

In the Court of Appeal of Alberta

Citation: Accretive Asset Management Corp. v. Bar-O-W-Ranches Ltd., 2011 ABCA 329

Date: 20111122

Docket: 1101-0215-AC

Registry: Calgary

Between:

Accretive Asset Management Corp.

Appellant (Respondent)

- and -

Bar-O-W-Ranches Ltd.

Respondent (Applicant)

- and -

**Prosul Marketing Inc., Polar Creek Industries Inc., 542021 Alberta Ltd.,
Vaugh Reid and Partners Holdings Inc.**

Not a Party to the Appeal (Plaintiff)

- and -

Intreo Corporation

Not a Party to the Appeal (Defendant)

The Court:

**The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Order by
The Honourable Mr. Justice A.D. Macleod
Dated the 19th day of July, 2011
Filed on the 30th day of August, 2011
(Docket: 1001-01645)

**Memorandum of Judgment
Delivered from the Bench**

Rowbotham J.A. (for the Court):

[1] This dispute stems from foreclosure proceedings with respect to mortgages granted by the mortgagor, Intreo Corporation. Relevant to this appeal are two mortgages granted by the respondent and one granted by the appellant. Initially, both of the respondent's mortgages were registered on title prior to that of the appellant. In 2009 the respondent agreed to postpone one of its mortgages to the appellant's mortgage.

[2] Subsequent to the postponement, the appellant and the mortgagor amended their mortgage pursuant to an amending agreement. At issue in this appeal is whether the amount owing on the appellant's mortgage is confined to the amounts actually advanced, or includes an amount contemplated by the amending agreement. This amount was not an advance of new money but rather a repayment of old debts owed by the mortgagor's principal, Mr. Chok, to the appellant.

[3] The chambers judge determined that the mortgage only secured monies advanced under it, i.e., monies advanced either contemporaneously with the registration of the mortgage or afterward, and did not contemplate the repayment of old debts.

[4] The appellant submits that the chambers judge erred in finding facts not supported by or otherwise referred to in the evidence, and in his interpretation of the law and the terms of the mortgage. It submits, as it did at the special chambers application, that the amending agreement does not change the material terms of the mortgage because, even with the addition of the old debt, the principal sum does not exceed what was originally defined as the principal sum in the appellant's mortgage.

[5] We are not persuaded that the chambers judge erred in his assessment of the facts or in interpreting the terms of the mortgage. The amending agreement materially changed the terms of the mortgage. This is supported by the language of the amending agreement which states: "the Principal Sum shall be **increased** to include debt previously owed" (emphasis added). The appellant's contention that the old debt was merely subsumed in the principal sum is contradicted by the terms of the mortgage itself which relate to advances in the present or future tense. Article 2.1 states that the "MORTGAGEE agrees **to lend** the PRINCIPAL SUM" (emphasis added). Article 5.5 provides that if the principal is not advanced at the date of the mortgage, "the MORTGAGEE may advance the same in one or more sums to or on behalf of the MORTGAGOR at any future date or dates ...".

[6] The chambers judge concluded that, "On the wording of this mortgage document and the commitment letter, the Accretive mortgage cannot be used as security for prior unrelated amounts lent to Mr. Chok." The chambers judge also noted that the respondent would have contemplated that

any advance of funds in the future would be used to develop the land and increase its value; old debt would not qualify.

[7] Accordingly, the chambers judge was correct in finding that the appellant's mortgage contemplated advances to be made, not advances that had already been made. He made no factual or interpretive errors in coming to this conclusion. The appeal is dismissed.

(Discussion on Costs)

Berger J.A.:

[8] The respondent shall be entitled to costs of the appeal as follows: up to and including the filing and service of the factum, single column 5; oral argument, I gather that is the only subsequent matter, double column 5.

Appeal heard on November 7, 2011

Memorandum filed at Calgary, Alberta
this 22nd day of November, 2011

Rowbotham J.A.

"as authorized"

Berger J.A.

Appearances:

R.P. Pelletier and K.R. Setrakov
for the Appellant

N.D. Anderson and B. McLain (student-at-law)
for the Respondent