections.
>
> (6) If it could be said that the mortgage contemplates that a 'criminal rate' may be charged depending on the will of the mortgagor, every mortgage containing a prepayment option would contain an unlawful 'criminal rate'. Such an interpretation is preposterous.
>
> (7) Where a criminal statute is capable of two reasonable interpretations, the interpretation which favours the subject should be chosen.
>
> (8) The interpretation that the rate of interest be calculated over the term of the mortgage is inf accordance with commercial reality and at the same time meets the object of the statute, namely, to curb excessive interest charges."

The judge then stated her conclusion:

> "As in Nelson, the payments in dispute here are not required to be paid under the terms of the mortgage therein, therefore, the fact that they were paid and received by 1100 does not place 1100 in breach of s. 347 of the **Criminal Code**, even assuming the fees constitute interest."

The Judge disagreed with an argument made by the counsel for the trustee that regardless of the interpretation of the discharge provisions of the mortgage, 1100 was estopped from taking the position that D.C. was not required to pay the partial discharge fees under the mortgage. The judge held that it had not been established that D.C. suffered any significant detriment as a result of the position taken by 1100, and further, that it would, therefore, be neither unfair nor unjust to allow 1100 to rely upon the plain wording of paragraph 24 of the mortgage. She therefore dismissed the application.

ERRORS ALLEGED

Counsel for the appellant before us submitted that the learned Judge erred:

1. In holding that the agreement between 1100 and D.C. did not

require the payment of discharge fees and that it was open to D.C. to avoid the payment of same by either selling lots without requesting a partial discharge, or by refraining from selling any lots and simply paying interest under the mortgage until expiration thereof.

2. In holding that the agreement between D.C. and 1100 did not constitute a breach of s. 347(1)(a) of the **Criminal Code** and, in particular, in concluding that the discharge fees did not constitute "interest" as that term is defined in s. 347(2) of the **Code**.

3. In holding that the receipt of monies by 1100 on account of discharge fees did not constitute a breach of s. 347(1)(b) of the **Criminal Code** and, in particular, in holding that such monies did not constitute "interest" as the term is defined in s. 347(2).

4. In applying the principles expressed in **Nelson and Nelson and Nationwide Auto Leasing Ltd. v. C.T.C. Mortgage Corporation** to the circumstances of this case.

5. In holding that 1100's refusal to waive discharge fees for the purpose of First Heritage refinancing or for any purpose did not constitute prejudice to D.C. and erred in holding that the wrongful encumbrance of D.C.'s properties as from September 15, 1987, its wrongful demands for and receipt of and retention of discharge fees subsequent to that date, and the resulting expense and inconvenience to D.C. did not constitute prejudice sufficient to found an estoppel against 1100.

WAS THERE BUT ONE ARRANGEMENT ENCOMPASSING THE TWO MORTGAGES

I turn now to the threshold question which is whether there was but one arrangement encompassing the two mortgages, or must the 1100 mortgage be considered as standing alone. This is a vital consideration as it is common ground that if the former is the case this appeal must fail. It thus becomes necessary to consider the evidence bearing upon this question.

I note at the outset, that as appears from paragraph 2 of the respondent's factum, it was agreed when this matter was heard in chambers that whenever there is a conflict of evidence, the evidence of the respondent is to be accepted, except with respect to the evidence of whether or not pre-sales were required as a condition of granting the mortgage.

D.C. Properties was aware that Yorkshire could not, because of certain statutory restrictions which govern its operations as a trust company, finance more than 75% of the development, and that as D.C. was looking for 100% financing it was a term of the loan package that Yorkshire would arrange a second mortgage to be provided by its subsidiary, the respondent 100.

I note in passing that the mortgages which were in fact entered into provided that Yorkshire would advance not 75% but 80% of the total while 1100 would advance 20% instead of 25%. However counsel stated that nothing turns upon this departure from the statutory limitation on Yorkshire's lending powers.

Mr. Brian Kennedy, who at the relevant times was employed by Yorkshire as a mortgage underwriter, had carriage of the negotiations with Mr. Udy, a principal of D.C. In paras. 11 and 12 of his affidavit Mr. Kennedy deposed:

11. I advised Mr. Udy that Yorkshire Trust Company could not provide 100% financing for the Development by itself and consequently the transaction would have to be structured in such a way that Yorkshire Trust Company would advance 75% of the amount required being $1,680,000 to be secured by a first mortgage on the Development and that Yorkshire Trust Company would cause its subsidiary, 1100 Properties Ltd. to advance 25% of the amount required, being $420,000 to be secured by a second mortgage on the Development.

12. I further advised Mr. Udy that notwithstanding that the Loan requested by D.C. Properties Ltd. would be structured in such a way so as to be

split between Yorkshire Trust Company and 1100 Properties Ltd. for all intents and purposes it would be considered as one transaction and consequently the interest rate on both the first mortgage and the second mortgage would be the same rate of prime plus 2% and that it was an all or nothing arrangement to provide the 100% financing requested by him. In particular Mr. Udy was advised that D.C. Properties Ltd. would be required to borrow the full $2,100,000 and could not borrow just the $1,680,000 from Yorkshire Trust Company or just the $420,000 from 1100 Properties Ltd.

In view of the agreement between counsel that the evidence of the respondent is to be accepted, this is unchallenged evidence.

Then, in paragraph 13, Kennedy deposes that Udy agreed to the structuring of the $2,100,000.00 loan requested by D.C. in the manner set out in paragraphs 11 and 12, and stated that he did not care how Yorkshire structured the arrangement as long as D.C. got the 100% financing that it required.

This, again, is unchallenged evidence, which goes to show that there was but one arrangement encompassing two mortgages.

Two applications for mortgage loan forms were completed by D.C. One, for the sum of $1,680,000.00, was on a form headed 'Yorkshire Trust Company' and the second, for $420,000.00, was on an identical form but headed 'Yorkshire Trust Company/or Nominee'.

The commitment letter issued by the respondent 1100 indicates that the Yorkshire loan and the respondent's loan are integrated. It provides, under the heading "FUNDINGS":

The fundings of this loan will be made in conjunction with the advances to be made by Yorkshire Trust Company. Following full advance by Yorkshire Trust company, 1100 Properties Ltd. will commit to fund the balance of $420,000.00 based on the cost-to-complete basis of funding.

and under the heading ACCELERATION:

This loan is to be due and payable at the option of 1100 Properties Ltd. if the property or any part thereof is sold, transferred or further encumbered without the written consent of Yorkshire Trust company.

Kennedy deposes in paragraph 18 that during the construction of the development D.C. made 14 draw requests to Yorkshire. At no time did D.C. make any distinction between funds being drawn down under the Yorkshire first mortgage or the 1100 second mortgage. The mortgage draws, however, were applied by Yorkshire to the Yorkshire Trust Co. mortgage and the 1100 Properties second mortgage, in accordance with the accounting which was provided by Yorkshire.

Again, this is unchallenged evidence.

Kennedy further deposes in paragraph 19 that as individual strata lots in the development were sold, the net proceeds of such sales were paid by or on behalf of D.C. to Yorkshire, and at no time did D.C. give any direction as to whether the payment of such sale proceeds was to be credited to the Yorkshire first mortgage or the 1100 second mortgage. The funds received were applied by Yorkshire to the first and second mortgages in accordance with the accounting to which I have referred.

Again, this is unchallenged.

Finally, in paragraph 20 of his affidavit, Kennedy deposes:

I verily believe that at all material times Yorkshire Trust Company, 1100 Properties Ltd. and D.C. Properties Ltd. treated and dealt with the Yorkshire Trust Company First Mortgage and the 1100 Properties Ltd. Second Mortgage as one arrangement for the purpose of providing 100% financing for the Development, and that the transaction was structured into the Yorkshire Trust Company First

Mortgage and the 1100 Properties Ltd. Second Mortgage solely to ensure compliance by Yorkshire Trust Company with its governing legislation.

Again, it is agreed that this evidence prevails over any conflicting evidence offered by the trustee or D.C.

Further evidence pointing to the fact that the arrangement is a single one encompassing the two mortgages is found in the partial discharge clauses set out in the two commitment letters. In the case of Yorkshire the partial discharge clause reads:

The borrower will be entitled to partial discharges in respect of the individual strata lots, when sold, upon payment of 80% of the sale proceeds of the unit, less $4,000.00 per unit for marketing costs or $51,200.00 per unit, whichever is greater together with interest thereon to the date of payment.

In the case of 1100, the companion clause reads:

The borrower will be entitled to partial discharges in respect of the individual strata lots, when sold, upon payment of 20% of the sale proceeds or upon payment of $12,800.00 per unit (whichever is the greater) together with interest thereon to the date of payment plus a discharge fee of $4,000.00 per unit.

It can be seen that the partial discharge clauses were dove-tailed to provide that on payment of the amounts specified D.C. was entitled to partial discharges under both mortgages.

In view of this evidence which I have reviewed and which the appellant conceded must prevail, I think the chambers judge erred when she rejected the contention of the respondent that the arrangement between D.C., 1100 and Yorkshire was one transaction to provide 100% financing for the 38-unit development and that the overall interest payable pursuant to that arrangement (even assuming the inclusion of the partial discharge fees) does not constitute a criminal rate of interest.

I agree with the submissions of counsel for the respondent that when s.57 of the ***Trust Company Act*** R.S. 1979, c.412 is read in conjunction with Investment Approval Regulation No.2, O.C. 18/78, Yorkshire did not contravene the Act or the Regulations by using its subsidiary 1100 to make a joint investment. I would reject the contention of counsel for the appellant that 1100 and Yorkshire's arrangement of the mortgages was contrary to the Act or the Regulation.

Having reached these conclusions it is not necessary to deal with the other arguments advanced by the appellants.

For these reasons I would dismiss the appeal.

THE HONOURABLE MR. JUSTICE CUMMING

I AGREE: THE HONOURABLE MR. JUSTICE HUTCHEON

I AGREE: THE HONOURABLE MR. JUSTICE LEGG