

# KEEPING CURRENT

August 19, 2024

## Receiver appointed over property notwithstanding allegations of fraudulent mortgage (*Hillmount Capital Mortgage Holdings Inc. v. Onsori-Saisan*)

By James R.G. Cook

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

**James R.G. Cook**  
Partner  
416.865.6628  
jcook@grllp.com

In *Hillmount Capital Mortgage Holdings Inc. v. Onsori-Saisan*, [2024 ONSC 4481 \(CanLII\)](#), the applicant lender sought to appoint a receiver over a property in King City, Ontario, following default under a mortgage provided by the registered homeowner. The mortgage agreement entitled the applicant to realize on its security through a court-appointed receiver over the mortgaged property.

In May 2023, the respondent borrower entered into the mortgage which was registered on title in favour of the lender to secure a loan of \$1,945,000. In the mortgage application, the borrower represented that he owned the property and that it was his primary residence.

The mortgage matured in June 2024, without payment. No payments were made since maturity. The full amount of the loan principal and accrued interest due as of June 24, 2024, was \$2,026,624.99. Interest, fees, and expenses continued to accrue. The borrower was also in default in payment of 2023 and 2024 realty taxes totaling over \$28,000.

There was also a second mortgage registered on the property by another lender. A recent valuation of the property indicated that net proceeds of sale may be insufficient to satisfy the two mortgages and tax arrears.

In May 2024, a *Mareva* injunction was registered on title to the property by a plaintiff claiming that the borrower and others were liable for, among other things, damages for conspiracy, conversion, fraudulent misrepresentation, breach of fiduciary duty, breach of trust and unjust enrichment. The *Mareva* injunction restrained the borrower from utilizing his assets.

The parcel register for the property indicated that it was originally purchased by another defendant in the *Mareva* action (*Afkari*) in June 2017 and was transferred in a power of sale to the borrower in January 2023.

In response to the lender's application for a receiver, *Afkari* alleged that she was the true owner of the property and had occupied it since 2017. She alleged that

she moved into the property with her husband, from whom she had since separated and was in the process of obtaining a divorce.

Afkari further claimed that she had been romantically involved with an individual named Arash Missaghi, who she understood was a real estate broker, and that in July 2021, Missaghi had arranged for a second mortgage of \$200,000 on the property from a private lender. Missaghi allegedly offered to take care of the mortgage payments for both the first and second mortgages to “alleviate” Afkari’s financial burden. Afkari claimed that unbeknownst to her, Missaghi fraudulently transferred the title of the property to the borrower, who was one of his business partners.

Missaghi was recently shot to death in Toronto by a victim of alleged mortgage fraud in a [well-publicized incident in a seemingly unrelated matter](#).

While Afkari did not deny signing the relevant mortgage documents, she claimed that Missaghi called her to his lawyer’s office to sign documents and never provided copies or explained their content. She claimed to have been duped by him and his associates. Afkari alleged that after the transfer of title to the borrower, Missaghi secured a first mortgage with the applicant lender for \$1.95 million. She further alleged that the second mortgage was fraudulent.

Afkari requested an adjournment of the lender’s application to enable her lawyer to investigate the alleged frauds and initiate legal actions against Missaghi, the borrower, and their associates.

The application judge noted that Afkari was a real estate broker with an MBA. The mortgage acknowledgment was brief and straightforward and she ought to have been able to understand the references to principal amount and monthly

payments. Although Afkari alleged that Missaghi told her that he would make the mortgage payments, there was no evidence that any such payments were actually made, and it belied belief that Missaghi would agree to make such payments simply to “alleviate” her financial burden.

As a matter of law, Afkari could not avoid a signed mortgage acknowledgment by simply asserting that she signed it without reading it, or that it was not explained to her. A person signing a document cannot avoid their obligations simply by claiming that they were careless and did not read it: *The Guarantee Company of North America v. City Excavating & Grading Ltd.*, [2016 ONCA 125](#), at paragraph [15](#).

The legal defence of *non est factum* is only available to “someone who, as a result of misrepresentation, has signed a document mistaken as to its nature and character and who has not been careless in doing so”: *Bulut v. Carter*, [2014 ONCA 424](#), at paragraph [18](#), citing *Marvco Color Research Ltd. v. Harris*, [1982 CanLII 63 \(SCC\)](#).

In any event, for the purposes of the application, it did not matter whether Afkari was a victim of Missaghi or an accomplice. In that regard, the property was transferred from a mortgagee to the borrower in a power of sale on January 27, 2023. The borrower became the registered owner of Afkari’s property on that date.

The subsequent mortgage to the applicant lender was governed by [sections 78\(4\) to 78\(4.2\)](#) of the *Land Titles Act (LTA)*, which provides the statutory framework for “fraudulent instruments”.

[Section 1](#) of the *LTA* defines a “fraudulent instrument” as an instrument,

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,

- (b) that is given under the purported authority of a power of attorney that is forged,
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument.

A “fraudulent person” is defined in [section 1 of the LTA](#) to mean a person who executes or purports to execute an instrument if,

- (a) the person forged the instrument,
- (b) the person is a fictitious person, or
- (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.

In the case at hand: (a) the borrower was not a fraudulent person as he did not forge the mortgage instrument; (b) he was not a fictitious person; and (c) he was not an imposter who knowingly and falsely held himself out to be the registered owner. Rather, he was the registered owner at the material time. As noted by the Court of Appeal for Ontario in *Froom v. Lafontaine*, [2023 ONCA 519](#), at paragraph [62](#), “A person cannot falsely hold itself out as something that it actually is”.

The mortgage was not a fraudulent instrument as defined by the [LTA](#). The lender was entitled to rely on both “the mirror principle” (the register is a perfect mirror of the state of title) and the “curtain principle” (a purchaser need not investigate the history of past dealings with the land, or search behind title): *CIBC Mortgages Inc. v. Computershare Trust Company of Canada*, [2016 ONSC 7094](#), at paragraph [63](#).

The application judge refused the adjournment request and [ordered](#) the appointment of a receiver to conduct a sale in a transparent and court-supervised process, and to ensure that the property was marketed and sold at the highest price attainable. In the court’s view, this would avoid further litigation that may otherwise arise among the stakeholders concerning the sales process.

The applicant lender was an innocent party which lent \$1,945,000 to the registered owner of the property. While Afkari may well also be an innocent party, the decision illustrates the operation of the “fraudulent instrument” framework in the [LTA](#) and the consequences that may result from legislative protections of the interests of one innocent party over another. The various proceedings underlying the decision will continue to be litigated in the ordinary course.

### Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

*(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)*