



Original

2015 ONSC 5553  
Ontario Superior Court of Justice

Canaccede International Acquisitions Ltd. v. Abdullah

2015 CarswellOnt 13623, 2015 ONSC 5553

**Canaccede International Acquisitions Ltd., Applicant and Shabbir Abdullah,  
Respondent**

Canaccede International Acquisitions Ltd., Applicant and Mary Louise Mantle, Respondent

Canaccede International Acquisitions Ltd., Applicant and Elaine Nugent aka Kerryon Elaine Nugent, Respondent

Canaccede International Acquisitions Ltd., Applicant and Diane Richel aka Marjorie Diane Richel, Respondent

Canaccede International Acquisitions Ltd., Applicant and Genio Ienzi aka Eugenio Ienze aka Eugenio Mario Ienzi,  
Respondent

D.A. Broad J.

Heard: June 25, 2015

Judgment: September 9, 2015

Docket: C-375-15, C-376-15, C-416-15, C-377-15, C-378-15

Counsel: Todd R. Christensen, for Applicant, Canaccede International Acquisitions Ltd.

No one for Respondents

Subject: Corporate and Commercial; Insolvency; Property

**Headnote**

**Debtors and creditors**

**Real property**

*D.A. Broad J.:*

**Background**

1 The applicant, Canaccede International Acquisitions Ltd. ("Canaccede"), is a judgment creditor of each of the named respondents in these five separate proceedings, each commenced by Notice of Application. These Reasons dispose of all five applications together.

2 The applicant seeks, in respect of each application, an order directing a reference to inquire into and determine all issues relating to the conduct of a sale of the described property of each respondent. What the applicant seeks, in essence, is the implementation of a method of enforcing its money judgments against real property owned by the respondents which will be an alternative to the sheriff's sale process mandated by the *Execution Act*, R.S.O. 1990 c. E. 24.

3 The affidavit material filed in support of each application indicates that the applicant recovered judgments against the respondents which remain unsatisfied, the particulars of which are as follows:

COURT FILE	DEBTOR	DATE OF JUDGMENT	COURT GRANTING JUDGMENT	AMOUNT OF JUDGMENT	AMOUNT OUTSTANDING
C-375-15	Shabbir Abdullah	September 20, 2011	Small Claims Court at Brampton	\$27,205.27	\$39,112.26
C-376-15	Mary Louise Mantle	February 22, 2012	Small Claims Court St. Thomas	\$25,116.74	\$34,840.12
C-377-15	Elaine Nugent aka Kerryon Elaine Nugent	December 6, 2011	Small Claims Court Richmond Hill	\$11,730.10	\$16,671.99
C-378-15	Diane Richel aka Marjorie Diane Richel	October 5, 2011	Small Claims Court Brampton	\$14,932.95	\$29,953.15
C-416-15	Genio Ienzi aka Eugenio Ienze aka Eugenio Mario Ienzi	July 6, 2012	Small Claims Court Ottawa	\$16,536.14	\$18,663.21

4 The applicant personally served an Application Record on the respondent in each file, with the exception of the respondent in file C-376-15. I made an order on motion validating service on the respondent Mary Louise Mantle in file no. C-376-15. The Application Records were also served on each party shown on the parcel register for each respective property and shown on execution searches against each respondent as being parties having an interest in each particular property.

5 None of the respondents, and none of the other parties who were served appeared on the return of the applications. The applicant did file an executed Consent of the respondent Genio Ienzi aka Eugenio Ienze aka Eugenio Mario Ienzi in file no. C-416-15 to the order sought on the application against him.

6 On the return of the applications I requested that counsel for the applicants file supplementary written submissions addressing the jurisdiction of the court to grant the relief sought and, in particular, whether the question of providing an alternative method of enforcing money judgments against real property ought to be left to the legislature, and what principles ought to guide the court in ordering a judicially-supervised sale of real property to enforce a money judgment. Counsel for the applicant filed the requested the supplementary written submissions and authorities on July 8, 2015.

**Nature of the Relief Sought**

7 The sale process which the applicant proposes involves two steps. The applicant seeks firstly an order on each application pursuant to rule 54.02(2)(b) of the *Rules of Civil Procedure* directing a reference to inquire into and determine all

issues relating to the conduct of the sale of the property of each respondent, as described in the respective application record in each file, as a prerequisite to seeking an order for sale. The applicant proposes that the reference hearing perform the following functions:

- determine what property or interest in the lands is liable to be sold under the judgment;
- determine who has interests in the lands;
- define those interests and determine their priority;
- determine how the proceeds of a sale should be distributed; and
- allow an opportunity for the respondent or any interested party in each case to show cause why it would be unjust or inequitable to require the sale of the respondent's property or interest in the lands.

8 Once the initial reference hearing has been completed, if the referee has determined that the respondents have interests in the lands that may be sold to satisfy the judgment debt against them, the applicant will return to the court with the referee's report and move for an order for sale by private contract pursuant to rule 55.06(1).

#### ***Position of the Applicant***

9 The applicant begins with the principle relating to the inherent jurisdiction of the Superior Court of Justice summarized in the case of *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.) where the Court stated at para. 9:

As a superior court of general jurisdiction the [Superior Court of Ontario] has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law in civil matters.

10 Although rule 60.02(1)(a) of the *Rules of Civil Procedure* provides that an order for the payment or recovery of money may be enforced by a writ of seizure and sale, that rule is prefaced by the phrase "in addition to any other method of enforcement provided by law." The applicant argues that the inclusive language of rule 60.02(1)(a) provides sufficient authority for the court to utilize the reference and sale procedure in rules 54 and 55 for the enforcement of a money judgment against land of a judgment debtor. Although the applicant concedes that it has been unable to find a reported case where an order for the payment of money has been enforced in Ontario in this manner outside of mortgage enforcement, family law and other litigation with respect to a specific property, it has similarly been unable to find any statutory or common law that "provides to the contrary," which would impinge on the court's inherent jurisdiction, as referred to in *80 Wellesley*.

11 The applicant points to the British Columbia case of *Instafund Mortgage Management Corp. v. 379100 British Columbia Ltd.*, 1998 CarswellBC 2450 as providing support for the utilization of the process which it proposes. In that case, Burnyeat, J. noted the finding of the British Columbia Court of Appeal in *First Western Capital Ltd. v. Wardle* (1984), 59 B.C.L.R. 309 (B.C.C.A.) that the British Columbia *Court Order Enforcement Act*, which only provided for enforcement of judgment debts against the interest of judgment debtors in land by way of sheriff's auction, was not a complete code and that the court retained jurisdiction over the conduct of the sale. Justice Burnyeat ordered in *Instafund* that the sale of the judgement debtor's property proceed under the supervision of the court rather than by sheriff's auction, for the practical reasons that the process would allow a listing with a real estate agent in the realistic and active marketing of the property

instead of the ineffective marketing of the property which results from an auction by the sheriff, and that the additional cost of a second auction which is created if the offers received are not in accordance with the sheriff's view as to what the property is worth can be avoided.

12 The applicant advised that the approach of Justice Burnyeat in *Instafund* has been adopted in two decisions of this court, being those of Justice Gordon in *Capital One Bank (Canada Branch) v. Ludvik Lacek and Janice Lacek*, (April 4, 2014) Kitchener 07-4342-SR (Ont. S.C.J.) and Justice Campbell in *Capital One Bank (Canada Branch) v. Charles Kirk Anderson aka Kirk K. Anderson*, (May 9, 2013) Kitchener 11-4120-SR (Ont. S.C.J.). Counsel for the applicants in the matters now before the Court was also counsel for the applicants in the matters before Justices Gordon and Campbell. It is noted that neither Justice Gordon nor Justice Campbell gave any written or oral reasons for their decisions. As such, in my view, these decisions are not binding on me.

13 The applicant submits that, although the judgments that are the subject of these applications are of the Small Claims Court, the enforcement method sought, being a judicially-supervised sale conducted by way of a reference, as equitable relief, is available only in the Superior Court of Justice. Rule 20 of the *Small Claims Court Rules* provides that judgments of that court may be enforced by the methods listed in that rule "in addition to any other method of enforcement provided by law," thereby reserving the authority of this court to enforce judgments of the Small Claims Court.

## Analysis

14 Section 9(1) of the *Execution Act* provides as follows:

9. (1) The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and including any interest of the execution debtor in lands held in joint tenancy. R.S.O. 1990, c. E.24, s. 9.

15 There is no provision in the *Execution Act* specifying that the process in the Act providing for the sheriff to seize and sell lands of an execution debtor to enforce a money judgment is a complete code which would encroach on the court's unlimited and unrestricted jurisdiction in the substantive law in civil matters. The language of section 9(1) is permissive only, giving the sheriff authority to seize and sell property of the execution debtor. I have been unable to discover any binding authority holding that the sheriff's sale process under the *Execution Act* is to be considered as the exclusive process for the enforcement of money judgments against land.

16 In the case of *Shaver v. Goldhar*, [1925] 2 D.L.R. 1216 (C.A.) the Court of Appeal, after setting aside a fraudulent conveyance by the execution debtor, held at p. 3 of the report "the statement of claim asks that the lands be sold under the direction of the Court, but this is not necessary or proper when the conveyances set aside and the plaintiffs are execution creditors. They sell through the sheriff by virtue of their execution."

17 I would not consider this brief statement by the Court of Appeal to be binding authority that the sheriff's sale is the exclusive process for enforcing judgments against land, by providing "specifically to the contrary" to the court's unlimited and unrestricted inherent jurisdiction in civil matters. The Court, in making the brief observation in *Shaver*, did not expressly

carry out any analysis to support the conclusion stated, nor did it provide any rationale for the statement. Moreover, *Shaver* does not appear to have been cited or referred to by any subsequent case. In my view, the binding effect, if any, of the principle stated in *Shaver* should be restricted to the particular circumstances of that case namely “when the conveyance is set aside and the plaintiffs are execution creditors”.

18 Having found that the sheriff’s sale process provided by the *Execution Act* is not the exclusive process for the enforcement of money judgments, I turn now to a consideration of the circumstances under which the court may or should follow an alternative process to a sheriff’s sale, and whether the process proposed by the applicant in these proceedings is appropriate in the circumstances of the cases before the court.

19 The law relating to equitable execution provides some insight into some of the difficulties and impediments posed by the legal process for the enforcement of judgments and the response of the courts, applying equitable principles, to provide relief from those difficulties and impediments.

20 The British Columbia Court of Appeal in the recent case of *Quest Capital Corporation v Osoyoos Sands Joint Venture* 2012 BCCA 49 (B.C.C.A.) set forth at paras. 15-16 a useful summary of the law respecting equitable execution as follows:

Equitable receivers are appointed pursuant to legislation... or by court rules... or as part of the inherent jurisdiction of the court (*Capewell v. Customs and Excise Commissioners*, [2007] 2 Costs L.R. 287 (U.K. H.L.) at para. 19). They are appointed over property.

E. R. Edinger describes the rules governing the appointment of equitable receivers in “*The Appointment of Equitable Receivers: Application of Rules or Exercise of Pure Discretion?*” (1988) 67 Can. B. R. 306 at p. 308 as follows:

... [F]irst, the asset must be of a kind that is exigible by a common law or legal process; second, there must be some impediment to employment of a legal process; third, there must be some benefit to be obtained by the appointing of an equitable receiver and the appointment must be just and convenient; but fourth, special circumstances established by the judgment creditor may permit the court to disregard the second rule.

To like effect are the comments of Master Joyce in *Pacific West Systems Supply Ltd. v. Fehr Dri-Wall Ltd.*, 2001 BCSC 354, 4 C.P.C. (5th) 127 (B.C. Master), as quoted by Chief Justice Brenner in *Down, Re*, 2002 BCSC 1023, 21 C.P.C. (5th) 230 (B.C. S.C.) at para. 9.

21 Although the applicant does not seek the appointment of a receiver by way of equitable execution over the subject properties, in my view, it is appropriate to employ the principles governing equitable execution in considering whether to follow an alternative process to a sheriff’s sale for the enforcement of money judgments against land. The appointment of a receiver is the enforcement tool traditionally employed by way of equitable execution to overcome impediments inherent in the common law or legal enforcement process. A judicially-supervised sale is similarly an enforcement tool which may be considered as an alternative to a sheriff’s sale of land.

22 In applying these principles, it is noted that the properties in question are of a kind that are exigible by a common law or legal process and there is some benefit to be obtained by the initiation of a judicially-supervised sale process on the practical grounds suggested by Justice Burnyeat in *Instafund*. Moreover, the utilization of the alternate process would be just and convenient by preserving the right of the judgment debtors, and other parties with interests in the properties, to show cause why it would be unjust or inequitable to require the sale of the properties.

23 On the question of whether there is some impediment to employment of the legal process under the *Execution Act*, and whether there are special circumstances which may permit the court to disregard the requirement for such an impediment, the applicant points to the practical implications for sheriffs' sales which flow from the recent case of *Citi Cards Canada Inc. v. Plesance*, 2011 ONCA 3 (C.A.). In that case the Court of Appeal held that a mortgagee is prevented by the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5 (*PIPEDA*) from providing a mortgage statement to a third-party judgment creditor of the mortgagor/debtor so that the creditor may pursue a legal remedy to enforce its judgment.

24 The Court in *Citi Cards*, at para. 8, acknowledged that the conundrum of a judgment creditor proposing to initiate a sheriff's sale is both practical and legal in that sheriffs routinely require mortgage discharge statements from mortgagees showing outstanding balances on the encumbrances before commencing sales of property. Given that a mortgagee is prevented by *PIPEDA* from providing such mortgage discharge statements required by sheriffs, the practical implication is that an execution creditor who wishes to initiate a sheriff's sale of any encumbered property will likely be required to undertake potentially protracted and expensive examinations in aid of execution and other processes, with uncertain outcomes, just to get into the position of being able to initiate the sale process.

25 *PIPEDA*, in preventing a mortgagee from providing a mortgage statement to an execution creditor proposing to initiate a sheriff's sale, does represent an impediment to employment of the sheriff's sale process. Even if *PIPEDA* may not be considered a complete impediment of this nature, in my view it creates special circumstances permitting the court to disregard any necessity for showing such a complete impediment as a precondition to following an alternate process for the sale of land to enforce a money judgment.

26 I have considered the question of whether the court should refrain from endorsing an alternative approach to the enforcement of judgments against land in favour of leaving it to the legislature to address any difficulties in the judgment enforcement process by legislative reform.

27 In my view, where the court has an inherent jurisdiction to make an appropriate order which will do justice between the parties, the court is at liberty to do so and should do so where the circumstances warrant it, in the absence of binding authority or an overriding policy reason constraining it from following such a course.

28 In this case, none of the respondents and none of the encumbrancers appeared to oppose the relief sought by the applicant. Indeed, as indicated above, the respondent in one of the files consented to the order sought. The proposed two-step process for judicially-supervised sales of the subject properties preserves the right of the respondents and the encumbrancers to show cause on a case-specific basis why a judicial sale should not proceed. In the event that sales of the properties are ordered, the process will allow for the "realistic and active marketing of the properties" (utilizing the words of Justice Burnyeat in *Instafund*), which should, in turn, result in higher sale prices, to the potential benefit of all interested parties.

29 The Court of Appeal, in the very recent case of *Fernandes v. Araujo*, 2015 ONCA 571 (C.A.) stated, at para. 47, albeit in a different context, "the common law has long prided itself in its capacity to evolve and improve with the times." In my view, the recognition and adoption of an alternate method for the enforcement of money judgments against land, as exemplified by the British Columbia case of *Instafund*, represents such an evolution and improvement in the common law.

**Disposition**

30 On the basis of the foregoing, Judgment shall issue in respect of each application in accordance with paragraphs 1, including subparagraphs (a) to (e) and 2 of the prayer for relief in the Notice of Application in each of the above-noted files.

31 In addition, it is ordered that the respondent in each of the above-noted files pay costs to the applicant fixed in the amounts set forth below, and if such costs remain unpaid, such costs shall be paid from the proceeds of sale:

- (a) File-C-375-15 — respondent Shabbir Abdullah \$725.42;
- (b) File C-376-15 — respondent Mary Louise Mantle \$1,133.42;
- (c) File C-377-15 — respondent Elaine Nugent aka Kerryon Elaine Nugent \$767.42;
- (d) File C-378-15 — respondent Diane Richel aka Marjorie Diane Richel \$1,009.42; and
- (e) File C-416-15 — no order for costs.