COURT OF APPEAL FOR ONTARIO

CITATION: Airport Business Park Inc. v. Huszti Holdings Inc., 2023 ONCA 391
DATE: 20230602
DOCKET: C70238

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

Airport Business Park Inc.

Applicant (Respondent)

and

Huszti Holdings Inc., The Corporation of the City of Windsor, Your Quick Getaway (Windsor) Inc., and the Attorney General of Canada

Respondents (Appellant)

Shaun Laubman, Niklas Holmberg, and Xin Lu (Crystal) Li, for the appellant

Dante Gatti, for the respondent

Heard: September 23, 2022

On appeal from the order of the Divisional Court (Justices D.L. Corbett, Newton, and Kristjanson) dated June 14, 2021 with reasons reported at 2021 ONSC 4276.

Coroza J.A.:

I. INTRODUCTION

[1] The appellant, Huszti Holdings Inc. ("Huszti"), agreed to sell to the respondent, Airport Business Park Inc. ("ABP"), a property located in Windsor adjacent to the Windsor International Airport pursuant to an Agreement

of Purchase and Sale. The property was subject to an easement in favour of the City of Windsor and Your Quick Getaway (Windsor) Inc. (the “Easement”).

[2] Prior to closing, ABP requisitioned that Huszti have the Easement discharged from title to the property. Huszti did not do so before the closing date. Nevertheless, the parties closed the sale on revised terms. Title to the property was transferred to ABP subject to the Easement, and a charge was placed on the property by a vendor take-back mortgage (the “VTB Mortgage”) with a provision that required Huszti to remove the Easement within one year, failing which the amount owing under the VTB Mortgage would be reduced.

[3] Huszti encountered difficulties in having the Easement removed voluntarily. Accordingly, it commenced an application to have the Easement discharged. ABP was aware of the application but did not participate in the proceedings. Huszti obtained a court order discharging the Easement and it registered the order on the property’s title, thereby vacating the Easement before the deadline in the VTB Mortgage.

[4] After the deadline in the VTB Mortgage, the City of Windsor appealed the discharge order. The appeal was dismissed by this court nine months after Huszti had obtained the discharge order.

[5] ABP took the position that the discharge order vacating the Easement did not satisfy the requirements of the VTB Mortgage. ABP commenced an application

for a declaration that Huszti failed to comply with the condition to obtain a valid release of the Easement, arguing that the court order did not meet the condition, and furthermore, the order did not meet the deadline because appeal rights existed after the deadline. The Application Judge rejected both arguments and dismissed ABP's application.

[6] ABP then appealed to the Divisional Court. The panel reversed the Application Judge's decision, holding that although Huszti had obtained a valid release of the Easement, the contractual deadline was not met because appeal rights still existed at the time of the deadline. Relying on this court's decision in *Smith et al. v. Tellier et al.* (1974), 4 O.R. (2d) 154 (C.A.) ("*Smith* (ONCA)"), the Divisional Court held that the order obtained by Huszti was "in a sense interlocutory" until appeal rights had been exhausted.

[7] Although the Divisional Court noted that the Supreme Court of Canada reversed the *Smith* (ONCA) decision[1], it held that the Supreme Court did not displace the principle that an order which is subject to appeal is not effective for all purposes before appeal rights have been exhausted. The Divisional Court held that the Supreme Court only carved out a limited exception to the principle: where the "prospect of an appeal" was ephemeral. The Divisional Court reasoned that, in this case, the prospect of appeal was not ephemeral when the order was obtained

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[1] *Smith et al. v. Tellier et al.*, [1976] 2 S.C.R. 255 ("*Smith* (SCC)").

and ABP's request for good title without contingency was not met until the actual appeal had concluded – which took place well beyond the deadline.

[8] Huszti appeals to this court.[2] Its primary argument is that the Divisional Court's reliance on *Smith* (ONCA) was misplaced and that the discharge order was a final order, binding on the parties unless it was reversed on appeal or stayed. The discharge order was registered on title, effective as of the deadline and complied with the terms of the mortgage. Accordingly, the Divisional Court erred in law and principle by failing to accord proper deference to the Application Judge's finding that it had complied with the terms of the VTB Mortgage.

[9] ABP argues that the Divisional Court did not err in finding that the discharge order, which was still subject to appeal, did not satisfy the terms of the VTB Mortgage.

[10] I would allow the appeal. As I will explain, the Application Judge was right to find that Hustzi fulfilled its side of the bargain by obtaining the discharge order and registering it on title before the deadline. Respectfully, the Divisional Court erred by interfering with that conclusion in the absence of any palpable and overriding error. I would set aside the order of the Divisional Court and restore the Application Judge's order.

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[2] Leave to appeal was granted by a panel of this court on January 20, 2022.

II. BACKGROUND

[11] The parties entered into the Agreement of Purchase and Sale on November 26, 2015. The purchase price was $4,420,000, some of which was to be satisfied by a VTB Mortgage. The closing date was December 30, 2015.

[12] The property is adjacent to the Windsor International Airport, and the City of Windsor held an easement registered as instrument R334811. As noted above, prior to the closing date, ABP requisitioned Huszti to have the Easement released from title to the property by requiring: “On or before closing, production and registration of a good and valid Release and Abandonment of the said easement.” This requisition was not fulfilled before the closing date. Nevertheless, the parties closed the sale on December 30, 2015. Upon closing, the title to the property subject to the Easement was transferred to ABP.

[13] At the time of closing, the parties added a provision to the VTB Mortgage requiring Huszti to remove the Easement by a deadline of December 30, 2016, or suffer a reduction in the amount that would be paid to it under the VTB Mortgage. The terms of the provision specifically read as follows:

> In the event that the Chargee fails to secure and register on title a good and valid Transfer Release and Abandonment relating to the Additional Grant of Easement registered on title as R334811 on July 13, 1965 in favour of Her Majesty the Queen in Right of Canada on or before December 30, 2016, the principal balance outstanding at that time shall be automatically

> reduced by the amount of Four Hundred and Forty Two Thousand Dollars ($442,000.00).

[14] Huszti was unable to persuade the City of Windsor to remove the Easement on consent, so it brought a court application to have it removed. The application was contested. Heeney R.S.J. (as he then was) decided that the Easement had expired by its own terms and ordered it removed from title. The Order of Heeney R.S.J. dated December 28, 2016 reads:

> THIS COURT ORDERS THAT the easement registered as instrument number R334811 registered on the lands legally described as Part Lot 17, Concession 7, Sandwich East, PT3, 4 & 6 on 12R3910 and bearing the PIN 75232-0032 (the "Easement") is immediately discharged and otherwise released from those lands;
>
> THIS COURT DECLARES THAT that [sic] the Easement has been abandoned and/or extinguished;
>
> THIS COURT ORDERS THAT the Applicant shall be permitted to immediately register a Transfer, Release and Abandonment of the Easement on title for the affected lands.

[15] Huszti immediately registered the discharge order with the Land Registry Office on December 28, 2016, and the Easement was vacated from title.

[16] The City of Windsor filed a Notice of Appeal with this court dated January 23, 2017. However, it did not seek a stay of the discharge order.

[17] On February 28, 2017, ABP advised Huszti that it had not fulfilled its contractual obligations under the VTB Mortgage. Consequently, on March 5, 2017,

ABP brought an application before Patterson J. (“the Application Judge”) for the $442,000 reduction to the mortgage.

[18] This court dismissed the City of Windsor’s appeal on September 8, 2017.

III. DECISIONS BELOW

A. The Application Judge’s decision

[19] ABP took the position before the Application Judge that Huszti failed to obtain a Transfer Release and Abandonment from the City of Windsor to meet the requirement under the VTB Mortgage by December 30, 2016. According to ABP, Heeney R.S.J.’s order did not satisfy the requirement under the VTB Mortgage as the order was not final, given that it was appealed.

[20] The Application Judge was required to address: (i) whether obtaining and registering Heeney R.S.J.’s order on title satisfied Huszti’s obligation to obtain a release of the Easement; and (ii) whether the registration of Heeney R.S.J.’s order on December 28, 2016, met the deadline, given that an appeal was later taken by the City of Windsor from the order.

[21] The Application Judge answered both questions in the affirmative. He found that Heeney R.S.J.’s order vacated the easement as of December 28, 2016, and therefore satisfied the requirement under the VTB Mortgage prior to the deadline. Accordingly, ABP was not entitled to the benefit of the reduction of the amount due under the VTB Mortgage.

B. The Divisional Court's decision

[22] The Divisional Court addressed the following questions: (i) whether obtaining and registering the order of Heeney R.S.J. satisfied Huszti's obligation to obtain a release of the Easement; and (ii) whether obtaining and registering the order of Heeney R.S.J. two days before the contractual deadline met the deadline to obtain a release of the Easement when appeal rights from the order subsisted after the deadline.

[23] The Divisional Court answered the first issue in the affirmative and found that the application judge was correct.

[24] The Divisional Court, however, allowed the appeal on the second issue. The Divisional Court, relying on *Smith* (ONCA), held that despite Heeney R.S.J.'s order being a final order, there remained a contingency that it could be overturned on appeal. The court found that the order remained "in some sense interlocutory" until all avenues of appeal had been exhausted.

[25] Accordingly, the Divisional Court found that ABP did not receive what it had bargained for: good title, not subject to any contingency that the Easement might remain on title. According to the Divisional Court, until the decision of the Court of Appeal was rendered and the time to appeal to the Supreme Court of Canada had expired, Heeney R.S.J.'s order did not provide ABP with the finality it had bargained for.

[26] Accordingly, the Divisional Court set aside the application judge's order and directed that ABP was entitled to the $442,000 reduction.

IV. ISSUES

[27] Huszti now appeals to this court. The appellant raises three issues on appeal. It submits that:

(i) the Divisional Court erred in law by finding that the discharge order was not final and did not satisfy the VTB Mortgage;

(ii) the Divisional Court erred by failing to consider that ABP will receive both the benefit of its bargain of having the Easement removed and the windfall of a reduction in the purchase price; and

(iii) this court should consider new arguments of relief from forfeiture on appeal.

V. ANALYSIS

A. ISSUE 1: The Divisional Court erred in finding that the discharge order was not final and did not satisfy the VTB Mortgage

[28] The Divisional Court held that the discharge order obtained by Huszti did not satisfy the provisions of the VTB Mortgage because it was not final. The essential finding by the Divisional Court is found at para. 20 of its decision:

> The appellant bargained for good title, not subject to any contingency that the Easement might remain on title. The result – the order of Heeney RSJ – did not provide the

> appellant with what it bargained for until the decision of the Court of Appeal was rendered and the time to seek leave to appeal from that decision to the Supreme Court of Canada had expired. This did not happen until almost a year after the deadline by which the respondent was to have extinguished the Easement absolutely.

[29] Huszti argues that the Divisional Court improperly revisited the Application Judge's findings regarding the parties' agreement and erred in reversing the Application Judge by relying on this court's decision in *Smith*, which has been overturned on appeal, and in any event, is distinguishable on the facts.

[30] ABP argues that as of the date of the deadline, it required a good and valid Transfer Release and Abandonment, which is a specific form that is required to be registered to extinguish the Easement. That was not done in this case. It also argues that after the contractual deadline, the City of Windsor's decision to issue a notice of appeal meant that title was contingent on the appeal failing and it did not receive what it had bargained for, because it was left with uncertainty over whether it could sell the property, borrow against it, or develop it. What ABP had bargained for was clear title from the moment of the deadline and given the outstanding appeal rights, Huszti failed to meet its obligation under the VTB Mortgage.

[31] It is helpful to place these submissions in context by reviewing this court's decision in *Smith* (ONCA). There, the parties entered into an Agreement of Purchase and Sale (APS) that included a clause that the purchaser would

investigate title before the closing date and, if within that time the purchaser raised valid objections in writing that the vendor was unable or unwilling to remove, then the APS was void. The closing date for the APS was June 30, 1971, and “time was of the essence”: *Smith* (ONCA), at 343.

[32] On April 28, 1971, the purchaser submitted a requisition because they had discovered restrictive covenants ran with the land. The purchaser’s requisition to remove the restrictive covenants included language specifically contemplating an appeal: It “required a final and conclusive order, or in the alternative undertakings not to appeal or waivers of right to appeal executed by the interested parties:” *Smith* (ONCA), at 343. The vendor did not formally answer the requisition, but proceeded to court to seek an order discharging the restrictive covenants under s. 62 of the *Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85. The matter came before the County Court on June 23, 1971, where an order was granted to discharge the restrictive covenants, which were the subject of the original requisition.

[33] The purchaser refused to close on June 30, 1971, on the ground that the order discharging the restrictive covenants was not a final order as of June 30, 1971, since the time for appeal had not expired and since no undertakings not to appeal nor waivers of right to appeal executed by the interested parties were provided. At that time, the *Rules* provided an automatic stay pending an appeal. The vendor sought damages for breach of the APS: *Smith* (ONCA), at 344. The

judge at first instance allowed the vendor's action relying on *Re West*, [1928] 1 D.L.R. 937, at 542-3. In that case, Middleton J.A. held:

> Our jurisprudence speaks in no uncertain way upon the conclusive effect of the judgments of courts. There must be some finality in human affairs or the business of every-day life would become an inextricable tangle.
>
> Any final judgement or order of a court of record, so long as it stands, is conclusive as to the matters determined by it. It may be attacked directly by motion in the same action, and in some cases it may be attacked collaterally, but unless and until attacked, its conclusive effect is not open to question.

[34] Arnup J.A., for this court, allowed the purchaser's appeal based on *Leonard v. Wharton* (1921), 64 D.L.R. 609, at 610, which was an earlier decision of Middleton J., where he said:

> This [the Rule] is not in truth a qualification of the general right, but only a recognition of the fact that a judgment, until the right of appeal is exhausted, does not possess the element of absolute finality. It is in a sense interlocutory and the Court, recognizing this principle, expounded in *Polini v. Gray* (1879), 12 Ch. D. 438, controls the action in such a way as to enable justice to be done in accordance with the view that may be expressed by the final judgment of the Court of ultimate resort.

[35] Arnup J.A. then concluded that the vendor in *Smith* had not validly met the requisition by producing an order discharging the restrictions, in respect of which order the time for appeal had not expired on the date of closing.

[36] On a further appeal, the Supreme Court reversed the decision. The court rejected both *Re West* and *Leonard v. Wharton* as too "extreme". Instead, Laskin C.J.C., for the court, instructed courts to use a contextual analysis to determine whether an order is final, at para. 4:

> The case appears to have been argued on the footing that either there was or was not an effective, a final order upon which the vendors could rely as satisfactorily answering the purchasers' requisition. On the facts of this case, I would regard this statement of the issue as extreme on each side of the case. An order which is subject to appeal cannot be said to be effective for all purposes, even in respect of third parties, before the time for appeal has run. On the other hand, the fact that the time for appeal has not yet run will not invariably stay the full effectiveness of the order, even against third parties, if there is only an ephemeral prospect of an appeal. It is always necessary to consider the purpose for which the finality or want of finality of an order is urged, to consider who is affected by the order, and in what context its finality or lack of finality is asserted at a time when the prescribed appeal period has not yet run. Hence, I do not think that either *Re West* upon which the trial judge relied or *Leonard v. Wharton* upon which the Court of Appeal relied, can dictate the result of the present appeal. [Emphasis added.]

[37] Put another way, the holding of *Smith* (SCC) is that in determining whether an order is final depends on the context of why finality is being questioned. It is not a bright line test.

[38] Against this backdrop, I now turn to this ground of appeal.

[39] I will first briefly deal with ABP's submission that Huszti did not discharge their obligation to obtain a specific document that could be registered on title. The

Divisional Court rejected that argument. It found that the Application Judge had not erred when he found that Heeney R.S.J.'s order had satisfied the terms of the condition between the parties regarding the release of the Easement. As the Divisional Court noted, if the order of Heeney R.S.J. had been obtained a month after closing and all appeal rights had been extinguished before the one-year deadline, the discharge order would have had the same effect as a voluntary discharge of the Easement. I agree. Huszti had fulfilled its obligations under the term of the VTB Mortgage by obtaining a court order to the same effect.

[40] The core submission advanced by Huszti on this ground of appeal is that the Divisional Court failed to accord proper deference to the Application Judge's findings regarding the terms of the VTB Mortgage. It argues that those findings should not have been disturbed unless the Divisional Court identified a palpable and overriding error, which it did not do. I agree with that submission.

[41] The Application Judge properly noted that the language of the governing provision in the VTB Mortgage is clear and straightforward. It required Huszti to secure and register on title a good and valid Transfer Release and Abandonment relating to the Easement. As noted above, Huszti obtained a discharge order, which the Application Judge and the Divisional Court held was the equivalent of a "good and valid Transfer Release and Abandonment". Once that order was immediately registered in the land titles system, the Easement, as the Application

Judge correctly observed, was extinguished two days before the deadline set out in the VTB Mortgage.

[42] The fundamental principles of a land titles regime *w*ere described by Epstein J. (as she then was) in *Durrani v. Augier* (2000), 50 O.R. (3d) 353, at para. 42:

> The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, 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; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and [are] the essence of the land titles system[.]

[43] This court has repeated and adopted Epstein J.'s description of the fundamental principles on many occasions. See for example: *Re Regal Constellation Hotel* (2004), O.R. (3d) (C.A.), at para. 42; *Stanbarr Services Ltd. v. Metropolis Properties Inc.*, 2018 ONCA 244, 141 O.R. (3d) 102; *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, 2022 ONCA 529; and *Martin v. 11037315 Canada Inc.*, 2022 ONCA 322.

[44] Section 78(4) of the *Land Titles Act*, R.S.O. 1990, c. L.5, is one of the main legislative mechanisms to achieve the mirror principle. Subject to limited exceptions that must be narrowly construed, s. 78(4) establishes a deferred indefeasibility of title regime that guarantees that a transfer in favour of a

subsequent purchaser is effective once registered: *Martin*, at para. 59. Put another way, everyone is entitled to rely on the land titles system to deal with land in accordance with what is shown on the registered title. The system establishes that title is what the registry says and changes to title, such as transfer or discharge of mortgage, are effective once registered: *Stanbarr*, at paras. 13-26.

[45] One exception to the mirror principle is for fraudulent instruments: see s. 78(4.1) of the *Land Titles Act*; *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101 (P.C.), as cited in *Stanbarr,* at para. 14; and *Lawrence v. Maple Trust Company*, 2007 ONCA 74, 84 O.R. (3d) 94. Fraud is not an issue in this case.

[46] The other exception is actual notice of an unregistered instrument to a third party purchaser for value: *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915, although this court has questioned whether this exception remains good law: *Stanbarr*, at paras. 22, 25 and 53.

[47] In any event, this second exception has no applicability here because an unexpired right to appeal (which is all that existed at the deadline) is not an instrument recognized for the purposes of registration. Although the *Land Titles Act* does not define “instrument”, it identifies which interests are capable of registration, such as: a transfer of freehold land in s. 86(1); a charge in s. 93; a transfer under power of sale in s. 99; a transfer of charge and a cessation of charge

in ss. 101(1) or (6) and 102; a transfer of leasehold land in s. 105; a notice of lease in s. 111; conditions, restrictions and covenants in ss. 118 or 119; and a caution in s. 128: see also O. Reg. 430/11 “Forms” and Donald H. L. Lamont, *Lamont on Real Estate Conveyancing*, 2nd ed. (Thomson Reuters looseleaf, 1991) at § 1:15. An appeal of an order is not such an instrument.

[48] The British Columbia Court of Appeal decided this very issue of whether the former owners of land retained some unregistered interest by bringing an appeal against orders vesting the land in another party in *Hydro Fuels Inc. v. Mid-Pacific Services Inc.*, 2000 BCCA 608, at para. 11.[3] The Court of Appeal rejected the contention that an appeal of a vesting order created an unregistered interest in property stating that if the party wished to preserve their interest in title, they had to seek a stay of the order. The Court held that having taken no action other than to appeal, the former owners could not complain that the land had been transferred to another party pending outcome of the appeal: *Hydro Fuels*, at paras. 12-13. In our case, at the pivotal date of December 30, 2016, the City had not even filed an appeal.

[49] Furthermore, the jurisprudence also holds that where there is no stay of an order that is being appealed, there is no jurisdiction to rectify the register on a

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[3] Note that the appellant, Huszti, also relies on this case for its argument that a difference upon which to distinguish *Smith v. Tellier* is that the order was not registered in that case and the statutory scheme provided an automatic stay.

successful appeal, if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: *Re Regal Constellation,* at para. 45, citing *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (C.A.); and *Durrani*, at paras. 49, 75-76.

[50] The importance of the City of Windsor not seeking a stay of the discharge order cannot be overstated. Rule 63 of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, no longer provides for an automatic stay pending appeal, except in certain enumerated cases, unlike the previous iteration of the rule engaged in *Smith*. As this court has previously noted, there is no requirement under the *Land Titles Act* to show that no appeal is pending, or appeal rights have not terminated. Appeal rights may be protected by obtaining a stay, which precludes registration of the order, but where a losing party does not seek such a stay, their rights of appeal might well be prejudiced: *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (C.A.), at paras. 33 and 49; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 41.

[51] This court's comments in *Regal Constellation* fortify Huszti's submission that the unexpired right to appeal held by the City as of the deadline did not affect title without a stay. In *Regal Constellation*, the owner of the hotel sought to set aside a vesting order of the Superior Court of the property following its approval of the sale of the property in the receivership process. Blair J.A. quashed the appeal brought

by the owner on the basis that it was moot because the appellant had not sought a stay of the vesting order. Blair J.A. explained at para. 33 that once a vesting order is registered on title, the change of title has been effected.

[52] He went on to add:

> [38] Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.' s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances. When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.
>
> [39] Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.
>
> [40] This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty

> required in commercial and real estate transactions that must be able to rely upon the integrity of the register. [Footnote omitted.]

[53] Blair J.A. emphasized the importance of seeking a stay to protect an appellant's remedies, at para. 49:

> I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

[54] Although Heeney R.S.J.'s discharge order in this appeal is not a vesting order, it operated in the same way by discharging the Easement immediately from title. There was no stay of this order. The fact that the effect of the discharge order when registered was the equivalent in all respects of the release of the Easement required under the VTB Mortgage is a complete answer to the Divisional Court's

concern about title being uncertain or contingent. There is no basis to find that the City's appeal rights impacted on ABP's good and marketable title in any meaningful way and the Divisional Court was wrong to find that the Application Judge erred in failing to consider the City's appeal rights without first considering the significance of those appeal rights in the context of this case.[4]

[55] In sum, the Application Judge was satisfied that ABP was fully aware of the court application to remove the Easement and decided not to be involved. He concluded that the discharge order satisfied the requirement of the VTB Mortgage and that the Easement was removed from title prior to the deadline. His findings should not have been disturbed unless there was a palpable and overriding error. I see none. The Divisional Court erred, and I would allow the appeal on this ground of appeal.

[56] Huszti also asks this court to clarify the Divisional Court's comments that all final orders are "in a sense interlocutory" and "do not possess the element of absolute finality" until appeal rights have been exhausted. It argues that the Divisional Court's decision calls into question the finality of court orders generally and that the Divisional Court's reliance on *Smith* (ONCA) was misplaced.

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[4] I also observe that the chances of the City obtaining a stay were negligible since by the time it had decided to appeal, the order had been registered on title. Under the land titles system, rights of third parties who were bound by the provisions of the VTB Mortgage, had been affected by the discharge order and its registration.

[57] Given my conclusion that the Divisional Court erred by setting aside the Application Judge's finding that Huszti had complied with the terms of the VTB Mortgage in the absence of any palpable and overriding error, it is not necessary for this Court to deal with this submission.

B. ISSUES 2 AND 3

[58] My conclusion with respect to the first issue is dispositive of this appeal. Therefore, it is not necessary to deal with the remaining grounds of appeal.

VI. DISPOSITION

[59] For these reasons, I would allow the appeal, set aside the order of the Divisional Court, and restore the order of the Application Judge. As the successful party, I would award Huszti costs, in the agreed upon total amount of $109,000, inclusive of HST and disbursements, for this appeal and the two proceedings below.

Released: June 2, 2023 "B.Z."

"S. Coroza J.A."

"I agree B. Zarnett J.A."

"I agree L. Favreau J.A."