

2018 ONCA 672  
Ontario Court of Appeal

58 Cardill Inc. v. Rathcliffe Holdings Limited

2018 CarswellOnt 12561, 2018 ONCA 672, 294 A.C.W.S. (3d) 852

**58 Cardill Inc. (Applicant / Respondent) and  
Rathcliffe Holdings Limited (Respondent / Appellant)**

K. Feldman J.A., C.W. Hourigan J.A., David Brown J.A.

Heard: July 4, 2018

Judgment: August 2, 2018

Docket: CA C64744

Proceedings: affirming *58 Cardill Inc. v. Rathcliffe Holdings Limited* (2017), 55 C.B.R. (6th) 230, 84 R.P.R. (5th) 44, 2017 CarswellOnt 17908, 2017 ONSC 6828, Sanfilippo J. (Ont. S.C.J.); additional reasons at *58 Cardill Inc. v. Rathcliffe Holdings Limited* (2017), 2017 CarswellOnt 19995, 2017 ONSC 7545, Sanfilippo J. (Ont. S.C.J.)

Counsel: Robert Choi, for Appellant  
Richard Worsfold, for Respondent

**Per curiam:**

**I. OVERVIEW**

1 The appellant, Rathcliffe Holdings Limited ("Rathcliffe"), loaned money to the respondent, 58 Cardill Inc. ("Cardill"), secured by a mortgage on a development property (the "Mortgage"). Cardill defaulted on the loan.

2 Rathcliffe, exercising its rights under the Mortgage, appointed a receiver over the property. The receiver, Schwartz Levitsky Feldman Inc. ("SLF Inc."), sold the property and paid part of the sale proceeds to Rathcliffe in full satisfaction of the Mortgage debt, including accrued interest. The amount paid to Rathcliffe included approximately \$351,000, representing an extra three months' interest on the outstanding principal due under the Mortgage.

3 Rathcliffe took the position that it was entitled to the three months' interest pursuant to one of the additional provisions contained in Schedule "B" of the Mortgage (the "Additional Provisions"), which states:

12. The said Chargor covenants with the Chargee that in the event of non-payment of the principal amount at the time or times above provided in the mortgage then *he shall not require the Chargee to accept payment* of the said principal amount without first giving three months' previous notice in writing, or paying a bonus equal to three months' interest in advance on the said principal amount. [Emphasis added.] [Hereafter the "Three-Month Interest Provision"]

4 Following the payout of the Mortgage, Cardill applied for a declaration that Rathcliffe was not entitled to the three months' interest and an order requiring Rathcliffe to pay the amount to Cardill. The application judge granted the relief Cardill sought.

5 Rathcliffe appeals. For the reasons that follow, the appeal is dismissed.

**II. ANALYSIS**

6 Rathcliffe does not take issue with the application judge's finding, at paras. 21-23, that s. 17 of the *Mortgages Act*, R.S.O. 1990, c. M.40, does not apply where a mortgagee acts to realize on its security by appointing a receiver: see *Ialongo v. Serm Investments Ltd.* (2007), 54 R.P.R. (4th) 310 (Ont. S.C.J.), at para. 30. Instead, Rathcliffe grounds its claim to interest in the Mortgage's Three-Month Interest Provision.

7 Rathcliffe submits the application judge erred by interpreting the Three-Month Interest Provision as one that is mortgagee-centric, embodying a right available to the mortgagee: at para. 35. In Rathcliffe's view, the provision is mortgagee-centric in that it obligates the mortgagee, upon default, either to give the three-month written notice or make a payment in lieu of notice. It argues that the receiver, acting as agent for the mortgagee, required the mortgagee to accept payment of the Mortgage debt, thereby triggering the provision.

8 In our view, the application judge made no error in rejecting Rathcliffe's submission.

9 First, we agree with the application judge that the language of the Three-Month Interest Provision indicates that it is only when the Chargor seeks to require the Chargee to accept payment of the principal amount that the Chargor agrees either to pay the three months' interest or give the three months' notice.

10 Second, we do not accept Rathcliffe's argument that the application judge misunderstood the jurisprudence when he concluded that the receiver did not act as Cardill's agent in paying out the Mortgage on the receiver's sale. The application judge correctly stated the governing general principle, articulated by Houlden J.A. in *Peat Marwick Ltd. v. Consumers' Gas Co.* (1980), 29 O.R. (2d) 336 (Ont. C.A.), at p. 344:

It seems to me that the receiver and manager in a situation, like the present, is wearing two hats. When wearing one hat, he is the agent of the debtor company; when wearing the other, the agent of the debenture holder. In occupying the premises of the debtor and in carrying on the business, the receiver and manager acts as the agent of the debtor company. In realizing the security of the debenture holder, notwithstanding the language of the debenture, he acts as the agent of the debenture holder, and thus is able to confer title on a purchaser free of encumbrance.

11 Nor do we accept Rathcliffe's argument that the application judge erred in law when, at para. 44 of his reasons, he held that "[i]t would be a mischaracterization of the role of SLF Inc. as the receiver privately appointed by Rathcliffe to state that the steps taken by SLF Inc. to realize maximum recovery of the Property for the benefit of Rathcliffe were actually taken by SLF Inc. on behalf of Cardill for the purpose of requesting a pay-out of the Mortgage." As this court stated in *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.), at p. 277: "It is only 'in realizing' that the receiver acts as the creditor's agent — to give commercial efficacy to the security agreement, i.e., so that title may be conferred on the purchaser free of encumbrance."

12 In the present case, the receiver's sale agreement with the third party purchaser required the conveyance of title to the purchaser free and clear of all encumbrances, including the Mortgage. In order to convert the charged asset into cash — i.e., close the sale transaction — the receiver was required to discharge the Mortgage. To do that, it had to pay Rathcliffe. That payment was not made at the request of Cardill but to complete the sale. As a result, the process of "realization" during which the receiver acted as Rathcliffe's agent necessarily encompassed the discharge of the Mortgage by payment to the mortgagee. Consequently, the application judge did not misunderstand or misapply the general principles in the jurisprudence.

13 Rathcliffe contends that the brief endorsement of this court in *1220510 Ontario Inc. v. Radium-O Developments Ltd.*, 2017 ONCA 490 (Ont. C.A.), affirms the proposition that as a matter of law three months' interest can be collected by a mortgagee who has commenced receivership proceedings. The decision does not stand for that proposition. The case involved the enforcement of a negotiated settlement following default on a mortgage and the initiation of receivership proceedings. The negotiated settlement included payment of three months' interest. This court upheld the motion judge's enforcement of the settlement. The case did not involve the interpretation of the three months' interest provision or its applicability in contested realization proceedings.

14 Further, we see no error in the application judge's finding that the general principle set out in *Peat Marwick* was not displaced by the specific language of the Mortgage. He considered s. 5(1)(g) of the Additional Provisions, which described one of the powers of the receiver as follows:

To execute and deliver to the purchaser of any part or parts of the charged lands, good and sufficient deeds for the same, *the Receiver hereby being constituted the irrevocable attorney of the Chargor for the purpose of making such sale and executing such deed*, and any such sale made as aforesaid shall be a perpetual bar both in law and equity against the Chargor, and all other persons claiming the said property or any part of parcels thereof by, from, through or under the Chargor, and the proceeds of any such sale shall be distributed in the manner hereinafter provided. [Emphasis added.]

15 We agree with the application judge's interpretation of that provision, at para. 45, as one that "limits the appointment of the receiver as agent for the borrower to the specified purpose of 'making such sale [of the Property] and executing such Deed [in relation thereto]'. This would not support the characterization of SLF Inc. as agent for Cardill for the purpose of requesting pay-out of the Mortgage."

16 In his reasons, the application judge did not address s. 5(3) of the Additional Provisions, which states:

The Chargee shall not be liable to the Receiver for his remuneration costs, charges or expenses, and the Receiver shall not be liable for any loss however arising unless the same shall be caused by his own gross negligence or wilful default; and he shall, when so appointed, by notice in writing pursuant hereto, be deemed to be the agent of the Chargor and the Chargor shall be solely responsible for his acts and defaults and for his remuneration.

17 However, the application judge's conclusion that s. 5(1)(g) would not support the characterization of the receiver as agent for Cardill for the purpose of requesting pay-out of the Mortgage would apply equally to the interpretation of s. 5(3).

### III. DISPOSITION

18 For the reasons set out above, the appeal is dismissed.

19 Cardill is entitled to its costs of the appeal fixed in the amount of \$11,500, inclusive of disbursements and all applicable taxes.

*Appeal dismissed.*