

**Mazurek v. Bakker, 2001 ABQB 183**

Date: 20010313  
Action No. 0003 05252

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF LOT 7 BLOCK 2 PLAN 7722859  
IN THE MATTER OF SECTIONS 177 TO 180 OF THE  
*LAND TITLES ACT*, BEING R.S.A. 1980 c.L-5

BETWEEN:

JEAN AMY MAZUREK

Applicant/Plaintiff

- and -

BARBARA G. BAKKER, LEONARD BAKKER,  
CIBC MORTGAGE CORPORATION, ASSOCIATES MORTGAGE  
CORPORATION, ACTION TRAVEL INC. AND  
COUNTY OF STRATHCONA NO. 20

Respondents/Defendants

[Note: An Erratum was filed on March 22, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

---

REASONS FOR JUDGMENT  
of the  
HONOURABLE MR. JUSTICE DONALD LEE

---

APPEARANCES:

Mr. D. Stachnik, Q.C. - Miller Thomson  
for the Applicant/Plaintiff Jean Amy Mazurek

Mr. P.L. Court  
for the Respondent/Defendant Barbara G. Bakker

Ms. F. Schutz - Emery Jamieson  
for CIBC

Mr. A. Friedenthal -  
for Associates Mortgage Corporation

**FACTS**

[1] In May of 1996, the Applicant/Plaintiff, was the registered owner of property legally described as Lot 7 Block 2 Plan 7722859 consisting of 10.58 acres (hereinafter referred to as “the Lands”). In the month of May 1996, the Plaintiff listed the Lands for sale through a licensed Real Estate Agent.

[2] Prior to listing the land for sale, it was the Plaintiff’s intention to have the Lands subdivided into two parcels, the first parcel containing 4.58 acres to include the Plaintiff’s residence, and a second parcel of 6 acres. In this regard the Plaintiff hired the services of Hagen Surveys (1982) Ltd. The Plaintiff and Hagen Surveys (1982) Ltd. were solely responsible for obtaining the subdivision of the Lands.

[3] On July 3, 1996, the Plaintiff was advised by Hagen Surveys (1982) Ltd. that they had received conditional approval from Strathcona County with respect to the subdivision. The Plaintiff was aware that approval of the subdivision was conditional upon outstanding property taxes being paid, sewage disposal system complying with disposal regulations, a caveat being registered concerning further development of the 6 acre parcel and that all application fees being paid to Strathcona County.

[4] On July 14, 1996 the Plaintiff and the Defendant Barbara G. Bakker, entered into a Real Estate Purchase Contract for the purchase of a portion of the Lands namely: the proposed 4.58 acre parcel containing the residence. At the time that the Real Estate Purchase Contract was completed both the Plaintiff and the Defendant Barbara G. Bakker, understood that the Plaintiff was to complete the subdivision of the Lands. The agreement specifically stated that “Buyer understands it is only approx. 4.5 acres, and new legal will be done by the County with registration of title around possession date”.

[5] Prior to selling the Lands to the Defendant, the Plaintiff transferred the property from her name only, to the name of Leslie A. Mazurek and Jean Amy Mazurek as Joint Tenants, and at the same time registered a mortgage to the Defendant, CIBC Mortgage Corporation in the amount of \$140,000.00. This was done so that the Plaintiff could purchase a new home in British Columbia. It was subsequently agreed to between the Plaintiff and the Defendant Barbara G. Bakker that Bakker would assume the mortgage of \$140,000.00 as part of the purchase of the 4.58 acre parcel.

[6] On the 27<sup>th</sup> day of August 1996, Leslie A. Mazurek and Jean Amy Mazurek executed a Transfer of the Lands to the Defendant Barbara G. Bakker. Although the Mazureks had taken the responsibility upon themselves to obtain and register the subdivision they had failed to do so. However, the Mazureks apparently did not notice that the transfer of land purported to transfer the entire 10.58 acres parcel to the Defendant Barbara G. Bakker. The Mazureks failed also to obtain consent of the CIBC Mortgage Corporation to the proposed subdivision, and failed to make any arrangements with CIBC Mortgage Corporation for a partial discharge of the Mortgage on the proposed 6 acre parcel.

[7] The said Transfer of Land was prepared by a lawyer in the City of Edmonton, who acted for both the Plaintiff and the Defendant Barbara G. Bakker. The Defendant, Barbara G. Bakker, was also unaware that the subdivision had not been registered and that the entire 10.58 acres had been transferred into her name.

[8] On September 18<sup>th</sup>, 1996, title to Lands was transferred into the name of Barbara G. Bakker, subject to the assumed mortgage to the Defendant, CIBC Mortgage Corporation. The Purchase price of the transaction was \$195,000.00 paid by \$55,000.00 cash and \$140,000.00 mortgage assumption. Upon registration all monies were paid, the mortgage assumed and possession of the property was granted.

[9] On October 9<sup>th</sup>, 1998 the Defendant Barbara G. Bakker transferred the said lands from her name only, to the name of Barbara G. Bakker and Leonard Bakker as Joint Tenants (the Defendant Leonard Bakker is the 22-year old son of Barbara G. Bakker) for \$1.00 consideration. At the same time as the transfer the Defendants Barbara G. Bakker and Leonard Bakker mortgaged the Lands to the Defendants Associates Mortgage Corporation in the amount of \$30,500.00.

[10] On November 4<sup>th</sup>, 1998, a Writ was filed on title to the Lands by the Defendants, Action Travel Inc.

[11] On May 1<sup>st</sup>, 1999, a Certificate of Lis Pendens was filed by the Defendants CIBC Mortgage Corporation, pursuant to a foreclosure action on the first mortgage.

[12] Some time in May of 1999 the Plaintiff approached the Defendant Barbara G. Bakker for the first time, with concerns that the property had not been subdivided and that the entire 10.58 acre parcel was in the Defendant's name. On May 10<sup>th</sup>, 1999 the Plaintiff filed a caveat on title to the Lands.

[13] The subdivision of the Lands has not been registered at Land Titles and the property still consists of one 10.58 acre parcel. The final approval to the subdivision was obtained from Strathcona County in May 2000. Neither the County of Strathcona nor representatives of Hagen Surveys (1982) Ltd. were aware that the Plaintiff had complied with the conditions of subdivision as set out in correspondence from Strathcona County dated July 3, 1996. No caveat has been registered on title as required in the Strathcona County conditions to approval of subdivision.

[14] A caveat is filed by John Stainton on behalf of Jean Amy Mazurek pursuant to the real estate purchase contract on May 10, 1999. It was during this time period that Ms. Mazurek noticed that she had not received a fax bill for the 6 acre parcel and began making inquiries.

[15] There is some evidence that the Plaintiff was notified by Hagen Surveys (1982) Ltd. in 1997 (one year after the sale to Bakker) that the subdivision had not been completed.

[16] On November 30, 2000 the Plaintiff made application to Master Breitkreuz and obtained an Order directing that the subdivision of the lands be registered thus creating a 4.58 acre parcel and a 6 acre parcel and further directing that the 6 acre parcel be registered in to the name of the Plaintiff. As the application was made on a without prejudice basis to the rights of the Defendants CIBC Mortgage Corporation and Associates Mortgage Corporation (both of these defendants having been present at the Chambers Application) it was ordered that the parcel created in favour of the Plaintiff be registered subject to the existing encumbrances.

[17] The Plaintiff obtained an Order of rectification of the Court directing the subdivision plan be registered and title to the 6 acre parcel be registered in the name of the Plaintiff free and clear of all existing encumbrances.

## **DEFENDANT'S ARGUMENT**

[18] The Defendant Barbara Bakker argues that rectification is not possible for at least three reasons:-

- A) Rectification would defeat the interests in the proposed 6 acre parcel acquired by two bona fide mortgagees for value without notice and one bona fide purchaser of a joint tenancy for value without notice and thus adversely effect Bakkers obligation to these parties;
- B) Rectification would not be the proper or appropriate remedy under the circumstances of the case and;
- C) Rectification is not possible as the agreement between the parties for the sale of the Lands is illegal and unenforceable as it offends the provisions of section 95 of the *Land Titles Act* and s. 652(1) of the *Municipal Government Act*.

**A. Rectification would defeat the interests by two bona fide mortgagees for value without notice and one bona fide purchaser of a joint tenancy for value without notice.**

[19] It is submitted that rectification of the title is not possible without adversely affecting the rights of, and consequently her obligation to, the two mortgagees and the subsequent transferee.

[20] The equitable and registered interests of CIBC Mortgage Corporation and Associates Mortgage Corporation as well as the interests of Leonard Bakker and the interests of Action Travel Inc. were all acquired prior to the registration of the Plaintiff's caveat and as such each of the aforementioned must be able to rely on the principle of indefeasibility of title as set out in s. 64(1) and s. 66(1) of the *Land Titles Act*.

[21] Section 64(1) states:

64(1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud wherein he has participated or colluded, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates and interests that are endorsed on the certificate of title, absolutely free from all other encumbrances, liens estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.

[22] Section 66(1) reads as follows:-

66(1) Every certificate of title granted under this Act (except in case of fraud wherein the owner has participated or colluded), so long as it remains in force and uncancelled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named therein is entitled to the land included in the certificate for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 65, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

[23] It is submitted that the Plaintiff has not specifically alleged fraud and could not in any event allege fraud as it relates to the CIBC mortgage as this mortgage was placed by the Plaintiff herself. Barbara Bakker acquired title without knowledge that the Lands had not been subdivided

into two separate parcels. Monies were lent and interest in the Lands were acquired based on what was represented on the face of the title, namely that the Lands consisted of 10.58 acres.

[24] The Defendants Associates Mortgage Corporation and Leonard Bakker acquired their interest in the property more than two years after the property was transferred to Barbara Bakker and well before the Plaintiff had file her caveat on title. It is submitted that without notice of the Plaintiff's interest these Defendants are entitled to rely on the face of the title.

[25] In any event it is submitted that both Associates Mortgage Corporation and Leonard Bakker must be able to rely on the protection of ss. 160 and 195 of the *Land Titles Act* which read:-

**Protection of bona fide purchasers and mortgagees**

160 Nothing in this Act shall be so interpreted as to leave subject to action for recovery of damages, or to action of ejectment, or to deprivation of land in respect of which he is registered as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act on the plea that his transferor or mortgagor has been registered as owner through fraud or error, or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription as mentioned in section 173(1)(e). RSA 1980 c L-5 s 160

**Protection of person accepting transfer, etc.**

195(1) In this section,

- (a) "interest" includes any estate or interest in land;
  - (b) "owner" means
    - (i) the owner of an interest in whose name a certificate of title has been granted,
    - (ii) the owner of any other registered interest in whose name the interest is registered, or
    - (iii) the caveator or transferee of a caveat in whose name the caveat is registered.
- (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,
- (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner

or an previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or

- (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
- (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.
- (4) This section is deemed to have been in force since the commencement of The Land Titles Act, being chapter 24 of the Statutes of Alberta, 1906, in place of section 135 of that Act and similar sections in successor Acts. RSA 1980 c L-5 s195; 1994 c23 s 26

[26] It is submitted that the Defendant Barbara G. Bakker cannot consent to the rectification of title as requested by the Plaintiff because the above referred to mortgagees and transferee have not agreed to rectification.

[27] It is submitted that if the mortgagees agree to the rectification, they would be left with less security than they originally bargained for and the mortgagees would be in a doubtful position in enforcing their security against the Plaintiff's 6 acre parcel.

[28] All Defendants, including Barbara G. Bakker, acquired their interest in the Lands without fraud on their part, without notice of the Plaintiffs interests and in reliance of the protections of the *Land Titles Act*.

[29] The Plaintiffs failure to transfer title as agreed has left the Defendant Bakker in a dilemma in that she cannot sell the land (which what she would like to do as the property is in foreclosure) because of the Plaintiff's caveat, she cannot consent to the subdivision and transfer clear title to the Plaintiff because the mortgagees would not permit this (presumably not unless they were compensated), and an Order for rectification would severely further reduce any equity the Defendant Bakker has in the property.

**B. Rectification would not be the proper or appropriate remedy under the circumstances of the case.**

[30] The Defendant argues further that if the Plaintiff is to avail herself of an equitable remedy then the Courts must also balance the equities of the Defendants' position. In this regard the Respondents asks that the Court consider the following:

- a) Not only was it the Plaintiff's responsibility to effect the subdivision but there is some evidence that the Plaintiff was advised that the subdivision had not been completed one year after the sale to the Defendant, Barbara G. Bakker. The Plaintiff was also advised in writing by the surveyor in October of 1996, one year after the sale, that the subdivision was not completed for the property;
- b) The Plaintiff waited almost four years to take action on her interest in the property. Accordingly, it is submitted that the equitable doctrine of laches should apply when considering the equities of the Plaintiff's case.
- c) The Defendant Ms. Bakker has unknowingly paid the taxes on the Lands for the past four years at great personal difficulty to herself. Ms. Bakker has not been able to market the property for sale in order to avoid the foreclosure action because of the Plaintiff's caveat. The foreclosure action has been delayed and complicated by the Plaintiff's position which has resulted in considerable legal costs to her and to the mortgagees (there are now counsel for both mortgagees and these costs will no doubt be taken from the Respondent's equity in the property on a solicitor and client basis).
- d) The Plaintiff is aware that she has a remedy in a legal action against the Edmonton lawyer who handled the sale of the lands and has indeed commenced such an action in the Court of Queen's Bench of Alberta. The Defendant may well have less of a remedy in any such legal action against the said solicitor.

**C. Rectification is not possible as the agreement between the parties for the sale of the Lands is illegal and unenforceable as it offends the provisions of s. 95 of the *Land Titles Act* and s. 652(1) of the *Municipal Government Act*.**

[31] Section 95 of the *Land Titles Act* states:

- 95(1) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until a plan creating the lots has been registered.
- (2) A person who contravenes subsection (1) is guilty of an offence.
- (3) No party to a sale or agreement for sale is entitled in a civil action or proceeding to rely on or plead the provisions of this section if the plan of subdivision by reference to which the sale or agreement for sale was made is registered when the action or proceeding is commenced; or

- (a) if, pursuant to the arrangement between the parties, it was the duty of the party who seeks to rely on or plead the provisions of this section to cause the plan of subdivision to be registered.

[32] Section 652(1) of the *Municipal Government Act* states:

652(1) A Registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing the parcel of land unless the subdivision has been approved by a subdivision authority.

[33] The Defendant states that the substance of the Real Estate Contract purports to deal with subdivided property that was not approved by the subdivision authority and that was not registered at Land Titles. It is submitted that it was always the responsibility of the Plaintiff to obtain the subdivision and that the subdivision has still not been registered. Accordingly, the saving provisions of s.s. 95(3) can be disposed of and the facts of the case can be considered in light of s. 95(2) as an offence under the *Land Titles Act*. The Defendant notes that subdivision approval was only granted in May of 2000, and so the sale of the property in question it is submitted offends s. 652(1) of the *Municipal Government Act*.

## ISSUES

[34]

- I. Is the Plaintiff entitled to relief where the Defendant Barbara Bakker knowingly encumbered the entire parcel of land when she knew that she had not purchased the entire parcel of land from Jean Amy Mazurek? Is Barbara Bakker and her interest in the Lands protected pursuant to Sections 64(1) and 66(1) of the *Land Titles Act*;
- II. Is the Plaintiff entitled to rectification of the agreement and a correction of the title pursuant to Section 180 of the *Land Titles Act*?

## CONCLUSION

### I. Ms. Bakker's Conduct

[35] Barbara Bakker acknowledges in cross-examination that she was told by the realtor that she was only purchasing a 4.58 acre parcel. The specification sheet clearly identified that Mazurek was only going to sell 4.58 acres. The Offer to Purchaser clearly indicated in writing that only part of the lands were to be sold: namely, the "4.58 acres including the home and attached garage".

[36] When she realized that there had been an error committed by her former legal counsel in 1998, she did not contact her former legal counsel or the vendor but phoned a lawyer involved in general practice and was allegedly advised that malpractice insurance would apply.

[37] When Barbara Bakker seeks financing in October 1998, she makes a call to the County of Strathcona and is told that she is the owner of the entire parcel of land and not just the 4.68 acres. She then secures an appraisal which segregates out her 4.68 acres and provides a value for this parcel and buildings and a separate value for the 6 acre parcel. The value of the land that is disclosed in the Affidavit of Transferee signed by her son is \$250,000.00 which is exactly the value of the appraisal that Associates required for the purpose of doing the financing.

[38] The value of \$250,000.00 only is achieved if one combines both the 4.68 and 6 acre parcel values. Ms. Bakker acknowledges on the cross-examination of her Affidavit that she had not done any improvements to the land. Therefore the reason for the increase in the value of the land from the original purchase price of \$195,000.00 to \$250,000.00 appears to related to the extra land that she was now shown to be the owner of as a result of an error or oversight.

[39] Barbara Bakker did not contribute to the deception in securing the entire parcel of land through her dealings with either the Mazurek's or the lawyer, John Stainton, who facilitated the transfer of land between the parties. Rather the situation may be equivalent to an individual holding a bank account and discovering that there was an amount deposited in error into the account.

## **II Is the Applicant entitled to rectification of the agreement and a correction of the title pursuant to Section 180 of the *Land Titles Act*?**

[40] Section 180 of the *Land Titles Act* permits the Court to direct the Registrar to cancel or correct a title where the Court is satisfied that the Applicant is entitled to a transfer of the land and to be registered the owner thereof.

[41] In *BCE Development Corporation v. Cascade* (1987), 55 Alta. L.R. (2d) 22 [A.C.Q.B.] the Defendant agreed to sell lands to a purchaser for the construction of a shopping centre. The Plaintiff acquired the purchaser's interest and the transaction was subject to the purchaser obtaining a satisfactory land use designation and a Development Agreement with the City.

[42] The Agreement provided that the offer would be null and void on the expiry of 10 months from the date the purchaser obtained satisfactory financing. When the Plaintiff had obtained financing, the Agreement was redrafted; however, the 10 month expiry clause was not included. Therefore, the requirement to close only arose 90 days after the obtaining of satisfactory land use designation. The Defendant received a better offer and forced the Plaintiff to prove their caveat.

[43] Virtue, J. found that the redrafted Agreement was not ambiguous as its expiration date was tied to the obtaining of a satisfactory land use designation. He stated that the Courts should

take care in cases such as this where there has been part performance to avoid a finding of invalidity by reason of uncertainty.

[44] In dealing with the issue of mistake, he states as follows at 22:

In order for a party to be entitled to rectification on the grounds of mutual mistake it must be shown that the parties were in complete agreement as to the terms of the contract but wrote them down incorrectly. To establish unilateral mistake, a mistake must be shown to have been of such a character that it would have been obvious to the party taking advantage of it that such action would amount to fraud or fraudulent misrepresentation. The evidence does not support either of these findings.

[45] At 33 Virtue, J. quotes with approval a decision from the Supreme Court of Canada **Hart v. Boutilier** (1916) 56 D.L.R. 620:-

The power of rectification must be used with great caution; and only after the Court has been satisfied by evidence which leaves “no fair and reasonable doubt” ... that the deed impeached does not embody the final intention of the parties. This evidence must make it clear that the alleged intention to which the plaintiff asks that the deed be made to conform, continued concurrently in the minds of all parties down to the time of the execution; and the plaintiff must succeed in showing also the precise form in which the instrument will express this intention.

[46] Virtue J.’s decision was upheld by the Alberta Court of Appeal at (1987), 56 Alta. L.R. (2d) 349.

[47] In the case at hand, a mistake was made in conveying the entire parcel of land and thereafter Ms. Bakker took advantage of this mistake knowing she had never purchased the entire parcel. The Applicant is seeking to only secure those Lands which were never intended to be sold to Bakker.

[48] **Consortium Capital Projects v. Blind River Veneer** (1988), 47 R.P.R. 225 (Ont. S.C.) is authority for the proposition that rectification is available even if third party interests are effected where the Court finds the third party was not relying upon the document as executed and took action based on that document.

[49] In **Consortium Capital**, the Defendant bank took a collateral mortgage which was intended to cover certain parcels of land on a certain plan. In fact, some of those parcels of land were misdescribed. There was a subsequent sale of land and a caveat registered. It was only then that the bank noticed the error. An argument was made that the mortgage was void as creating an interest in the land as the vendor was only transferring part of the Lands. The suggestion was that the conduct violated the *Planning Act*.

[50] The Court held that the *Planning Act* was “never intended to apply to an error or mistake made between the executing parties. The policy of the Act is to regulate the development and use of land, not to prevent the transfer or inhibit the security inherit in land. Its aim and purpose is to regulate subdivision of land, not the transfer of ownership.”

[51] Further, in the head note from the *Consortium* case, *supra*, it states as follows:

In considering whether rectification should be granted, the fact that the rights of a third party may be effected will not stand in the way of rectification unless the third party relied on the document as executed and took action based on that document.

[52] In *Qualico Development Ltd. v. City of Calgary* (1987), 5 W.W.R. (Alta. Q.B.), there was the sale of land in which the intention expressed by the parties was that the vendor would be entitled to re-acquire from the City of Calgary that portion of land not required for a freeway. The actual Agreement referred to lands being returned which were not required for the City as opposed to a specific use being the freeway. At 361 of the case it states:

A document must be read and interpreted as a whole in order to extract the meaning of any particular part or expression, and evidence as to the commercial setting in which a contract is made is admissible to assist in ascertaining the intention of the parties from the language they have used in the contract.”

[53] In the *Qualico* case Virtue, J. found that clearly the intent of the parties was that the land was only to be used for freeway purposes and accordingly allowed the Plaintiff rectification of the agreement.

[54] The commercial setting in the case at hand indicates that both sides understood that Ms. Bakker was only to acquire 4.68 acres after subdivision. The CIBC was aware of the subdivision and was planning to register security against it when it was completed. This is supported by notes to their own file and a letter by the surveyor to the CIBC in October of 1996.

[55] Section 95 of the *Planning Act* and the *Municipal Government Act* have limited application to the facts of this case. Those cases cited by the Appellant deal with actions where one party intends to deliberately circumvent the requirements of the said Acts by the use of leases, caveats or other instruments (options) *Sullivan v. Newsome* (1987), A.R. 297 (Alta. C.A.).

[56] In *Newsome*, the owner entered into an agreement where it would sell one-half of a parcel of land contained in a larger parcel for \$75,000.00 with an agreement that the Purchaser would have the right at any time before or after subdivision of the property to secure the same for \$1.00. Clearly the agreement and actions in *Newsome* were intended to circumvent the relevant sections of the *Planning Act* as the consideration was a nominal dollar for the transfer when the subdivision occurred, if at all.

[57] There have also been a number of cases considered which state that a long term lease of part of an unsubdivided parcel constitutes an unlawful subdivision. When such leases are registered by way of a caveat, they have been found by the Court to be an attempt to circumvent the *Municipal Government Act* and/or the *Planning Act* - *Otan v. Kuropatwa* (1978), 7 Alta. L.R. (2d) 274 (Alta. C.A.).

[58] In the case at hand, Ms. Mazurek understood the obligations and requirements of the *Planning Act*. She retained a qualified surveyor for the purposes of dealing directly with the County of Strathcona. An appropriate subdivision application and linen was submitted to the County of Strathcona for their approval and a subdivision was indeed approved subject to four conditions which were all satisfied. There is no indication that Ms. Mazurek is using this application as a back door method to achieve subdivision, or to circumvent the planning legislation.

[59] A review of case law in the area of land sales shows that it is not unusual to draw up an agreement where the sale of a portion of land is to proceed subject to obtaining a subdivision approval. This was understood by Master Breitzkreuz during the oral argument in the application. The Master rejected the arguments of the Bakkers in reference to s. 64, 160 and 195 of the *Land Titles Act* as Ms. Bakker was the original party to the transaction.

[60] Master Breitzkreuz also correctly noted that Mazureks' argument would be considered much differently had Ms. Bakker sold the land to some third party who had not participated in the original negotiations, signed the offer to purchase and was fully aware of the original intentions of the parties. Here the subdivision approval had already been secured from the County of Strathcona prior to the signing of the Offer to Purchase between the Mazureks and Ms. Bakker.

[61] The Appellant Ms. Bakker objects to rectification as she argues this would defeat the interest of the two bona fide mortgages for value without notice.

[62] However it was agreed by all parties including Ms. Bakker's legal counsel that the application before Master Breitzkreuz would be allowed to proceed without prejudice to the rights of CIBC or any other subsequent encumbrancer. If the subdivision were allowed to proceed as provided for by Master Breitzkreuz, this would then permit the foreclosure to proceed as against Ms. Bakker. This would also preserve the right of the Mazureks to the 6 acre parcel upon registration of the subdivision. Master Breitzkreuz's decision states: "I have been asked not to deal with CIBC claim at this point".

[63] In so far as the claim of Leonard Bakker being a bona fide purchaser for value, it is to be noted that he is Ms. Bakker's 22- year old son, and the stated consideration on the transfer of land is one dollar. As such he is not a purchaser for value.

[64] It is to be also noted that the son has not signed an Affidavit or advanced this argument in any meaningful way. It is significant to note that s. 160 of the *Land Titles Act* does not speak

about mere consideration or nominal consideration; it expressly provides for “valuable consideration”.

[65] Section 160 reads:-

160 Nothing in this action shall be so interpreted as to leave subject to action for recovery of damages, or to action of ejectment, or to deprivation of land in respect of which he is registered as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act or the plea that his transferor or mortgagor has been registered as owner through fraud or error, or has derived title from or through a person registered as owner through fraud or error, except in the case of mis-description as mentioned in s. 173(1)(a).

[66] The Appellant seeks to argue that notwithstanding her knowledge of the true intentions as between the parties, and her knowledge that she only acquired a portion of the land and paid for only a portion of the land from the Mazureks, she has subsequent to the sale set off a course of events that she cannot now undo.

[67] The position of the subsequent encumbrancers is not prejudiced in any event in the context that they will maintain their interests in relation to the subdivided parcel of land. The effect of the subdivision will be to give Ms. Bakker exactly what she bargained for namely 4.58 acres and the buildings.

[68] The principle of mutual mistake does apply in the case that where parties have reached a common intention and where that common intention is not accurately displayed as a result of a mutual mistake. Rectification should occur as long as it is in accord with what the parties' original intention was. The parties agreed that only 4.58 acres was to be sold, and that was wrongfully displayed on the transfer documents and the subsequent certificate of title by the lawyer acting for both of them.

[69] It is also submitted that Ms. Mazurek is guilty of laches.

[70] However, it should be noted that delay by itself does not give rise to this defence. To be guilty of laches, the delay of the Applicant must have prejudiced the position of Ms. Bakker.

[71] At all times she knew that the intent of both parties was to convey only 4.58 acres. There was never any reliance upon Ms. Mazurek with respect to a representation or understanding that she had in fact purchased more land. When the Applicant was advised that the subdivision was not completed is largely immaterial to Ms. Bakker's position as she was always aware of what she has agreed to purchase.

[72] Ms. Bakker has not suffered any inequities that she did not knowingly impose, and she has basically the same remedies against her solicitor as does the Mazureks have. In fact, both

parties have sued their solicitor, John Stainton and Ms. Mazurek has also sued Hagen Surveys (1982) Ltd.

[73] However Ms. Mazurek has incurred legal and other costs and has been denied her property rights for a number of years as a result of the mutual mistake. The Appellant represented to the surveyor that she was prepared to proceed with the subdivision, but now appears to have changed her position and seek the extra land that she did not buy.

[74] In relation to Leonard Bakker, he does not qualify as a bona fide purchaser for value. He is related to Barbara Bakker as her 22- year old son. The stated consideration is for \$1.00 and would not qualify as a “purchase for value” under Section 160 of the Land Titles Act.

[75] Allowing the registration of the subdivision as prepared by Hagen Surveys would permit the title to be severed as originally agreed between Mazurek and Bakker and permit the CIBC to thereafter proceed with its foreclosure. If sale proceeds are achieved of a sufficient amount to pay out the CIBC and Associates Mortgage, then their continued interest in the 6 acre parcel could be readily addressed.

[76] The appeal is dismissed with costs to the Plaintiff Ms. Mazurek.

HEARD on the 8<sup>th</sup> day of March, 2001.

**DATED** at Edmonton, Alberta this 13<sup>th</sup> day of March, 2001.

---

**J.C.Q.B.A.**

---

ERRATA OF REASONS FOR JUDGMENT  
of the HONOURABLE MR. JUSTICE DONALD LEE

---

In paragraph number [72] of the above judgment, the following words have been added:

In fact, both parties have sued their solicitor,  
John Stainton and Ms. Mazurek has also sued  
Hagen Surveys (1982) Ltd.

Please replace this page in your copy of the judgment.