ENDORSEMENT

Short Style of Cause: SHETH v. RANDHAWA ET AL **File No.: CV-20-1816**

Date	Counsel	
June 9, 2021	**PLAINTIFF:** Laframboise, D **DEFENDANTS:** Kestenberg, M mrk@ksllaw.com for Randhawa Yiokaris, D. and Thackeray, H. (student-at-law) dyiokaris@kmlaw.ca for TSD Law and Dhillon Harris, M. matthew@mrhlawyer.com for Bindass Capital, Karia, Pal and Dr. Mangesh prof. corp. Chhina, S. and Robson, P. info@canadalawcentre.org for 1103, Mangal and Singh	ADJOURNMENT REQUEST [1] The Plaintiff sought an adjournment of today's hearing in order to conduct further examination of the Defendant Ash Karia, principal of the Defendant Bindass Capital, and to compel answers to undertakings given by Mr. Karia. The adjournment was opposed by all Defendants. After considering both written and oral submissions, I denied the adjournment request, with reasons provided orally. I will not repeat those reasons in this Endorsement. INTRODUCTION [2] The Plaintiff seeks an order to set aside a conveyance of land that occurred on March 9, 2020, whereby the Defendant 1103 Corp. purchased the disputed property from the Defendant Bindaas Capital. The Defendant Shan Mangal is the principal of 1103 Corp. [3] The Plaintiff was the previous owner of the property. Bindaas is a lender who held two mortgages registered against the property. The Plaintiff was in default of both mortgages. The impugned sale to 1103 Corp. was completed by Bindass under Power of Sale. [4] The Plaintiff alleges that the Defendants engaged in a conspiracy to defraud her and take her property from her. She also argues that the Notice of Sale issued by Bindaas was invalid and that the subsequent sale to 1103 Corp. is therefore a nullity.

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		BACKGROUND FACTS [5] I will not summarize all the relevant facts and evidence, but a chronology of key dates and events will provide useful context. [6] The Plaintiff acquired the disputed property in November 2017. Prior to that, her children owned the property, but she was residing there with her husband. There were, at that time, three charges registered on title: a first mortgage held by BMO for $488,982, a second mortgage held by Bindaas for $160,000, and a third mortgage held by Park Lane Plumbing Ltd. for $90,000. The BMO mortgage was in default and BMO had threatened a Power of Sale. [7] When title was transferred to the Plaintiff, the BMO mortgage was discharged. A new mortgage loan in the amount of $610,000 was obtained and registered to Bindaas, the Defendant Sujoy Pal and the Defendant Inamdar Corp. A second mortgage was also registered to Bindaas, in the amount of $160,000. These two mortgages were interest-only and at high annual interest rates. A third mortgage was registered to Park Lane. [8] By July 2018, the Plaintiff had defaulted on the first and second mortgages. On July 30, 2018, a Notice of Sale was issued by Bindaas under the second mortgage, with a demand for repayment of $173,932 by September 5, 2018. On February 15, 2019, another Notice of Sale was issued by the Bindaas, Pal and Inamdar Corp., with a demand for repayment of $636,391 by April 5, 2019. The third mortgagee, Park Lane, was served with the Notice of Sale under the first mortgage. [9] The first mortgage was transferred from Bindaas, Pal and Inamdar Corp. to Bindaas and Pal in Februay 2019, then later to Bindaas and

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		Brinder Nagra in July 2019. I will refer to the various mortgagees on the first mortgage as the "Bindaas Group".
		[10] Legal actions were commenced against the Plaintiff by Bindaas and the Bindaas Group, relating to the Plaintiff's defaults. Bindaas and the Bindaas Group retained the Defendant Karanpaul Randhawa as their lawyer in the enforcement proceedings.
		[11] In August 2019, a fourth mortgage in the amount of $45,000 was registered on title to the property by Doris Joseph.
		[12] The Plaintiff was noted in default in both civil actions, and default judgments were obtained against her, but those judgments were subsequently set aside. The Plaintiff eventually served Statements of Defence in both actions in August 2019.
		[13] The Plaintiff and the Bindaas Group subsequently entered into a settlement agreement to resolve the two enforcement actions on December 4, 2019. Pursuant to the settlement, the Plaintiff agreed to pay a total $893,000 within 7 days, failing which she had seven days to cure such default, failing which the Bindaas Group could bring an *ex parte* motion for judgment in the amount of $927,465, representing the total sums due under the first and second mortgages as of December 2019.
		[14] The Plaintiff did not pay the $893,000 in accordance with the terms of settlement. She was unable to obtain financing to come up with the requisite funds. Randhawa advised the Plaintiff's counsel on January 2, 2020 that Bindaas would provide an indulgence until January 10, 2020 for payment of the settlement funds, failing which Bindaas would bring a motion to enforce the Minutes of Settlement. On January 10,

2020, Randhawa confirmed in writing with Plaintiff's counsel that Bindaas would be bringing a motion to enforce the settlement if the funds were not paid by the end of that day. The funds were not paid and the Bindaas Group proceeded with an *ex parte* motion.

[15] The motion to enforce the settlement was originally scheduled for January 24, 2020 but was adjourned to February 4, 2020, with an order for the motion to be served, despite the provision in the Minutes of Settlement permitting the Bindaas Group to proceed without notice. The motion was subsequently rescheduled, with notice, to February 6, 2020, then rescheduled again to February 13, 2020.

[16] Mangal (principal of 1103 Corp.) learned from Karia (principal of Bindaas) in January 2020 that Bindaas held mortgages on the property that were in default and that the property was being sold under Power of Sale. On behalf of 1103 Corp., Mangal was interested in purchasing the property in order to repair/renovate it and flip it for a profit. He began making inquiries and looking at comparable sales in the area to estimate the approximate value of the property. He factored in the approximate costs of renovations, assuming that the property would not be in a good state of repair since it was being sold by Power of Sale. He also factored in the savings afforded by a private sale without a realtor's commission. He began to negotiate a sale price with Karia/Bindaas.

[17] In January 2020, the Plaintiff listed the property for sale. She received a few offers.

[18] On January 29, 2020, the Plaintiff entered into an Agreement of Purchase and Sale (APS) to sell the property to a person named Bobby Abraham for $1,000,000, with a closing date of February 28, 2020.

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		Although she initially testified, during her cross-examination, that the APS was the only agreement between them, she later deposed that there was another agreement with Abraham that would allow her and her husband to retain occupancy of the property. She said Abraham was able to secure financing for $800,000 at a low interest rate, such that she could afford the monthly payments, so she agreed to split the equity in the property with him if he purchased it and allowed her and her husband to reside in the home, and they would make the mortgage installment payments. [19] On February 3, 2020, the Plaintiff's litigation counsel advised Randhawa by email that "my client has sold the property and will pay your client out his $893k". In the same email, Plaintiff's counsel advised that his client would be obtaining financing to pay out the settlement funds, which made no sense if the property had, in fact, been sold. No details of the purported sale of the property were provided. No copy of the Abraham APS was produced. [20] On February 13, 2020, the motion for enforcement of the settlement was heard. Neither the Plaintiff nor her counsel appeared or opposed the motion, although duly served. Justice Emery ordered her to pay the Bindaas Group the sum of $927,465 "being the amount due to [the Bindaas Group] today for principal, interest, and other fees and charges." Justice Emery also ordered costs of the motion payable by the Plaintiff in the amount of $3,128. Randhawa emailed a copy of Justice Emery's Order to the Plaintiff's counsel that same day. [21] On February 26, 2020, Randhawa received a message from the office of the Plaintiff's lawyer advising that the property had been sold for

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		$1,000,000 with a closing date of February 28, 2020. No copy of the Abraham APS was provided. [22] The Plaintiff requested a discharge statement for the mortgages. [23] On February 27, 2020, 1103 Corp. made an offer to Bindaas to purchase the property "as is" for $970,000. The offer was accepted. Karia and Mangal, on behalf of Bindaas and 1103 Corp., executed an APS on February 27, 2020 with a closing date of March 4, 2020. [24] On February 28, 2020, Bindaas's real estate solicitor (Devesh Gupta of Prudent Law) sent the Plaintiff's real estate solicitor (Manish Kapoor) a discharge statement for $980,272. The Plaintiff disputed the amount because it was considerably higher than the amount ordered by Justice Emery on February 13, 2020. Her litigation counsel wrote to Randhawa (Bindaas's litigation counsel), advising that the discharge statement was incorrect. Randhawa advised that he was no longer retained by Bindaas on the matter. [25] The Abraham sale did not close on February 28, 2020. [26] On February 29, 2020, the Plaintiff's counsel wrote to Devesh Gupta's articling student at Prudent law, with a copy to Randhawa, asking for confirmation that the court ordered amount of $930,593 was the correct amount to discharge the mortgages, and seeking confirmation that the sale transaction to Abraham would close the following Monday with a payout of that amount. He was advised by both Randhawa and Gupta that neither of them was retained by Bindaas for the purposes of discharge of the subject mortgages.

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		[27] The Plaintiff brought a motion to have the discharge statement fixed. The motion was scheduled to be heard on March 6, 2020. [28] On March 3, 2020, 1103 Corp. retained the Defendant Anoop Singh Dhillon (of the Defendant TSD Law) as its real estate solicitor with respect to the registration of the transfer of title. Dhillon forwarded a copy of the executed APS to Randhawa, who was acting for Bindaas on the transaction. [29] The closing for the transaction between Bindaas and 1103 Corp. was delayed because 1103 Corp. had not obtained title insurance to satisfy its mortgage lender. Bindaas and 1103 Corp. mutually agreed to extend the closing date from March 4 to March 5, then again to March 6, 2020. The closing funds were received after 5:00 PM on Friday March 6, 2020, so the transfer to 1103 Corp. was not registered until Monday March 9, 2020. [30] On March 4, 2020, the Plaintiff provided Randhawa with a copy of the Abraham APS, indicating a closing date of February 28, 2020. Randhawa had conducted a title search on March 3, 2020 that did not show a transfer to Abraham. He conducted another title search on March 6, 2020 and determined that the Plaintiff was still registered as the owner of the property. [31] Randhawa did not advise the Plaintiff's counsel of the pending sale to 1103 Corp. [32] On March 6, 2020, the Plaintiff obtained an Order from Justice Harris setting the amount required to discharge the first and second

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		mortgages as $932,212 and ordering the Bindaas Group to pay the Plaintiff's costs of the motion in the amount of $5,000.
		[33] On March 9, 2020, the deal between Bindaas and 1103 Corp. closed and the property was transferred to 1103 Corp. The sale occurred by Power of Sale under the first mortgage. The second mortgage was discharged. The third and fourth mortgages were extinguished by the Power of Sale. A new charge was registered to the Defendant Gurpal Singh for $880,000. Mangal was the guarantor on the new mortgage loan.
		[34] The March 9, 2020 transfer to 1103 Corp. was immediately registered on title. However, the Plaintiff was not immediately advised by either Bindaas or Randhawa that the property was sold under Power of Sale.
		[35] On March 16, 2020, the Plaintiff brought an emergency motion and obtained an Order from Justice Bloom setting the amount required to discharge the two mortgages at $929,498 and ordering that amount to be paid into court, upon which payment the mortgages would be discharged. Justice Bloom also ordered the Bindaas Group to pay the Plaintiff's costs in the amount of $3,500.
		[36] The Plaintiff did not attempt to register the March 16, 2020 order discharging the mortgages until May 7, 2020. Pursuant to that order, however, Abraham paid $920,998 into court, of which $800,000 was borrowed from the National Bank. Abraham also paid off the third mortgage to Parklane Plumbing in the amount of $51,000, apparently without realizing that that mortgage had been extinguished as a result of the Power of Sale. Abraham, it should be noted, is not a party to this proceeding.

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		[37] The Plaintiff began making monthly mortgage payments to National Bank pursuant to her arrangement with Abraham. [38] Mangal visited the property and discovered that the Plaintiff was still occupying it. He advised her that 1103 Corp. was the new owner and repeatedly requested vacant possession. She refused to vacate the property and brought the within action. [39] On March 16, 2021, the National Bank obtained a consent order to have the $800,000 in court returned to it. That consent order provides that the balance of the funds is to be paid to the Plaintiff. No explanation was provided for why the remaining funds would not be returned to Abraham. [40] The Plaintiff continues to occupy the property. She has paid no rent to 1103 Corp., which has borne the carrying costs for the property since March 9, 2020 (i.e., mortgage payments to Singh, property tax payments, and homeowner's insurance premiums). On November 24, 2020, 1103 Corp. obtained an Order from Justice Andre requiring the Plaintiff to pay $40,000 into court as security. <u>RELIEF SOUGHT BY THE PARTIES</u> [41] In addition to an Order setting aside the conveyance of the property to 1103 Corp., the Plaintiff seeks the following relief: *5. An Order that the conveyance be deemed a nullity at law and that the real estate lawyer Manish Kapoor can remove the 11035738 CANADA INC. registration from title.* *6. An Order that counsel Kiran Salooja can complete the transfer of the Loyalist property to Bobby Abraham from Lovera Sheth pursuant to the February 28, 2020 purchase and sale Agreement.*

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		7. An Order that the $40,000 ordered by the Honourable Justice Andre that was put into the Accountant of the Superior Court of Justice be paid out of court to Lovera Sheth in its entirety plus accumulated interest. *8. Costs of this motion on a full indemnity basis due to the perpetrated fraudulent transfer.* [42] The Plaintiff is, in effect, seeking partial summary judgment against the Defendants, although not framed as such. [43] The Defendants argue that there is no evidence of conspiracy or fraud and no basis upon which to set aside the impugned conveyance or grant any of the relief requested. [44] The Defendants seek "boomerang" orders (also effectively for partial summary judgment): *1062484 Ontario Inc. v. Williams McEnery*, 2020 ONSC 825, para.25, aff'd 2021 ONCA 129, paras. 36-40. They ask the court to dismiss not only the Plaintiff's motion but also the entire action as against them, except for the action against Bindaas, which they say should be referred to an accounting. [45] Partial summary judgment is reserved for issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34; *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 46 O.R. (3d) 135, at para. 14. This is such a case. [46] The parties submitted extensive affidavits and exhibits. The affiants were cross-examined. I am confident that the motion record allows me to make the necessary findings of fact, apply the relevant legal principles to

those facts, and arrive at a just result through a fair process without a trial: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 4.

ALLEGED FRAUD AND CONSPIRACY

[47] The Plaintiff has the onus of establishing the alleged fraudulent conveyance and/or conspiracy to defraud. She has not satisfied that onus.

[48] Whether an intent to defraud exists is a question of fact to be determined from all the circumstances that existed at the time of the conveyance. The primary burden of proof rests with the Plaintiff but if she can demonstrate "badges of fraud", the court may draw an inference of intent to defraud in the absence of an explanation from the Defendants: *Re Fancy*, 1984 CanLII 2031. Traditional "badges of fraud" include:

a) the vendor continued in possession and continued to use the property as his own;

b) the transaction was secret;

c) the transfer was made in the face of threatened legal proceedings, and/or at a time when there were creditors;

d) the transfer documents contained false statements;

e) the consideration is grossly inadequate;

f) there is unusual haste in making the transfer; and

g) a close relationship exists between parties to the conveyance.

[49] The Plaintiff has produced no direct evidence of any intent to defraud on the part of any of the Defendants. During her cross-examination, she

alluded to her husband having knowledge of fraud and conspiracy against her, but she did not submit an affidavit from her husband in support of her motion.

[50] With respect to circumstantial evidence, most of the traditional "badges of fraud" are absent from this case:

a) 1103 Corp. was a *bona fide* purchaser that has repeatedly tried to take possession of the property.

b) Although there was a motion date set to resolve the dispute over the amount owed by the Plaintiff to the Bindaas Group, at the time that the APS between Bindaas and 1103 Corp. was executed, there was no threatened litigation against the Bindass Group.

c) There is no evidence that the transfer documents contain false statements.

d) The consideration paid by 1103 Corp. (i.e. $970,000) was not inadequate, let alone grossly inadequate. When the Plaintiff acquired the property in November 2017, she signed a Land Transfer Tax statement confirming the property's value of $680,000. There is no evidence that major improvements were made to the property thereafter. The value would have increased due to inflation in the real estate market generally, but after listing the property for sale in January 2020 and receiving three offers, she agreed to sell it to Abraham for $1,000,000. I infer that $1,000,000 is therefore fair market value. The $970,000 paid by 1103 Corp. in a private sale without realtor's commissions is therefore a fair price. [Note: Although the Plaintiff claims that the property was worth at least $1,200,000, the appraisal upon which she seeks to rely is inadmissible as evidence because it was adduced after she completed her cross-examination: Rule 39.02(2).)

e) There was no benefit retained by any of the Defendants beyond that to which they were lawfully entitled pursuant the conveyance

(e.g. the Bindaas Group received the monies owed to them; the real estate solicitors; Randhawa, Dhillon and TSD Law, were paid their regular fees for legal services rendered; and Singh receives interest on the money he loaned to 1103 Corp. to finance the purchase of the property). There is no evidence that Karia or Mangal personally benefitted in any way.

f) 1103 Corp. was an arm's length purchaser. Contrary to the Plaintiff's suggestion, there was no close relationship between Karia and Mangal (the principals of Bindaas and 1103 Corp.). They had just met a party in December 2019 and were not friends. There was no prior relationship between Bindaas and 1103 Corp.

g) Contrary to the Plaintiff's suggestion, there is no evidence that Randhawa was involved in 1103 Corp.'s selection of Dhillon as its solicitor. The Plaintiff alleges that Dhillon is Randhawa's former articling student. Even if that is true, it does not constitute a suspicious circumstance that would amount to a badge of fraud. I note that neither Dhillon nor Randhawa had any involvement in negotiating the terms of the APS.

h) The Plaintiff argues that it is suspicious that 1103 Corp. hired a relatively junior lawyer (Dhillon). The APS had already been executed. Registration of the transfer of title is not a complicated task. There is no reason to question Dhillon's ability to complete the task or 1103 Corp.'s judgment in retaining him to do so.

i) The Plaintiff argues that Karia, Mangan, Randhawa and Dhillon are all "from the same community", meaning the Indian community. She submits that they are from a "subset" of that community, namely the Sikh Indian community. There is no evidence to support this submission; the Defendants Mangal and Karia assert that they are not Sikh.

j) In any event, it matters not whether the Defendants are Sikh or of Indian descent. The mere fact that the principals of two transacting corporations and/or their counsel happen to share an

> ethnic or religious background is not a basis upon which the court can assume that they have a close relationship that might constitute a badge of fraud. The Indian community in Peel Region, including the Sikh sub-set of the Indian community, is large and diverse. It would be unreasonable for the court to assume that all members of that community know each other, and would be absurd to assume that they necessarily have close bonds.

[51] Based on the evidence in the record, there are only two possible "badges of fraud". The first is a degree of secrecy in the manner that the impugned conveyance occurred.

[52] The Bindaas Group and their lawyer Randhawa did not advise the Plaintiff of the pending sale to 1103 Corp., even after Randhawa obtained a copy of the Abraham APS from the Plaintiff's lawyer. There is, however, an explanation for this silence that does not involve any intent to defraud or design to injure the Plaintiff.

[53] First, when Randhawa was advised on February 26, 2020 by the Plaintiff's counsel that the property had been sold for $1,000,000 with a closing date of February 28, 2020, he was not provided with a copy of the Abraham APS. He had previously been advised of a sale on February 3, 2020, which had not materialized. Given the Plaintiff's repeated defaults and empty promises to pay Bindaas, Randhawa had no reason to believe that the purported sale was anything other than a further attempt by the Plaintiff to delay Bindaas from enforcing its rights under the mortgages.

[54] Second, after Randhawa received a copy of the Abraham APS on March 4, 2020, he noted that the closing date of February 28 had passed. His title search on March 3, 2020 had determined that the Plaintiff was still the registered owner. He conducted another title search on March 6, 2020,

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		which produced the same result. He had not been provided with an amending agreement to extend the closing on the Abraham APS, so he reasonably assumed that the Abraham APS had expired. [55] Third, given that the plaintiff was still residing at the property, and based on their history of dealings with her, Bindaas and Randhawa feared that, if she knew about the pending sale to 1103 Corp., she would bring an emergency motion for some form of injunctive relief to seek to prevent the sale, which would further delay Bindaas's ability to enforce its rights. [56] In the circumstances, Bindaas and Randhawa were under no obligation to disclose the pending sale to the Plaintiff. [57] Counsel for Randhawa acknowledged during the motion hearing that, once the transaction was completed and 1103 Corp. was registered on title (on March 9, 2020), Randhawa ought to have notified the Plaintiff's lawyer of the transfer of title, as a matter of professional courtesy. However, Randhawa had no duty to the Plaintiff on the sale transaction and therefore had no *legal* obligation to advise her of the completion of the sale. The failure to do so does not give rise to a cause of action against Randhawa (or Bindaas or Karia). [58] Moreover, Randhawa had no obligation (professional or legal) to notify the Plaintiff of the sale to 1103 Corp. *prior* to the closing and there is a reasonable explanation for why that was not done. In the circumstances, the "secrecy" surrounding the sale was not a badge of fraud. [59] The second possible "badge of fraud" is the rushed closing on the deal between Bindaas and 1103 Corp. The APS was signed on February 27, 2020 and the initial closing date was March 4, 2020. That is a short closing. Because of the time constraint, the arrears in property taxes were

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		not paid prior to the closing. 1103 Corp. agreed to purchase the property "as is" and did not insist on the taxes being paid. [60] The haste in the closing was not "unusual" or suspicious considering that Bindaas had given the Plaintiff ample time to pay out the monies owed on the two mortgages. She had been in default since July 2018. She was given an opportunity to discharge the mortgages by paying a discounted amount of $873,000, pursuant to the settlement in early December 2019. She did not comply with the settlement. Bindaas then indulged her with extra time in January 2020 to obtain financing to pay the settlement funds or to sell the property in order to make the payment. By the time 1103 Corp. made its offer to purchase the property on February 27, 2020, and the APS with 1103 Corp. was executed, Bindaas (and its counsel) had not received the Abraham APS and had good reason to believe that it was fictitious or had fallen through. Bindaas was understandably eager to close the deal with 1103 Corp. so it could finally collect the monies owing to it on the two mortgages. The Plaintiff's motion scheduled for March 6, 2020 was of no consequence. [61] Although Randhawa received a copy of the Abraham APS before the deal with 1103 Corp. closed, he had good reason to believe that the APS had expired. There is no evidence that Bindaas and 1103 Corp. were rushing their closing to "beat" the closing on the Abraham deal. 1103 Corp. had no knowledge of the Abraham deal and Bindaas had no reason to believe that the Bindaas deal was still active. [62] Based on the above, I conclude that there is no evidence to support a finding of fraud in this case.

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		[63] With respect to the alleged conspiracy, as set out in *Yang v. Co-Operators General Insurance Company*, 2021 ONSC 1540, at paras.128-129, conspiracy requires proof of four elements: a) two or more Defendants agreed to injury the Plaintiff; b) the Defendants used some means (whether lawful or unlawful) for the predominate purpose of injuring the Plaintiff; c) the Defendants acted in furtherance of their agreement to injury the Plaintiff; and d) the Plaintiff suffers damages as a result of the Defendants' conduct. [64] The Plaintiff has produced no evidence of an agreement between the Defendants to injure her. [65] Furthermore, there is no evidence that the Plaintiff suffered damages as a result of any of the Defendants' conduct. The purchase price that was to be paid by Abraham ($1,000,000) was greater than the purchase price paid by 1103 Corp. ($970,000), but the net proceeds received on the sale to 1103 Corp. were at least the same (and possibly *greater*) than they would have been on the sale to Abraham because a realtor's commission was payable on the Abraham sale. Also, the third and fourth mortgages were extinguished by the Power of Sale but would have had to have been paid (in the amounts of $45,000 and $22,000) if the sale to Abraham was completed. [66] Based on my review of the motion materials and after considering the submissions of all the parties, I conclude that there is no genuine issue to be tried with respect to the alleged conspiracy.

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		[67] The claims of fraud and conspiracy as against all the Defendants are therefore dismissed. ALLEGED INVALIDITY OF NOTICE OF SALE [68] The Plaintiff argues that, apart from any alleged fraud or conspiracy, the conveyance to 1103 Corp. must be set aside because the Notice of Sale was defective or, in the alternative, because the December 3, 2019 settlement invalidated or extinguished the Notice of Sale. [69] A Notice of Sale issued as part of a Power of Sale proceeding must be correct in order to be effective. However, technical flaws, minor irregularities or inconsequential errors in the notice will not nullify the Power of Sale. [70] The purpose of a Notice of Sale is to notify the mortgagor of the amount that she must pay, by a specific time, in order to avoid a sale of the mortgaged property. Deficiencies in the Notice of Sale may be excused so long as the notice enables the mortgagor to intelligently assess her position with respect to the redemption of the mortgage. Where the mortgagee has a reasonable basis to claim an amount that can be disputed and sorted out in an accounting, the Notice of Sale will not be nullified: *Grenville Goodwin Ltd. v. MacDonald*, [1988] O.J. No.1437 (Ont. C.A.), at para.7; *Nadi Inc. v. Yahyavi*, 2015 ONSC 4386, at para.26; *Sibyl Investment Holdings Inc. v. Vlachich*, 2020 ONSC 2191 at paras. 71 to 74. [71] In this case, there is no evidence that the Notices of Sale were incorrect or deficient when they were given. The Plaintiff confirmed in a

sworn affidavit and under oath during cross-examination, that the notices were accurate.

[72] The Plaintiff relies on the decision in *Re Botiuk and Collison et al*. 1979 CanLII 2060 (ONCA) to argue that the Notice of Sale pursuant to which the power of sale proceeded ceased to be in effect when the Minutes of Settlement were executed in December 2019.

[73] In *Botiuk*, the validity of a sale pursuant to a power of sale under a first mortgage was challenged by the second mortgagee whose right to redemption was foreclosed by the sale. Justice Wilson, for the majority of the Court of the Appeal, concluded that the Notice of Sale was deficient because it was unsigned. She held:

> *[30] Because I have found that the notice of sale was invalid from the outset it is unnecessary for me to express a view as to the effect of subsequent negotiations on an initially valid notice. It had been urged before Mr. Justice Grange, as indeed it was before this Court also, that the original notice, if valid, was "spent" after the parties agreed to revised terms of payment on the mortgage and payments were made by the mortgagor and accepted by the mortgagee in accordance with this new arrangement. Counsel submitted that a fresh notice of intention to sell would be required when a default took place under the new arrangement. The learned trial Judge rejected this submission and held that the original notice had ongoing effect.*
>
> *[31] Because my colleagues on the Court may differ from me as to the validity of the original notice, I wish to record my disagreement with the position taken by the learned trial Judge on this aspect of the case. I think that the statutory conditions under which a power of sale contained in a mortgage may be exercised must be strictly complied with. They are there for the benefit of the defaulting mortgagor and they are requirements imposed by the Legislature on the exercise by the mortgagee of a self-help remedy. In my view, where a notice has been given warning a mortgagor that unless he makes the overdue payments within a certain date the property will be sold and the mortgagee thereafter agrees to new terms as an accommodation to the mortgagor, he should not be allowed to revert to the original notice on a subsequent default by the mortgagor under the new terms. Without doubt, his power of sale is revived but that does not mean that he can proceed under the original notice.*

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> *The accounts have changed. The mortgagee has accepted payments under the mortgage. The amount required to avoid the sale is different. It cannot be said in these circumstances that the original notice meets the requirements of s.30 of the Mortgages Act. Had I found the notice of sale to be valid, I would have held that a fresh notice was required following default in payment by the mortgagor under the revised terms of payment.*

[74] The decision in *Botiuk* is distinguishable on its facts. In this case, the December 4, 2019 settlement gave the Plaintiff a brief window of time in which she could pay the discounted amount of $893,000, failing which the mortgage loans would be due in full ($927,465) and the Bindaas Group could bring an *ex parte* motion for judgment in that entire amount. The Plaintiff made no payments under the settlement, so there was no revision of the total amount owing. Unlike in *Botiuk*, Bindaas did not accept any payments from the Plaintiff, the accounts did not change, and there was therefore no need for a fresh Notice of Sale to be served in order to put the Plaintiff on notice of a new amount owing to avoid sale of the property.

[75] The Plaintiff argues that when Justice Emery awarded costs in the amount of $3,128 on February 13, 2020, that order effectively changed the amount owing and necessitated a fresh Notice of Sale. I am not persuaded by this argument. The amount required to avoid the sale of the property stayed the same and the Plaintiff knew what she had to pay in order to avoid a Power of Sale. I accept the submission made by Randhawa's counsel that invaliding the Notice of Sale because of a nominal costs award would be tantamount to invalidating the notice based on the accumulation of interest on the outstanding amount owing. A fresh Notice of Sale is not required every time interest accrues. Similarly, when Justice Harris ordered the Bindaas Group the Plaintiff's costs in the amount of $5,000 on March 6, 2020, that did not change the amount owing to discharge the mortgages, and a new Notice of Sale was not required.

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		PROTECTION OF BONA FIDE PURCHASER FOR VALUE [76] Even if I concluded that the Notice of Sale pursuant to which the power of sale was conducted needed to be refreshed after the December 4, 2019 settlement, or after Justice Emery's or Justice Harris's orders, I would not set aside the conveyance to 1103 Corp. on that basis for two reasons. [77] First, any deficiency in the notice is minor and inconsequential. [78] Second, 1103 Corp. enjoys the protection afforded by ss.35 and 36 of the *Mortgages Act*, R.S.O. c.M.40 and ss.78(4), 99(1) and (1.1) of the *Land Transfer Act*, R.S.O. 1990, c.L.6 ("LTA"). These statutory provisions offer complementary protection to *bona fide* purchasers for value who acquire and register title without notice of a defect in a Power of Sale proceeding. As explained by the Court of Appeal for Ontario in *Stanbarr Services Ltd. v. Metropolis Properties Inc.*, 2018 ONCA 244: *[40] On my reading, ss. 35 and 36 of the Mortgages Act do not purport to limit 241 Ontario's other rights, including the right to rely on the registration of evidence referred to in ss. 99(1) and 99(1.1) of the Land Titles Act.* *[41] Under s. 99 of the Land Titles Act, a registered owner of a registered charge that contains a power of sale may sell and transfer the interest in land in accordance with the terms of the power of sale. The owner may do so "[s]ubject to the Mortgages Act" and "upon registering the evidence specified by the Director of Titles". According to subsection (1.1), such evidence is conclusive evidence of compliance with Part III of the Mortgages Act. Thus, while the registered owner must comply with the Mortgages Act, subsection (1.1) deems compliance with Part III of the Act.* *[42] Section 35 of the Mortgages Act also deems there to be compliance with Part III if certain conditions are satisfied: except where an order is made under s. 39, a document containing the requisite declarations is "conclusive evidence of compliance" with Part III. However, s. 35 is "[s]ubject to the Land Titles Act" and so,*

to the extent of any conflict between s. 35 and s. 99, the latter would prevail.

[43] Section 36 of the Mortgages Act operates as a saving provision where a notice has been given in "professed compliance" with Part III. I see no conflict between s. 36 of the Mortgages Act and s. 99 of the Land Titles Act. Reading the provisions harmoniously, where there has been technical non-compliance with Part III of the Mortgages Act, both s. 36 and s. 99(1.1) may be available.

[44] Accordingly, as I read ss. 35 and 36 of the Mortgages Act, they do not purport to limit 241 Ontario's right to rely on the registration of evidence referred to in ss. 99(1) and 99(1.1) of the Land Titles Act.

[45] In contrast to my interpretation, the pre-sale mortgagees' argument regarding the interplay between the Mortgages Act and the Land Titles Act would lead to conflict between the two statutes. According to their argument, if a purchaser could not rely on ss. 35 and 36 of the Mortgages Act, it would automatically be prohibited from relying on ss. 99(1) and 99(1.1) of the Land Titles Act. The latter sections would be rendered inoperative. Such an interpretation is inconsistent with the statutory interpretation principle that statutes are to be read harmoniously, in a manner that avoids conflict: Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 27.

[46] Further, the pre-sale mortgagees' submission makes little sense from a policy standpoint. There is no policy imperative that would suggest that the failure to produce a statutory declaration that complies with s. 35 of the Mortgages Act renders the registration of the evidence provided for under the Land Titles Act a nullity. Section 35 of the Mortgages Act is not mandatory. A mortgagee may choose to prepare a statutory declaration or elect not to do so as it sees fit. A purchaser may similarly rely on the statutory declaration or choose not to do so. There is also no reason why notice under s. 36 of the Mortgages Act must be relied upon given the availability of s. 99(1) of the Land Titles Act.

[47] The better interpretation of the interaction of ss. 35 and 36 of the Mortgages Act and s. 99(1) of the Land Titles Act is that the provisions provide complementary methods of protecting bona fide purchasers for value without notice of a defect in a power of sale proceeding. This interpretation is also consistent with the curtain principle underlying the Land Titles Act, which holds that a purchaser need not investigate the history of past dealings with the land or search behind the title as depicted on the register.

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		[79] In this case, the first mortgage indicates that standard charge terms 200033 apply. Section 9 of those standard charge terms expressly provides for power of sale. Bindaas's power of sale proceeding was pursuant to those terms in the registered charge. [80] Deemed compliance with Part III of the *Mortgages Act* was achieved by Bindaas's registration of evidence specified by the Director of Titles, namely the Law Statements made by Randhawa at the time of the conveyance. Those statements included that the Plaintiff/mortgagee was in default, that Notice of Sale was served on February 21, 2019, that the charge was still in default when the chargee/Bindaas entered into the APS with 1103 Corp. and that the sale proceedings complied with the Mortgages Act. These declarations were true when Randhawa made them. Dhillon and his client Bindaas/Mangal were entitled to rely on them. [81] Dhillon's uncontested evidence is that he was unaware of the disputed discharge statement, of Randhawa's and Bindaas's alleged failure to respond to the Plaintiff's communications about it, or of the existence of the Abraham APS. Unlike in *Botiuk*, where the vendor and purchaser were represented by the same lawyer, Bindaas and 1103 Corp. had separate counsel on this transaction. There is no evidence that Dhillon had knowledge of any alleged defect in the Notice of Sale or any irregularity with the Power of Sale. [82] Mangal's undisputed evidence is that he/1103 Corp. had no knowledge of any deficiencies in the Notice of Sale or any issues with respect to title to the property. He was advised by Dhillon that the transaction was completely legitimate and he reasonably relied on the solicitor's advice.

Date	Counsel	
		[83] There is no evidence that Dhillon or TSD Law had any knowledge of a defect in the Notice of Sale or of any adverse claims to the property. At the time of the conveyance, neither Dhillon nor Mangal/1103 Corp. were aware of the disputed discharge statement, the Abraham APS, or the alleged failure of Bindaas and its counsel to respond to the Plaintiff's lawyer regarding the disputed discharge statement. [84] The evidence establishes that 1103 Corp. was an innocent *bona fide* purchaser who bought the property for value and who did not have any knowledge of any irregularities, fraud or bad faith. <u>CONCLUSION</u> [85] For the above reasons, the Plaintiff's motion to set aside the impugned conveyance is dismissed. All relief sought by the Plaintiff in her motion is denied. [86] The action is dismissed as against all Defendants except that the Plaintiff may proceed with an accounting against Bindaas and Karia. 1103 Corp. may bring a motion for release of the $40,000 held in court. [87] I am not seized of this matter, except for the issue of costs of the motion. [88] If the parties are unable to resolve the issue of costs, they shall negotiate a timetable for written submissions on costs and advise the court of the timetable by no later than June 28, 2021. The timetable and submissions may be filed via email to my administrative assistant at Snaza.Velanovski@ontario.ca. The costs submissions of each of 1103 Corp./Mangal/Singh, Randhawa, Dhillon/TSD Law, and Karia/Bindaas

ENDORSEMENT

Short Style of Cause: SHETH v. RANDHAWA ET AL **File No.: CV-20-1816**

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		Group shall not exceed 3 pages in length (excluding bills of costs and any offers to settle). The responding costs submissions of the Plaintiff shall not exceed 8 pages total (excluding bills of costs and any offers to settle). There will be no reply submissions.  Dated June 14, 2021 Petersen, J.