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**Charles v. Whiting**

Between  
Solomon Charles, plaintiff (appellant), and  
Robert Allan Whiting, defendant (respondent)

[1990] O.J. No. 3075  
No. 1280/89

**Ontario Court of Justice (General Division)**  
**Divisional Court**  
**Coo J.**

December 3, 1990.  
(3 pp.)

*Mortgages — Mortgage actions.*

Appeal by the plaintiff, Charles, from a decision in a mortgage action.

**HELD:** Appeal allowed.

**Counsel:**

Sharon G.H. Bond, for the appellant.  
Keith M. Landy, for the respondent.

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¶ 1 **COO J.:**— An examination of the whole of the material in this case does not support the argument that the appellant did not receive a fair hearing, or that all that was sought to be placed before the court by the appellant was not. Indeed counsel for the appellant, in opening, abandoned this ground of appeal.

¶ 2 I conclude that the clause in the agreement between the plaintiff and the developer did require the former to post a letter of credit with respect to the mortgage described in paragraph 1.01(f) of the agreement, and that it is clear that there was this obligation despite the description of the mortgage in the standard wording as "second mortgage". There was a purchase money mortgage to be provided by the original vendor in all the terms set forth in 1.01(f) and the second mortgage reference simply pre-supposed a first mortgage, which in this case did not-exist, and was indicated not to exist in the immediately preceding paragraph. It would strain interpretation quite unnecessarily to decide that since the mortgage was to be first in priority all the rest of the contractual obligations on both sides with respect to the mortgage were cast

aside. The agreement can be otherwise interpreted to give sensible meaning to the agreement as a whole. The plaintiff did have an obligation to provide to the original vendor a letter of credit with regard to the mortgage provided.

¶ 3 I proceed on this point, as counsel agreed that I should, on the basis that there was in fact provided by the vendor to the plaintiff, and assumed by the defendant, the mortgage the terms of which are described in this clause of the agreement. In the light of the dialogue with counsel, if this cannot be agreed upon by the parties, there will be a new trial directed, despite the concession to which reference is made in the first paragraph of these reasons. This procedure is also agreed upon by both counsel.

¶ 4 I do not believe that in the contractual context in which the phrase is to be examined the letter of credit or the cost therefor which is the subject matter of these proceedings, should be interpreted to be "monies paid or to be paid by the assignor to Yonge-Esplanade", the vendor of the condominium. The exclusion of obligation clause sought to be relied upon by the defendant does not cover the cost of purchasing the letter of credit.

¶ 5 The appeal will be allowed with costs, fixed at the sum of \$1000, inclusive of disbursements.

COO J.

#### APPENDIX A

Supreme Court of Ontario  
Divisional Court

Between

Solomon Charles

plaintiff  
(appellant)

and

Robert Alan Whiting

plaintiff  
(respondent)

Notice of Appeal

THE APPELLANT APPEALS to the Divisional Court from the Order of His Honour Judge Lamb dated December 20, 1989.

THE APPELLANT ASKS that the Order be set aside and judgment be granted in favour of the Appellant for the sum of \$2,500.00 together with interest and costs.

THE GROUNDS OF APPEAL are as follows:

(1) His Honour Judge Lamb erred in law in construing the terms of an Agreement of Purchase and Sale dated November 19, 1986 between the Appellant and Yonge-Esplanade Enterprises Limited and an Assignment Agreement dated December 11, 1988 between the Appellant and Respondent.

(2) His Honour Judge Lamb erred in his interpretation of clauses 1.01(e) and (f) of the Agreement of Purchase and Sale dated November 19, 1986 between the Appellant and Yonge-Esplanade Enterprises Limited.

(3) His Honour Judge Lamb erred in finding that clause 1.01(f) of the above Agreement refers to a first mortgage on the property rather than a second mortgage, as specifically stated in clause 1.01(f).

(4) His Honour Judge Lamb erred in not allowing a proper presentation of all the facts.

THE APPELLANT REQUESTS that this appeal be heard at Osgoode Hall, 130 Queen Street, West, Toronto, Ontario.

December 21, 1989

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