2002 CarswellOnt 2875
Ontario Court of Appeal

McVan General Contracting Ltd. v. Arthur

2002 CarswellOnt 2875, [2002] O.J. No. 3336, 116 A.C.W.S. (3d) 446, 163 O.A.C. 11, 216 D.L.R. (4th) 544, 25 C.P.C. (5th) 250, 3 R.P.R. (4th) 170, 61 O.R. (3d) 240

McVan General Contracting Ltd. (Plaintiff / Defendant by Counterclaim / Appellant) and Isaac Arko Arthur and Gladys Aruthur (Defendants / Plaintiffs by Counterclaim / Respondents in Appeal)

Sharpe, Cronk, Gillese JJ.A.

Heard: April 22, 2002
Judgment: September 4, 2002
Docket: CA C36831

Proceedings: affirmed *McVan General Contracting Ltd. v. Arthur* ((July 17, 2001)), Doc. 01-CV-209831 ((Ont. S.C.J.))

Counsel: *Martin G. Banach*, for Appellant
Frank C. Carlone, for Respondents

Subject: Civil Practice and Procedure; Property; Contracts

Headnote

Limitation of actions --- Real property — Charges upon land — Mortgage — Mortgagee's remedies — Foreclosure and possession

In 1989, defendants granted plaintiff one-year term charge on their condominium as security for $10,000 loan — Charge provided for monthly interest payments only — Defendants paid interest payments for one year and made no payments thereafter — Ten years later, plaintiff initiated power of sale proceeding and sued for possession of property and recovery of debt owing on charge — Defendant's motion for determination of whether claims were barred by Limitations Act was granted — Motions judge dismissed action, discharged charge and directed that charge be deleted from title to property — Plaintiff appealed — Appeal dismissed — Charge is "speciality contract" within meaning of s. 45(1)(b) of Limitations Act — "Indenture on mortgage" in s. 45(1)(b) of Act constitutes form of "charge" for purpose of s. 6(3) of Land Registration Reform Act and as such, exception in s. 45(1)(b) applies — Twenty-year limitation period in s. 45(1)(b) did not apply to action for possession or for payment on covenant and as such, was claim was barred by ss. 4 and 15 of Limitations Act — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 6(3) — Limitations Act, R.S.O. 1990, c. L.15, ss. 4, 15, 45(1)(b).

Limitation of actions --- Real property — Charges upon land — Mortgage — Mortgagee's remedies — Action on covenant

In 1989, defendants granted plaintiff one-year term charge on their condominium as security for loan of $10,000 — Charge provided for monthly interest payments only — Defendants paid interest payments for one year and made no payments thereafter — Ten years later, plaintiff initiated power of sale proceeding and sued for possession of property and recovery of debt owing on charge — Defendant's motion for determination of whether claims were barred by Limitations Act was granted — Motions judge dismissed action, discharged charge and directed that charge be deleted from title to property — Plaintiff appealed — Appeal dismissed — Charge is "speciality contract" within meaning of s. 45(1)(b) of Limitations Act — "Indenture on mortgage" in s. 45(1)(b) of Act constitutes form of "charge" for purpose of s. 6(3) of Land Registration Reform Act and as such, exception in s. 45(1)(b) applies — Twenty-year limitation period in s. 45(1)(b) did not apply to action for possession or for payment on covenant and as such, was claim was barred by ss. 4 and 15 of Limitations Act — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 6(3) — Limitations Act, R.S.O. 1990, c. L.15, ss. 4, 15, 45(1)(b).

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Real property --- Registration of land — Land titles — Practice and procedure — Jurisdiction of court

In 1989, defendants granted plaintiff one-year term charge on their condominium as security for loan of $10,000 — Charge provided for monthly interest payments only — Defendants paid interest payments for one year and made no payments thereafter — Ten years later, plaintiff initiated power of sale proceeding and sued for possession of property and recovery of debt owing on charge — Defendant's motion for determination of whether claims were barred by Limitations Act was granted — Motions judge dismissed action, discharged charge and directed that charge be deleted from title to property — Plaintiff appealed — Appeal dismissed — Section 6(2) of Land Registration Reform Act does not displace jurisdiction of court to order discharge when limitation period has intervened to extinguish rights and remedies provided in charge — As plaintiff's claims were extinguished by operation of s. 15 of Limitations Act due to expiry of limitation period in s. 4, motions judge had jurisdiction under s. 11 of Courts of Justice Act to discharge charge and direct deletion from title — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 11 — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 6(3) — Limitations Act, R.S.O. 1990, c. L.15, ss. 4, 15.

APPEAL by chargee from judgment granting chargors' motion for summary dismissal of action for possession of property and payment on covenant and from order discharging charge and directing that charge be deleted from title of property.

***Cronk J.A.*:**

1 This appeal concerns the limitation periods applicable to a chargee's rights to sue for possession and to seek payment on the covenant under a charge on residential property, and to sell the charged land under power of sale, following default by the chargor in payment of principal and interest.

2 In 1989 McVan General Contracting Ltd. lent $10,000 to Isaac Arko Arthur and Gladys Arthur, secured by a one-year term charge on the Arthurs' condominium residence. The charge provided for monthly interest payments only, which were made by the Arthurs for one year. No further payments of any kind were made thereafter. McVan claims that in 1991 the charge was renewed for an additional year. The Arthurs deny the alleged renewal. Approximately ten years later, McVan initiated a power of sale proceeding and sued for possession of the land and recovery of the debt due on the charge.

3 On a motion to determine a question of law, Croll J. held that McVan's claims were barred by the *Limitations Act*, R.S.O. 1990, c. L.15 (the "*Limitations Act"* or *"Act"*). She discharged the charge and directed that it be deleted from title to the property. McVan appeals that decision. I agree that McVan's claims are statute-barred and that the charge should be discharged. Accordingly, for the reasons that follow, I would dismiss the appeal.

I. FACTS

4 The original charge in favour of McVan was granted on November 10, 1989. It was described as a "charge/mortgage of land" prepared in accordance with Form 2 of the *Land Registration Reform Act, 1984*, R.S.O. 1984, c. 32 [now R.S.O. 1990, c. L.4] (the "*LRRA*"), and incorporated a set of standard charge terms authorized by the *LRRA*. The charge was registered in the Land Titles Division of the Regional Municipality of Peel on November 15, 1989. It provided for interest payments payable on the fifteenth day of each month and for repayment of the principal on November 15, 1990. The Arthurs agreed under the charge to pay McVan the principal and interest secured thereunder, when due.

5 The Arthurs made the required monthly interest payments until November 15, 1990. No payments on account of interest or principal were made thereafter.

6 On January 22, 1991, McVan sent a letter to the Arthurs offering to renew the "mortgage" for a further term of one year, on the original terms, on condition that the Arthurs pay a renewal fee and two months past due interest and provide McVan with post-dated cheques to November 15, 1991 and a signed copy of the letter. The Arthurs signed and returned the letter to McVan but did not comply with any of the other renewal conditions. McVan contends, and the Arthurs dispute, that the charge was thereby renewed for a further term of one year, until November 15, 1991.

7 For the next ten years, McVan made no effort to communicate with the Arthurs, or to enforce its security.

8 The charge contained an acceleration clause permitting McVan, at its option, to accelerate repayment of the principal amount secured by the charge upon default by the Arthurs in payment of interest. McVan did not exercise that option.

9 The charge also provided that, upon default of payment for at least fifteen days, the chargee could enter on and lease the land or sell the land upon at least thirty-five days written notice to the chargor. If default in payment continued for two months, no notice was required by the chargee as a condition of exercising such powers.

10 On March 12, 2001, McVan issued a "notice of sale under mortgage". The notice referred to default under a "mortgage" dated November 10, 1989.

11 On April 26, 2001, McVan issued a statement of claim against the Arthurs, seeking possession of the charged property and payment of the moneys said to be owing under the charge, plus interest and legal costs.

12 A subsequent motion by the Arthurs for summary judgment was adjourned and a motion under Rule 21 of the *Rules of Civil Procedure* was argued to determine whether McVan's claims, including its power of sale proceeding, were statute-barred by operation of the *Limitations Act*. The motions judge held that the action for possession of the property was barred by s. 15, the action for payment on the covenant was barred by s. 45 (1)(k), and the power of sale proceeding was barred by ss. 4 and 15 of the *Act*. By order dated July 17, 2001, the motions judge enjoined McVan from continuing with the power of sale proceeding, discharged the charge and directed that it be deleted from title.

II. ISSUES

13 This appeal raises two issues: i) whether McVan's claims for possession of the lands, for payment on the covenant of the moneys due under the charge and for power of sale are barred by the *Act*; and ii) whether the motions judge erred in discharging the charge and directing that it be deleted from title to the Arthurs' property.

III. ANALYSIS

14 Several provisions of the *LRRA* and the *Limitations Act* are relevant to this appeal:

A. The *LRRA*:

1. In this Part,

> "charge" means a charge on land given for the purposes of securing the payment of a debt or the performance of an obligation, and includes a charge under the *Land Titles Act* and a mortgage, but does not include a rent charge;

. . . .

6. (1) A charge does not operate as a transfer of the legal estate in the land to the chargee.

(2) A charge ceases to operate when the money and interest secured by the charge are paid, or the obligations whose performance is secured by the charge are performed, in the manner provided by the charge.

(3) Despite subsection (1), a chargor and chargee are entitled to all the legal and equitable rights and remedies that would be available to them if the chargor had transferred the land to the chargee by way of mortgage, subject to a proviso for redemption.

. . . .

13. (1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

B. The *Limitations Act*:

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

. . . .

15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

. . . .

23(1). No action shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of the land or rent, or to recover any legacy, whether it is or is not charged upon land, but within ten years next after a present right to receive it accrued to some person capable of giving a discharge for, or release of it, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgement in writing of the right thereto signed by the person by whom it is payable, or the person's agent, has been given to the person entitled thereto or that person's agent, and in such case no action shall be brought but within ten years after the payment or acknowledgement, or the last of the payments or acknowledgements if more than one, was made or given.

. . . .

45(1). The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

. . .

> (b) an action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894;

. . . .

within twenty years after the cause of action arose.

. . . .

> (k) an action upon a covenant contained in an indenture of mortgage or any other instrument made on or after the 1st day of July, 1894, to repay the whole or part of any money secured by a mortgage, within ten years after the cause of action arose or within ten years after the date upon which the person liable on the covenant conveyed or transferred the person's interest in the mortgaged lands, whichever is later in point in time.

(1) Whether McVan's Claims Are Statute-Barred

(a) Action for possession

15 McVan makes three arguments in support of its action for possession. First, although McVan acknowledges that s. 4 of the *Act* provides a ten-year limitation period from the time the cause of action arose to bring an action to recover land, it asserts that its cause of action under s. 4 arose ten years after the principal became due under the charge because it did not exercise its acceleration option. McVan contends that the principal became due on November 15, 1991 because the Arthurs renewed the charge for a further term of one year. Therefore, McVan argues that its action for possession was commenced within the applicable ten-year limitation period.

16 Second, McVan asserts that the charge is a specialty contract within the meaning of s. 45 (1)(b) of the *Act*, such that a twenty-year limitation period applies from the time the cause of action arose. If that argument is accepted, McVan's claim for possession was advanced within the applicable limitation period.

17 Finally, McVan submits that the ten-year limitation period established by s. 23 of the *Act* has no application to its claim for possession, because it relates only to actions brought to recover money.

18 On the record before this court, it is unclear whether McVan argued on the Rule 21 motion that s. 45 (1)(b) of the *Act* applies to its claim for possession, as distinct from its claims for payment on the covenant and for power of sale. The motions judge's decision that McVan's action for possession was statute-barred was based on ss. 4 and 15 of the *Act*. She concluded that the Arthurs' first default in payment of interest in 1990 afforded McVan a right to take possession and to bring an action to recover the land. As McVan failed to commence its action for possession within ten years of that date, as required by s. 4 of the *Act*, its right to possession of the land was extinguished under s. 15 of the *Act*. I agree.

19 This court determined in *King v. Flanigan*, [1944] O.R. 537 (Ont. C.A.) and *Andre v. Valade*, [1944] O.R. 257 (Ont. C.A.), that a mortgagee's right to claim possession of mortgaged land accrues upon the first default in payment of interest and that the ten-year limitation period established by s. 4 of the *Act* runs from that time. In this case, that event of default occurred, at the latest, by December 15, 1990. McVan's claim for possession was not advanced until April 2001. Accordingly, McVan's action for possession is statute-barred by s. 4 of the *Act* and its right to seek possession of the land is extinguished by operation of s. 15 of the *Act*. Sections 4 and 15 of the *Act* apply in this case unless displaced by s. 45 (1)(b), as urged by McVan.

20 McVan relies on the decision of this court in *North American Life Assurance Co. v. Johnson*, [1940] O.R. 522 (Ont. C.A.) in support of its contention that a cause of action for possession of the land arises when the principal first became due under the charge. In my view, that case does not assist McVan. As Gillanders J.A. observed in *Andre v. Valade* at p. 262, the issue in *North American Life Assurance* was whether the original *mortgagor*, the assignor of the equity of redemption in mortgaged lands, had lost the right to compel the assignee of the equity of redemption to pay the mortgage debt. It did not involve, or determine, the right of the original *mortgagees* to enforce their remedies under the mortgage.

21 While I agree with McVan that s. 23 of the *Act* has no application to a claim for possession, as distinct from a claim for recovery of money, that is not determinative of whether McVan is entitled to now seek possession of the Arthurs' land. That question turns on consideration of McVan's remaining argument, that the twenty-year limitation period established by s. 45 (1)(b) of the *Act* applies to its claim for possession. For the reasons that follow in my consideration of whether McVan's action on the covenant is statute-barred, I would reject that argument. Accordingly, as held by the motions judge, McVan's claim for possession is barred by ss. 4 and 15 of the *Act*.

(b) Action on the covenant

22 Section 45 (1)(b) of the *Limitations Act* provides that an action on a "speciality" may be commenced within twenty years after the cause of action arose, except in connection with "a covenant contained in an indenture of mortgage made on or after the 1st day of July, 1894". Accordingly, if the charge here is a "speciality", a twenty-year limitation period applies unless the charge fits within the exception established by s. 45 (1)(b). If the exception applies, the applicable limitation period is ten years, as provided by s. 45 (1)(k). In that event, as the first interest payment default occurred here, at the latest, by December 1990, the ten-year limitation period under s. 45 (1)(k) expired in December 2000, regardless of any renewal of the charge.

23 Traditionally, a speciality contract was regarded as a contract under seal, or a deed. It was said to be a "formal" contract, in the sense that it derived its validity from the form in which it was expressed, it bore the seal of the signatory and it required no consideration: *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999). The modern view suggests that both the nature of the claim and the formalities of execution of the contract giving rise to the claim will determine whether an action is a proceeding on a "speciality": *872899 Ontario Inc. v. Iacovoni* (1998), 40 O.R. (3d) 715 (Ont. C.A.).

24 Under s. 13 (1) of the *LRRA*, a document transferring an interest in land or a charge, when not executed under seal, has the same effect for all purposes as if executed under seal. The effect of s. 13 (1) is to deem executed conveyances of land, transfers and charges to be speciality contracts: *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 (S.C.C.). I conclude that the charge in this case is a "speciality". It is a contract under seal, whereby the Arthurs undertook an obligation to repay the debt secured by the charge. McVan's action on the covenant is an action on that obligation. It follows that s. 45 (1)(b) of the *Act* applies, unless the charge falls within the exception to the twenty-year rule established under that section.

25 Section 1 of the *LRRA* defines the word "charge" as including a mortgage and a charge under the *Land Titles Act*, R.S.O. 1980, c. 230 [now R.S.O 1990, c. L.5]. In this case, the terms of the charge provide that the word "charge" has the same meaning as established by s. 1 of the *LRRA*. Notwithstanding the broad definition of "charge" under the *LRRA*, s. 6 (1) of the *LRRA* provides that a "charge" does not operate to transfer the legal estate in the land to the chargee. Under the *Land Titles Act*, a charge does not convey the legal estate in land, whereas a mortgage under the *Registry Act*, R.S.O. 1980, c. 445 [now R.S.O. 1990, c. R.20] operates to transfer the legal estate in the land to the mortgagee. Section 6 (3) of the *LRRA*, however, contains an important qualification on the rule established by s. 6 (1):

> 6. (3) Despite subsection (1), a chargor and chargee are entitled to all the legal and equitable rights and remedies that would be available to them if the chargor had transferred the land to the chargee by way of mortgage, subject to a proviso for redemption.

26 McVan argues that the *Act* distinguishes between mortgages registered under the *Registry Act* prior to the introduction of the *LRRA* in 1984, and other mortgages or charges. As the *Limitations Act* was not amended upon introduction of the *LRRA* to delete references to an "indenture of mortgage", McVan submits that that phrase, as it appears in the exception under s. 45 (1)(b), refers only to pre-1984 mortgages under the *Registry Act*. Similarly, McVan contends that the rights and remedies referenced in s. 6 (3) of the *LRRA* are confined to those rights and remedies applicable to a pre-1984 mortgage under the *Registry Act*. Those submissions, if accepted, would exclude the charge here from the application of the exception in s. 45 (1)(b) and from the limitation period under s. 45 (1)(k) of the *Act*. I would reject McVan's submissions, for several reasons.

27 McVan relies on the following passage from W. B. Rayner and R. H. McLaren, *Falconbridge on Mortgages*, 4th ed. (Agincourt, Ont.: Canada Law Book, 1977) at pp. 570 - 571 to assert that s. 45 (1)(b) of the *Act* applies to actions on a covenant:

> In Ontario, however, the view taken by the courts, and confirmed by the Legislature, is that the personal remedy on the covenant for payment comes within the provision relating to bonds or other specialities, and that the provision relating to an action to recover money secured by the mortgage applies only so far as it is sought to recover the money out of the land. On this view it is clear that the six-year limitation as to the recovery of arrears of interest relates only to an action to recover money out of the land. Thus, it has been held in Ontario, in the case of mortgages made before the 1st day of July, 1894, that the action on the covenant for payment is not barred until after twenty years though the right to resort to the land

> may have been already barred, and similarly that in an action on the covenant arrears of interest up to twenty years may be recovered, although only six years' arrears may be recovered out of the land. It follows that in the case of mortgages made on or after the 1st day of July, 1894, a personal judgment on the covenant may be recovered for ten years' arrears of interest, although only six years' arrears may be recovered out of the land.

28 In my view, the quoted statement from *Falconbridge* is not directed at the distinction between ss. 45 (1)(b) and 45 (1)(k) of the *Act.* Rather, it addresses the distinction between a personal action on the covenant, which is governed by s. 45 of the *Act*, and an action to recover money out of land, which is governed by s. 23 of the *Act*. That interpretation is supported by footnote 27 at p. 570 of *Falconbridge*, which first refers to an amendment to s. 23 made in 1887 and then states: "[s]o when the period of limitation for an action on a covenant in a mortgage was reduced from 20 to 10 years, the change was effected by the amendment of s. 45 . . . ".

29 The intended meaning and effect of s. 45 (1)(b) is to be ascertained by examination of the *Act* in its entirety, in combination with the subsequently enacted *LRRA*. I agree with the Arthurs' submission that, when viewed as a whole, the *Act* evidences an intention to establish a uniform ten-year limitation period for remedies under charges or mortgages. Thus, a ten-year limitation period is provided for actions for entry, distress, recovery of land and recovery of money out of land (ss. 4, 15, 23 (1) and 45 (1)(k) of the *Act*). The construction of the s. 45 (1)(b) exception urged by McVan would establish a different, and much lengthier, limitation period for actions for possession and on a covenant contained in a speciality mortgage or charge, save only for a covenant in a mortgage registered under the *Registry Act* prior to 1984. That interpretative outcome would result in inconsistent and confusing limitation periods for remedies under speciality mortgages and charges. Absent clear statutory language to the contrary, such an anomalous result is to be avoided.

30 Support for the conclusion that the exception in s. 45 (1)(b) is not to be construed as narrowly as McVan urges is provided by *Martin v. Youngson* (1924), 55 O.L.R. 658 (Ont. C.A.). In that case, this court held that s. 49 (1)(k) of the limitations statute then in force [now s. 45 (1)(k) of the *Act*], rather than s. 49 (1)(b) [now s. 45 (1)(b) of the *Act*] governed an action on a covenant contained in a mortgage, such that a ten-year limitation period applied to the action. See also, D. Dukelow, *Guide to Ontario and Federal Limitation Periods* (Toronto: Carswell, 1998), at pp. Ont. 149 - 150.

31 In my view, confining the exception in s. 45 (1)(b) to only those mortgages registered under the *Registry Act* prior to 1984 - when the *LRRA* was introduced - is inconsistent with an important purpose of the land registration system envisaged under the *LRRA*, which is to eliminate the differences between charges under the *Land Titles Act* and mortgages under the *Registry Act* except in respect of the transfer of the legal estate in land. To facilitate achievement of that legislative purpose, a "charge" under the *LRRA* is defined to include a mortgage and the rights and remedies of the parties to a charge are to be determined as if the legal effect of the charge is to transfer the land by way of mortgage.

32 Thus, after 1984 and for the purpose of rights and remedies, no distinction is to be drawn between actions on a covenant in charges under the *Land Titles Act* and actions on a covenant in mortgages under the *Registry Act*. Stated differently, "an indenture of mortgage" under ss. 45 (1)(b) and 45 (1)(k) of the *Act* is a form of "charge" under the *LRRA* for the purpose of s. 6 (3) of the latter statute. That supports the conclusion that McVan's action on the covenant is an action on a covenant contained in a mortgage made after July 1, 1894, thus falling within the exception set out in s. 45 (1)(b).

33 In my view, had the legislature intended that, following introduction of the *LRRA*, the exception in s. 45 (1)(b) of the *Limitations Act* apply only to mortgages registered under the *Registry Act* prior to introduction of the *LRRA*, it is reasonable to assume that such an intention would have been expressed clearly and unequivocally in the *LRRA* or in an amendment to the *Limitations Act*. The absence of such qualifying language militates against a construction of the exception in s. 45 (1)(b) which would effect a significant reduction in the rights and remedies of chargors, contrary to s. 6 (3) of the *LRRA*.

34 The language of s. 6 (3) of the *LRRA* itself is also instructive. Limitation periods are not exempted from the rights and remedies referenced under that section. To the contrary, the language of s. 6 (3) is expansive. The clear intent of that section is to eliminate, rather than to preserve, the distinction between charges under the *Land Titles Act* and mortgages under the *Registry Act* for the purpose of determining rights and remedies. In addition, the ability to raise the expiry of a limitation period as a

defence to an action or a claim is a significant right which, if demonstrated, can be determinative of the proceeding in which the defence is raised. (See *Ball v. Donais* (1993), 13 O.R. (3d) 322 (Ont. C.A.)). Its exemption from the rights and remedies referenced under s. 6 (3) of the *LRRA* cannot be inferred.

35 The construction of the s. 45 (1)(b) exception advanced by McVan is flawed for an additional reason. It is inconsistent with the language of s. 45 (1)(k), which provides that an action upon a covenant contained in an indenture of mortgage or "any other instrument" made on or after July 1, 1894 for repayment of the money secured by a mortgage is subject to a ten-year limitation period. As I mentioned, s. 1 of the *LRRA* defines the word "charge" as including a mortgage. The word "indenture" is defined in *Black's Law Dictionary* as "a formal written instrument made by two or more parties with different interests". The same dictionary defines the word "mortgage" as:

> 2. A lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms.
>
> 3. An instrument (such as a deed or contract) specifying the terms of such a transaction . . . .

The charge here is clearly an "instrument" which meets those definitions.

36 Finally, although the parties' views of the nature of the charge are not determinative of its legal character, I note that McVan itself appears to have regarded the charge as a mortgage. Both its January 22, 1991 offer to renew the charge and its notice of sale refer to the charge as a "mortgage". Similarly, McVan's statement of claim seeks remedies concerning an alleged "mortgage".

37 Accordingly, I conclude that although the charge is a speciality contract within the meaning of s. 45 (1)(b) of the *Act*, it is also an instrument falling within the exception created by that section. Consequently, the twenty-year limitation period provided under s. 45 (1)(b) does not apply to McVan's action for possession or for payment on the covenant. Its action for possession is barred by ss. 4 and 15 of the *Act* and its action for payment on the covenant is barred by the ten-year limitation period created under s. 45 (1)(k) of the *Act*.

(c) The power of sale proceeding

38 McVan argues that the twenty-year limitation period established by s. 45 (1)(b) of the *Act* applies to its power of sale proceeding. In contrast, the Arthurs contend that the ten-year limitation period under s. 23 (1) of the *Act* operates to bar the power of sale proceeding.

39 Given that the charge in this case comes within the exception to the twenty-year rule set out in s. 45 (1)(b), it follows that that section does not operate to defeat a limitation period defence to McVan's power of sale proceeding. It remains, then, to consider whether s. 23 (1), or other provisions of the *Act*, apply to the sale proceeding.

40 The ten-year limitation period under s. 23 (1) applies to an action brought "*to recover out of any land . . . any sum of money secured by any mortgage or lien*, or *otherwise charged upon or payable out of the land . . .* ". The Arthurs assert that McVan's power of sale proceeding is an action to "recover out of land a sum of money secured by a mortgage or lien", thus attracting the ten-year limitation period under s. 23 (1). I do not agree that s. 23 (1) governs in this case.

41 In *Scott v. Pickell* (1984), 45 O.R. (2d) 158 (Ont. C.A.), this court considered the scope of s. 23 (1) of the *Limitations Act* in connection with power of sale proceedings. Weatherston J.A. stated (at p. 163): "[Section] 23 of the *Limitations Act* has nothing to do with a sale by a mortgagee under his power of sale".

42 The facts in *Scott v. Pickell* were unusual. The mortgagees in that case conveyed the mortgaged property under their power of sale contained in the mortgage after they had been in possession of the property for approximately forty-seven years. Thereafter, the heirs of the original mortgagor sought to attack the sale, relying on s. 23 of the *Act*. In this case, McVan has never been in possession of the charged property.

43 In recognition of the unusual circumstances in *Scott v. Pickell*, it was held in *Behmanesh v. Kaplan* (2000), 31 R.P.R. (3d) 48 (Ont. S.C.J.) that *Scott v. Pickell* is concerned with, and confined to, situations in which a mortgagee has been in possession for more than ten years, in which event the rights of the mortgagor are extinguished by operation of ss. 19 and 15 of the *Act.* In *Behmanesh*, the mortgagor had arranged a second residential mortgage loan. The mortgagor claimed that the mortgage loan had been repaid shortly after the granting of the mortgage, but no discharge of mortgage was ever registered. More than a decade after the mortgage fell due, the mortgagee demanded repayment of the mortgage principal, plus interest. On those facts, Stinson J. concluded that the mortgagee's rights were statute-barred by operation of ss. 4 and 15 of the *Act*, ten years having passed from the date when the mortgagee was entitled to take possession of the property and to bring action to recover the land.

44 In *Behmanesh*, however, unlike this case, the mortgagee had not attempted to exercise its power of sale, nor had it commenced any judicial action on the mortgage. Rather, the mortgagee had only made a demand for repayment of the mortgage debt and accumulated interest. Thus, *Behmanesh* did not involve consideration of whether the exercise of a contractual power of sale is subject to s. 23 (1) of the *Act*.

45 The motions judge in this case held that McVan's right to proceed with a power of sale was barred under ss. 4 and 15 of the *Act*. I agree.

46 In *Scott v. Pickell*, in concluding that s. 23 of the *Act* is unrelated to a mortgagee's sale under power of sale, Weatherston J.A. expressly recognized that other provisions of the *Act* apply to such proceedings (at p. 163):

> An action for foreclosure or sale is an action for the recovery of land, and not for the recovery of money out of land. Other sections of the *Limitations Act* apply to such an action, but not s. 23 . . . . [Citations omitted]

47 The Supreme Court of Canada in *Shantz v. Hallman*, [1928] S.C.R. 213 (S.C.C.) held that where a mortgagee failed to give notice of entry or to take proceedings to exercise its remedies under a mortgage within a ten-year period, the mortgagors, who did not make any payments within the ten-year period, were in constructive possession of the land and the mortgagee's right of entry and right to recover the mortgage money out of the land were barred by ss. 5 and 24 of the *Limitations Act*, R.S.O. 1914, c. 75 [now ss. 4 and 23 of the *Act*].

48 The mortgage in *Shantz* included a covenant by the mortgagor giving the mortgagee a right to quiet possession in the event of default. As well, the mortgage provided for a power of sale framed in the following terms: "[t]he said mortgagee, on default of payment for one month, may, on one month's notice, enter on and lease or sell the said lands". The majority of the court held that "[t]he right of entry of the mortgagee and its right to recover the mortgage money out of the land was effectively barred by sections 5 and 24 of the *Limitations Act* . . . ".

49 The court in *Shantz* did not specify whether the right of power of sale contained in the relevant mortgage was barred by s. 5 [now s. 4 of the *Act*] or s. 24 [now s. 23 of the *Act*]. This court confirmed in *Scott v. Pickell* that s. 23 of the *Act* does not apply to such proceedings. The combined effect of *Shantz* and *Scott v. Pickell*, therefore, supports the view that s. 4 of the *Act* governs a mortgagee's exercise of a power of sale.

50 It is also well-established that s. 4 of the *Act* applies to foreclosure actions, which are actions to recover land and not actions to recover money charged on land: *Andre v. Valade* and see *Falconbridge*, at p. 599.

51 In this case, McVan's statement of claim contains no assertion of a right to recover a sum of money "out . . . of land", or a claim for power of sale. Rather, its notice of sale was issued in the exercise of its contractual power of sale under the charge, without commencement of court proceedings. Under the terms of the charge, McVan was entitled to exercise its contractual power of sale, without notice to the Arthurs, two months after default in principal or interest payments. In addition, with at least thirty-five days' notice, McVan was entitled to exercise its power of sale after fifteen days on default of payment. Its entitlement to exercise its power of sale, therefore, accrued by at least January 15, 1991, two months after default by the Arthurs on payment of interest.

52 In my view, McVan's power of sale proceeding is an attempt to recover land, which is prohibited under s. 4 of the *Act* after the expiry of ten years from the time when the right to make such an attempt first accrued. Accordingly, I agree with the motions judge that McVan's power of sale proceeding is barred by operation of ss. 4 and 15 of the *Act*.

(2) The Discharge of the Charge and its Deletion from Title

53 McVan argues that even if its claims concerning the Arthurs' property are barred by the *Act*, the motions judge had no jurisdiction to discharge the charge, and to direct that it be deleted from title to the Arthurs' property. I conclude that this argument also fails.

54 In resisting the discharge of the charge, McVan relies on s. 6 (2) of the *LRRA*, which provides that a charge ceases to operate when the money and interest secured by the charge are paid, or the secured obligations are performed. McVan argues that the charge in this case continues to operate because the money and interest secured by the charge were not paid and the obligations secured by the charge were not performed. However, s. 6 (2) does not displace the jurisdiction of the court to order a discharge when a limitation period has intervened to extinguish the rights and remedies provided in the charge.

55 Under s. 15 of the *Act*, the expiry of a limitation period applicable to "making an entry or distress or bringing any action . . . for the recovery of land or rent" has the legal effect of extinguishing the "right and title" of the person otherwise entitled to make such entry or distress or to bring such an action. Here, by operation of s. 15 of the *Act*, McVan's entitlement under the charge to enter upon the Arthurs' land, to bring action for the recovery of such land, or to sue on the covenant has been extinguished due to the expiry of applicable limitation periods under the *Act*.

56 In those circumstances, in my view, in order to do justice between the parties the motions judge had jurisdiction under the wide authority of the Superior Court of Justice confirmed by s. 11 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to discharge the charge and to direct its deletion from title concerning the Arthurs' land: *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.) and *Cook v. Ip* (1985), 52 O.R. (2d) 289 (Ont. C.A.); leave to appeal to the Supreme Court of Canada dismissed *Cook v. Ip* (1986), 55 O.R. (2d) 288 (note) (S.C.C.).

IV. DISPOSITION

57 Accordingly, for the reasons given, I would dismiss the appeal. The respondents are entitled to their costs of the appeal. Counsel for the respondents properly informed this court that his fees to the respondents are set by the terms of a legal services plan. Having regard to the fees provisions of that plan, the respondents' costs of the appeal are fixed in the amount of $3,285.00, plus disbursements and Goods and Services Tax.

***Sharpe J.A.*:**

I agree.

***Gillese J.A.*:**

I agree.

Appeal dismissed.

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