Edelstein Construction Limited v. The Fire Pit Inc. et al.; Gaber Holdings Ltd., Third Party *

[Indexed as: Edelstein Construction Ltd. v. Fire Pit Inc.]

30 O.R. (3d) 383
[1996] O.J. No. 3005
Nos. C18025 and C18087

Court of Appeal for Ontario,
Morden A.C.J.O., Rosenberg and Moldaver JJ.A.

September 6, 1996

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs February 27, 1997 (L'Heureux-Dubé, Sopinka, and Iacobucci JJ.).

Mortgages — Action on covenant — Claim for payment against transferee — Claim for payment against undisclosed principals of transferee — Original mortgagor selling mortgaged land and purchaser agreeing to assume mortgage — Purchaser directing title to be taken in the name of nominee — Nominee liable for payment as grantee under s. 20(1) of Mortgages Act — Undisclosed principals of nominee also liable — Mortgages Act, R.S.O. 1990, c. M.40, s. 20(2).

Mortgages — Action on covenant — Original mortgagor selling land and purchaser agreeing to assume mortgage — Purchaser directing title to be taken in name of nominee — Mortgagee suing original mortgagor for payment — Purchaser and purchaser's nominee obligated to indemnify original mortgagor.

In November 1988, the defendant F Inc. granted to the plaintiff a second mortgage on a property in Aurora, Ontario. The principal amount of the mortgage was $860,000, and the mortgage was to mature on November 15, 1990. In December 1988, F Inc. entered into an agreement to sell the property to G Ltd. for $1,980,000 payable, in part, by G Ltd. agreeing to assume the second mortgage. Before the closing, however, G Ltd.'s solicitor advised F Inc.'s solicitor that title would be taken in a company to be incorporated. Pursuant to a direction as to title from G Ltd., the sale closed on February 2, 1989 with the registration of a transfer/deed under the Land Registration Reform Act, 1984, S.O. 1984, c. 32, from F Inc. as transferor to Y Ltd. as transferee. There was no seal affixed to this transfer.

On November 14, 1990, the plaintiff and Y Ltd. entered into a mortgage extension agreement to amend the second mortgage by, amongst other things, altering the terms of payment. The mortgage being amended contained a provision stipulating that any extension and amendment would not prejudice the mortgagee's rights, and the mortgage extension agreement contained a provision to the same effect. The mortgage extension agreement was embodied in a document general that was registered under the Land Registration Reform Act, 1984. No seal was affixed to the document.

The second mortgage went into default, and the plaintiff sued F Inc., Y Ltd. and also five personal defendants for payment. In this regard, the plaintiff sued: (a) F Ltd. as original mortgagor; (b) Y Ltd. pursuant to what is now s. 20 of the Mortgages Act; and (c) the five personal defendants as it was alleged that Y Ltd. was their agent and they were liable as undisclosed principals. F Ltd. cross-claimed against the personal defendants for an indemnity and also alleged that they were undisclosed principals.

F Ltd. brought a third party proceeding against G Ltd. claiming an indemnity based upon the original agreement of sale.

In their statement of defence to the main action and to the cross-claim, the personal defendants pleaded that the transfer by which Y Ltd. received title to the property and the mortgage extension agreement were by operation of the Land Registration Reform Act, 1984 to have the same effect as documents executed under seal and, accordingly, only the parties to the documents could be liable. The personal defendants moved for a summary judgment dismissing the main action and the cross-claim. In their statement of defence to the third party claim, G Ltd. pleaded that its liability ended when the transaction closed in the name of Y Ltd. and it relied on the doctrine of merger. G Ltd. also alleged that as the deed to Y Ltd. was by operation of the Land Registry Reform Act, 1984 a document under seal, it could not have any liability to F Ltd. It moved for a summary judgment dismissing the third party claim.

The motions for summary judgment were granted, and the plaintiff and the defendant F Ltd. respectively appealed.

Held, the appeals should be allowed.

The plaintiff's claim against Y Ltd. was based on s. 20(2) of the Mortgages Act. This section provides the mortgagee with a right to recover payment of the mortgage debt from a grantee where the mortgagor has conveyed the equity of redemption to a grantee in circumstances where the grantee is obligated to indemnify the mortgagor with respect to the mortgage. The circumstances here of Y Ltd.'s acquisition of the property and assumption of the mortgages were such that Y Ltd. was liable under s. 20(2) of the Act. The mortgage extension agreement did not create Y Ltd.'s basic liability, although this agreement varied the liability. The plaintiff's basic claim did not depend upon the plaintiff enforcing any obligation entered into under seal except, possibly, for the obligation to pay increased interest under the mortgage extension agreement. The document that came closest to imposing liability on Y Ltd. was the transfer signed by F Ltd., but Y Ltd. was not a signatory of this document and the document could not impose a sealed obligation on Y Ltd. Accordingly, it was not necessary to decide the effect of the Land Registration Reform Act, 1984. Further, the personal defendants also fell within the meaning of grantee under s. 20(2). There was nothing in the wording of s. 20(2) or any policy reason to exclude the section from operating with respect to an agency relationship. Accordingly, summary judgment should not have been granted dismissing the plaintiff's claims.

Turning to F Ltd.'s cross-claim, Y Ltd. had an equitable obligation to indemnify F Ltd. This obligation arose from the facts of the transaction and not from the terms of the documents effecting the sale from F Ltd. Y Ltd. incurred no obligation to F Ltd. in the transfer document and, in any event, no obligation under seal. Accordingly, the insulating effect of a seal had no bearing. The agency principles, which made the personal defendants liable to the plaintiff under s. 20(1) of the Mortgages Act, also made them liable under the equitable obligation to indemnify F Ltd.

As for F Ltd.'s third party claim, the operative principle for consideration of G Ltd.'s defence was novation and not merger. Under the agreement of sale, G Ltd. had agreed to assume the second mortgage, and this agreement would impose an obligation on G Ltd. to indemnify F Ltd. if the mortgage being assumed was not paid. F Ltd. was obliged to convey to G Ltd.'s nominee and the transaction closed with Y Ltd. taking title and assuming the mortgage. The closing in this way did not relieve G Ltd. from its obligations and establish a novation. This contrasts with the situation where the agreement of sale contract involves a mortgage back and the vendor closes with the nominee of the purchaser but does not require the purchaser to join in the mortgage back; in that situation it might be inferred that there has been a novation. Since F Ltd. was obliged to transfer in Y Ltd., its doing so did not indicate that it had an intention to accept Y Ltd.'s implied obligation as performance of G Ltd.'s express obligation under

the contract. There was nothing in the agreement of sale that indicated that if a third party took title, G Ltd. would cease to be liable on its agreement to assume the mortgage.

Cases referred to

Beatty v. Fitzsimmons (1893), 23 O.R. 245 (Q.B.D.); Campbell v. Douglas (1915), 34 O.L.R. 580, 25 D.L.R. 436 (C.A.), affd 54 S.C.R. 28, 32 D.L.R. 734; Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1987), 56 Alta. L.R. (2d) 47, 46 D.L.R. (4th) 37, 47 R.P.R. 203, 67 C.B.R. (N.S.) 125 (Q.B.); Da Costa v. Maksymiw, [1991] O.J. No. 1943 (Gen. Div.); King v. Urban & Country Transport Ltd. (1973), 1 O.R. (2d) 449, 40 D.L.R. (3d) 641 (C.A.); Knight Sugar Co. v. Alberta Railway & Irrigation Co., [1938] 1 All E.R. 266, [1938] 1 D.L.R. 321, [1938] 1 W.W.R. 234 (P.C.); Montgomery v. De Picot, 96 P. 305 (Cal. S.C., 1908); National Trust Co. v. Fuciarelli (1980), 30 O.R. (2d) 289, 117 D.L.R. (3d) 638, 16 R.P.R. 193 (C.A.); North American Life Assurance Co. v. Johnson, [1940] O.R. 522, [1940] 4 D.L.R. 496 (H.C.J.), affd O.R. loc. cit. at p. 538 (C.A.); Prince v. Gundy, [1936] O.W.N. 397 (C.A.); Thompson v. Wilkes (1856), 5 Gr. 594 (Ch.); Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65, 49 D.L.R. (4th) 1, 25 O.A.C. 37, 30 E.T.R. 67, 39 B.L.R. 296 (C.A.); Turchen v. Wood (1953), 11 W.W.R. (N.S.) 155, [1954] 2 D.L.R. 821, 11 W.W.R. 155, 61 Man. R. 349 (Q.B.); Walker v. Dickson (1892), 20 O.A.R. 96 (C.A.); Wandoan Holdings Ltd. v. Pieter Vos Ltd. (1974), 4 O.R. (2d) 102, 47 D.L.R. (3d) 202 (H.C.J.); Waring v. Ward (1802), 7 Ves. 332 (Ch.)

Statutes referred to

Land Registration Reform Act, 1984, S.O. 1984, c. 32, ss. 12, 13 -- now R.S.O. 1990, c. L.4
Mortgages Act, R.S.O. 1980, c. 296, s. 19(2) -- now R.S.O. 1990, c. M.40, s. 20(2)

Authorities referred to

American Law Institute, Restatement of the Law of Agency, 2nd ed., p. 57
Anson's Law of Contract, 25th ed. (1979), p. 618
Bowstead on Agency, 15th ed. (1985), p. 21
Falconbridge on Mortgages, 4th ed. (1977), p. 300
Note, 28 Law Q. Rev. 122 (1912)
Seavey, "The Rationale of Agency" (1920), 29 Yale L.J. 859, p. 879
Scott, The Law of Trusts, 4th ed. (1987), p. 95
Waddams, The Law of Contracts, 3rd ed (1993), p. 170

APPEALS from summary judgments in mortgage enforcement proceedings that dismissed claims of the mortgagee and cross-claims and a third party proceeding by a defendant mortgagor.

Keith M. Landy and Samuel S. Marr, for appellant, Edelstein Construction Ltd.
John P. Conway, for appellant, The Fire Pit Inc.
Mark S. Hayes, for respondents, Gad Noik, Bernard Noik, Thomas Michaels, David Noik and Anne Noik.

The judgment of the court was delivered by

MORDEN A.C.J.O.: — There are two appeals before the court. In one appeal Edelstein Construction Limited appeals from a summary judgment dismissing its action against five individuals ("the personal

defendants") as the undisclosed principals of Yongolf Ltd. on a mortgage between The Fire Pit Inc. as mortgagor and Edelstein as mortgagee. The action is based on s. 19(2) of the Mortgages Act, R.S.O. 1980, c. 296 (now s. 20(2) of R.S.O. 1990, c. M.40), and, also, an agreement between Edelstein and Yongolf made in November of 1990.

In the other appeal, Fire Pit appeals from a summary judgment, granted by the judge who granted the summary judgment against Edelstein (the motions for summary judgment were heard together) dismissing (1) Fire Pit's third party claim (in the action commenced by Edelstein) against Gaber Holdings Ltd. as purchaser in an agreement of purchase and sale with Fire Pit as vendor to assume liability under Fire Pit's mortgage to Edelstein, and (2) Fire Pit's cross-claim for indemnity under the mortgage against the personal defendants.

This brief statement of the claims and their disposition will become more understandable in the light of the following evidence.

The Evidence and Pleadings

On November 17, 1988, Fire Pit mortgaged property which it owned in Aurora to Edelstein. The mortgage was for $860,000 and was to mature on November 15, 1990. It was a second mortgage on the property. There was a first mortgage in favour of Central Trust Company.

On December 15, 1988, Fire Pit entered into an agreement of purchase and sale with Gaber to sell the property to Gaber for $1,980,000. In this agreement Gaber agreed to assume both the first and second mortgages. With respect to the second mortgage the agreement provided:

> Purchaser further agrees to assume an existing Second Mortgage of about $855,000.00 bearing interest at 12% per annum and to run until November 1990, said mortgage is an open mortgage, repayable at any time or times without notice or bonus.
> This transaction was to close on February 1, 1989.

On January 12, 1989, the vendor's solicitor wrote to the purchaser's solicitor requesting that certain financial information relating to the purchaser be sent to the first mortgagee. The purchaser's solicitor replied the next day as follows:

> In response to your letter dated January 12, 1989, regarding the Financial Statement, we respond that title will be taken in the corporation yet to be incorporated. The only asset will be the property. Accordingly, no financial information can be disclosed and we trust you will advise the mortgagee in that regard.

On January 24, 1989 the vendor's solicitor wrote to the purchaser's solicitor enclosing a draft transfer/deed of land in blank and requested that he be advised on "how your client will be taking title". He repeated the request in a letter dated January 30, 1989. On January 30, the purchaser's solicitor replied with a letter of requisitions. In it he asked that the draft transfer/deed be engrossed as follows: "Yongolf Ltd."

The purchaser's solicitor noted that the terms of the second mortgage required payments on account of interest only. He then said, "Our client is content to assume a mortgage repayable interest only as the registered documents indicate." The references to "our client" in the letter may reasonably be understood as referring to Gaber and not Yongolf.

On February 1, 1989, Gaber gave a written direction to the vendor and its solicitors as follows:

> YOU ARE HEREBY AUTHORIZED AND DIRECTED to engross the Transfer/Deed of Land in the following manner:
>
> YONGOLF LTD.
>
> and for so doing, this shall be your good and sufficient authority.

On February 2, 1989, a transfer/deed of land (in Form 1 -- Land Registration Reform Act, 1984, S.O. 1984, c. 32) from Fire Pit as transferor to Yongolf as transferee was registered. There is no seal affixed to this document. The affidavit relating to the value of the consideration showed that $620,513.63 was paid in cash and that mortgages "assumed" ("principal and interest to be credited against purchase price") were $1,354,486.37. The total consideration was $1,975,000.

As indicated above, the mortgage in favour of Edelstein was to mature on November 15, 1990. On November 14, 1990 Yongolf and Edelstein entered into an agreement embodied in a document entitled "Document General" (Form 4 -- Land Registration Reform Act, 1984) which was to extend and amend the second mortgage. The extension and amendment reads:

> THE Chargee, subject to the terms hereinafter set forth, grants and extends and amends to the Chargor time for payment of the said principal sum as follows:
> On the date of maturity above namely, November 15, 1990 the Chargor shall pay all accrued interest owing under the Charge plus the sum of SIXTY THOUSAND ($60,000.00) DOLLARS to reduce the outstanding principal balance to EIGHT HUNDRED THOUSAND ($800,000.00) DOLLARS. THEREAFTER, the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS shall become due and payable on account of principal on the 15th day of May, 1991 and the final payment of principal money shall become due and payable on the 15th day of August, 1991, the Chargor in the meantime and until final payment of the principal money paying interest on the unpaid principal monthly on the 15th day of each and every month in each year at the rate of 14-1/2% per cent per annum calculated monthly not in advance as well after as before maturity and both before and after default; the first payment of such interest to be computed from the 15th day of November, 1990, upon the amount of principal then outstanding, to become due and payable on the 15th day of December, 1990.

The document also contains the following provision:

> And it is expressly declared and agreed that if at any time during the extended term the Chargor shall make default in payment of the principal and interest secured by the Charge/Mortgage, or any part thereof, or in the performance of any of the covenants contained in the Charge/Mortgage, the extension hereby given shall, if the Chargee so elects, become void, and the said principal and every part thereof shall become due and payable, and the Chargee shall be at liberty to take any proceedings he may see fit for the purpose of enforcing payment of the said principal and interest or of the interest only, and performance of the said covenants in like manner as if this agreement had not been executed.

There was no seal affixed to this document.

I also note that the mortgage itself contained a provision to the same effect, in part:

> 17. No extension of time given by the Chargee to the Chargor or anyone claiming under him, or any other dealing by the Chargee with the owner of the land or of any part thereof, shall in any way affect or prejudice the rights of the Chargee against the Chargor or any other person liable for the payment of the money secured by the Charge, and the Charge may be renewed by an agreement in writing at maturity for any term with or without an increased rate of interest notwithstanding that there may be subsequent encumbrances.

The mortgage went into default and Edelstein commenced an action for payment against Fire Pit and Yongolf. (Diogene Food Limited, the guarantor of the mortgage, was included as a defendant in the action. Fire Pit pleaded that Diogene merged with it on June 1, 1989.) Subsequently, Edelstein amended its statement of claim to add the five personal defendants to the action. In this amended pleading Edelstein claims against the five personal defendants a "declaration that the defendant Yongolf Ltd. was agent for the Personal Defendants" and "a declaration that the Personal Defendants were liable to the Plaintiff as principals". The pleading also contains the following allegations:

> 11. The Defendant Yongolf Ltd. became liable under s. 19 of the Mortgages Act, R.S.O. 1980, c. 296, to pay the amount of the mortgage debt to the Plaintiff by reason of an Agreement Extending and Amending Charge/Mortgage dated November 16, 1990, and registered on November 20, 1990, bearing Registration No. 556482 and registered in the Land Registry Office for the Registry Division of York Region, and by reason of a Notice of Agreement Amending Charge dated November 16, 1990, bearing Registration No. LT712551 as registered in the Land Registry office of the Land Titles Division of York Region, on the 20th day of November, 1990.
>
> . . . . .
>
> 16. Yongolf Ltd. was a bare trustee and agent for the personal Defendants, who were both beneficiaries and principals. All power and control over the actions of Yongolf Ltd. was completely that of the personal Defendants. Yongolf Ltd. was in law an agent for the personal Defendants, and the personal Defendants, as principals, are liable in law for Yongolf Ltd.'s liability on the subject mortgage to the Plaintiff.

The allegations respecting the agency and trusteeship were based on information obtained by Edelstein on the examination for discovery of Gad Noik, the president of both Yongolf and Gaber. He was examined for discovery on behalf of both these companies. For the purposes of the motions for summary judgment, it was admitted by the personal defendants that Yongolf acted as bare trustee and agent for the personal defendants who were the beneficiaries of the trust and the principals in the agency relationship. The same admission was also made with respect to Gaber being a bare trustee and agent for the personal defendants.

The law respecting the co-existence of a trust and an agency relationship is discussed in Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65 at pp. 73-79, 49 D.L.R. (4th) 1 (C.A.). At pp. 73-74 the following is quoted from Scott, The Law of Trusts, 4th ed. (1987) at p. 95:

> A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the

principles of trust, are applicable.

In their amended statement of defence the personal defendants pleaded:

> 3. The deed (the "Transfer") by which Yongolf received title to the subject property (as defined in the amended statement of claim) and assumed its obligations to the plaintiff pursuant to the mortgage described in paragraph 7 of the amended statement of claim (the "Mortgage") was registered in the York Region Registry Office on or about February 2, 1989.
> 4. Pursuant to section 12 [s. 13] of the Land Registration Reform Act, all instruments not under seal which charge or transfer land "have the same effect for all purposes as if executed under seal".
> 5. As a document executed under seal, the Transfer can only be enforced by or against the parties to it. None of the Individual Defendants were or are parties to the Transfer, and they therefore have no liability on the Mortgagee or to the plaintiff.

In its amended statement of defence, Fire Pit cross-claimed against the personal defendants alleging that "the personal defendants are liable to indemnify this defendant in respect of the plaintiff's claim as undisclosed principals of Yongolf and Gaber".

The personal defendants' statement of defence to the cross-claim includes the following which, subject to necessary changes to reflect the relationship with Fire Pit, is the same as its pleaded defence to Edelstein's claim against it:

> 3. The deed by which Yongolf received title to the Property (the "Transfer") and assumed its obligations to indemnify The Fire Pit for any amounts due under the mortgage described in paragraph 7 of the amended statement of claim (the "Mortgage") was registered in the York Region Registry Office on or about February 2, 1989.
> 4. Pursuant to section 12 [s. 13] of the Land Registration Reform Act, all instruments not under seal which charge or transfer land "have the same effect for all purposes as if executed under seal".
> 5. As a document executed under seal, the Transfer can only be enforced by or against the parties to it. None of the Individual Defendants were or are parties to the Transfer and they therefore have no liability on the Mortgage or to The Fire Pit.

Fire Pit commenced a third party proceeding against Gaber in which it claimed indemnity in respect of the amount claimed against it by the plaintiff. The claim was based upon the agreement of Gaber, set forth in the agreement of purchase and sale dated December 15, 1998 to assume Edelstein's mortgage.

In its amended statement of defence in the third party proceeding Gaber pleaded:

> 3. . . . [T]he Agreement of Purchase and Sale between the defendant, third party plaintiff, The Fire Pit Inc. ("Fire Pit") and Gaber was assigned to the defendant, Yongolf Ltd., with the consent and agreement of Fire Pit.
> 4. Gaber states and the fact is that all documentation transferring the property and arising from such transfer was directed and in the name of the defendant, Yongolf Ltd., all of which has merged in the transfer to the defendant, Yongolf Ltd. and that Gaber is without liability whatsoever to Fire Pit.

In a following paragraph Gaber pleaded that the transfer by which Yongolf took title was deemed to "have the same effect for all purposes as if executed under seal" pursuant to s. 12 (s. 13 is the provision intended) of the Land Registration Reform Act, 1984. The final paragraph in the pleading reads:

> 7. As a document executed under seal, the Transfer can only be enforced by or against the parties to it. Gaber is not a party to the Transfer, and therefore cannot have any liability on the Mortgage or to Fire Pit.

The Motions for Summary Judgment

The five personal defendants brought a motion for summary judgment dismissing Edelstein's action and, also, Fire Pit's cross-claim, against them. Gaber brought a motion for summary judgment dismissing Fire Pit's third party claim against it. The motions judge granted summary judgment on each motion.

With respect to the motion to dismiss the action against the personal defendants, the judge said:

> It is well settled law that the principal of an agent or the beneficiary of a trustee cannot sue or be sued on an instrument executed under seal by the agent or trustee. (Porter v. Pelton (1903), 33 S.C.R. 449; Margolius v. Diesbourg, [1937] S.C.R. 183; Pielsticker v. Gray, [1947] 3 D.L.R. 249 (Ont. C.A.); Tri-S Investments Limited v. Vong (Ont. Court (Gen. Div.), unreported, Dec. 19th, 1991)).

With respect to Edelstein's submission that the liability of Yongolf was based on s. 19(2) of the Mortgages Act, R.S.O. 1980, c. 296, she said:

> . . . The obligations of Yongolf were established, in my view, under the deed through which the second mortgage liability was assumed. The resultant obligations under the mortgage represent, I find, a direct contractual liability assumed upon execution of the transfer documents. Accordingly, no liability can attach to the undisclosed principals who were not a party to the mortgage or extending agreements.
> In reaching that conclusion, one cannot ignore the impact of s. 13 of the Land Registration Reform Act, 1984, S.O. 1984, c. 32, by virtue of which any transfer or charge relating to land which is not executed under seal "has the same effect for all purposes as if executed under seal". As a result thereof, the mortgage, deed and agreement to extend the mortgage are deemed to be agreements under seal and are only enforceable by or against the named parties thereto. Thus, Yongolf alone remains liable pursuant to the said agreements. The intention of the parties is deemed to be reflected by the clear wording of the documents.

The judge then made the following observation which appears to relate more to Fire Pit's third party claim against Gaber than to Edelstein's claim against the personal defendants:

> The facts here present an even stronger case in favour of the applicants since prior to closing, the solicitor for Fire Pit was aware that title would be taken in the name of a new corporation whose only asset would be the property. Nevertheless, it raised no objection to title being taken in the name of Yongolf and it chose not to require collateral security or a guarantee from any person or from Gaber. Moreover, not only was Gaber not shown as a transferee, but it was not a party to the subsequent agreement to extend the mortgage.
> She then said:
> . . . Gaber is entitled to rely on the doctrine of merger. In my view, Gaber's obligation to

> assume the mortgage clearly crystallized and merged in the deed delivered and registered upon the closing of the purchase transaction. (See King v. Urban & Country Transport Ltd. (1973), 1 O.R. (2d) 449 (C.A.)).

The Edelstein Appeal

As the reasons quoted above show, the motions court judge dismissed Edelstein's action against the personal defendants because "the mortgage, deed and agreement to extend the mortgage are deemed to be agreements under seal and are only enforceable by or against the named parties thereto. Thus, Yongolf alone remains liable pursuant to the said agreements".

With respect, I disagree with this approach to the issues. The Edelstein claim is based, essentially, on what is now s. 20(2) of the Mortgages Act, R.S.O. 1990, c. M.40, the material part of which reads:

> 20(2) Despite any stipulation to the contrary in a mortgage, where a mortgagor has conveyed and transferred the equity of redemption to a grantee under such circumstances that the grantee is by express covenant or otherwise obligated to indemnify the mortgagor with respect to the mortgage, the mortgagee has the right to recover from the grantee the amount of the mortgage debt in respect of which the grantee is obligated to indemnify the mortgagor . . .

It is the applicability of this provision to the facts of this case that would entitle Edelstein to recover the amount of the mortgage debt, or a substantial portion of it, from Yongolf or its principals (the personal defendants). I deal now with the issues which relate to s. 20(2)'s applicability.

The first issue is whether Edelstein's claim against Yongolf and its principals is based on the November 1990 agreement and not s. 20(2). If it is based exclusively on the agreement, the personal defendants plead that they are not liable by reason of the rule that insulates a principal from liability on a contract executed under seal. Authorities which recognize this rule are cited in the first passage from the reasons of the motions judge which I have quoted and I accept that the rule is part of the law. The November 1990 agreement has no physical seals on it but the personal defendants rely on s. 13(1) of the Land Registration Reform Act, 1984 (now s. 13(1) of R.S.O. 1990, c. L.4), which reads:

> 13(1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

I deal first with the initial question of the basis of the claim -- whether it is s. 20(2) or the agreement.

Apart from that part of the claim which results from the increased rate of interest provided for in the agreement (over that provided for in the mortgage) I think that the basis of the claim is s. 20(2). I say this because, assuming s. 20(2) to have been applicable at the time of the transfer to Yongolf, no new liability of Yongolf or its principals was created when the mortgage matured in November of 1990. At that time, Yongolf, or its principals, owed the total mortgage debt. Although the agreement varied the time for payment of the debt by extending it, in favour of Yongolf and its principals, the basic liability was not created in this agreement. This conclusion is reinforced by provisions in the mortgage and extension agreement, which I have quoted, which preserved the mortgagee's rights under mortgage notwithstanding the extension and amendment agreement. The manner in which Edelstein has pleaded its claim against Yongolf and the personal defendants (in para. 11 of the statement of claim set forth

earlier in these reasons) may be somewhat confusing, but the pleading does allege s. 19 (now s. 20) as a basis of the claim.

Further, as far as the applicability of s. 20(2) is concerned, I think that the principals of Yongolf properly fall within the meaning of "grantee". Yongolf was created for the purpose of acquiring the property as an agent for the principals. Its act in this respect is to be treated as though it was the act of the principals: Bowstead on Agency, 15th ed. (1985), at p. 21 and American Law Institute, Restatement of the Law of Agency, 2nd ed. at p. 57.

There is nothing in the wording of s. 20(2) which excludes the effect of an agency relationship, nor do I think that there is any policy consideration which would prevent a principal from being considered a "grantee" within the meaning of this word in that provision.

The next consideration relating to the application of s. 20(2) is whether the equity was transferred to Yongolf or its principals "under such circumstances that [they are] . . . obligated to indemnify" the mortgagor, Fire Pit. I think it is clear that the circumstances of Yongolf's acquisition of the property (in a transaction in which the purchase price of $1,975,000 was paid $625,513.67 in cash and mortgages totalling $1,354,486.37 to be credited against the purchase price) show that Yongolf or its principals were obliged to indemnify Fire Pit with respect to the balance owing on the mortgages: Waring v. Ward (1802), 7 Ves. 332 at p. 337, 32 E.R. 136 (Ch.); National Trust Co. v. Fuciarelli (1980), 30 O.R. (2d) 289, 117 D.L.R. (3d) 638 (C.A.); and Falconbridge on Mortgages, 4th ed. (1977), at p. 300.

The foregoing analysis shows that Edelstein's claim is not dependent on enforcing any obligation entered into under seal, except, possibly, for the obligation to pay increased interest under the November 1990 agreement, to which I shall return. Accordingly, I think that the motions judge erred in viewing Edelstein's claim as being based on the transfer document to Yongolf, or on the mortgage itself, or on the amending and extending agreement (except, as I have said, for some of the interest). It is not necessary, therefore, to consider the bearing of s. 13 of the Land Registration Reform Act, 1984 on the documents in this case. I might observe, however, that the document which may come closest to imposing liability on Yongolf or its principals is the transfer from Fire Pit to Yongolf. Section 13 could be applied so that Fire Pit's execution could be regarded as being under seal but since Yongolf did not sign this document it cannot be considered to have resulted in imposing a sealed obligation on it: Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1987), 56 Alta. L.R. (2d) 47 at pp. 56-57, 46 D.L.R. (4th) 37 (Q.B.).

The foregoing is sufficient to show that the summary judgment dismissing Edelstein's action against the personal defendants should not have been granted. Accordingly, it is not necessary to decide whether s. 13 of the Land Registration Reform Act applies to the November 1990 agreement to insulate the personal defendants from liability for the increased interest. Should it be necessary to resolve this question, I think that it should be done on more complete argument than we received on the function and scope of s. 13.

Before leaving the subject of Edelstein's appeal, I should say something about the motions judge's statement that "[t]he intention of the parties is deemed to be reflected by the clear wording of the documents". In making this observation she may have had in mind that finding the personal defendants liable would be an unexpected windfall for Edelstein and for Fire Pit on the cross-claim. There is no doubt, however, that the doctrine of the undisclosed principal is well established in our law and it has been defended as being fair and as serving a useful commercial purpose: see Seavey, "The Rationale of Agency" (1920), 29 Yale L.J. 859 at p. 879, Waddams, The Law of Contracts, 3rd ed. (1993) at p. 170, and Anson's Law of Contract, 25th ed. (1979), at p. 618.

The Fire Pit Appeal

(a) The dismissal of the cross-claim

The motions judge does not appear to have given reasons expressly dealing with why Fire Pit's cross-claim against the personal defendants was dismissed. It may be that she intended that her reasons for dismissing Edelstein's action against these defendants should be equally applicable to the defence of the cross-claim.

In my reasons in the Edelstein appeal relating to the application of s. 20(2) of the Mortgages Act, I concluded that Yongolf or its principals were obliged to indemnify Fire Pit with respect to the balance owing on the mortgages. This conclusion is not really contested as far as Yongolf is concerned but it is contested with respect to Yongolf's principals, the personal defendants. I think that the agency principles which made the personal defendants liable under s. 20(2) also make them liable under the equitable obligation to indemnify Fire Pit. The principle underlying the obligation was enunciated by Lord Eldon in Waring v. Ward, supra, at p. 337.

This obligation to indemnify arises from the facts of the transaction (Thompson v. Wilkes (1856), 5 Gr. 594 at pp. 596 and 598 (Ch.); Beatty v. Fitzsimmons (1893), 23 O.R. 245 at p. 248 (Q.B.D.); Note, 28 Law Q. Rev. 122 (1912), and North American Life Assurance Co. v. Johnson, [1940] O.R. 522 at pp. 526-36, [1940] 4 D.L.R. 496 (H.C.J), affirmed loc. cit. at p. 538 O.R. (C.A.)), and not from the terms of the document effecting the transfer from Fire Pit to Yongolf. Yongolf incurred no obligation to Fire Pit in this document and, in any event, no obligation under seal. Accordingly, the insulating effect of a seal with respect to the liability of principals has no bearing on this claim and the personal defendants can be liable as principals under the implied obligation to Fire Pit.

(b) The dismissal of the third party claim

I have set forth the motions judge's reasons for dismissing Fire Pit's third party claim against Gaber. She referred to King v. Urban & Country Transport Ltd. (1973), 1 O.R. (2d) 449, 40 D.L.R. (3d) 641 (C.A.), and said that "Gaber's obligation to assume the mortgage clearly crystallised and merged in the deed delivered and registered upon the closing of the purchase transaction".

King v. Urban was not concerned with merger and so her reference to it may have been based on what she saw as an implicit holding in it. In King Arnup J.A., for this court, said at p. 454:

> So far as Goldberg [the person to whom the purchaser had assigned her interest under an agreement of purchase and sale] is concerned, it is my view that a purchaser cannot purport to assign the benefit of a contract for the purchase of land to a stranger to the transaction, where the contract involves a mortgage back to the vendor, and require, as a matter of law, that the vendor accepted a mortgage from the newly-introduced party without any covenant on the part of the original purchaser under the contract. The matter is discussed in broad terms in Anson's Law of Contract, 21st ed. (1959), at p. 364; Nokes v. Doncaster Amalgamated Collieries, Ltd., [1940] 3 All E.R. 549 (H.L.), and in Corbin on Contracts (1951), vol. 4, pp. 434-51, particularly at p. 447.
>
> On the other hand, I think the purchaser and the assignee of the purchaser, acting together, can require the closing of the transaction where they tender, in performance of the purchaser's obligation to give a mortgage back, a mortgage from the assignee as mortgagor together with a guarantee from the original purchaser under the contract. The vendor has his security on the property, as contracted for, and has the personal covenant

not only of the original purchaser but of the assignee as well.

For present purposes this is the relevant part of King v. Urban. There were other issues in that case, but on this part of the case, which was an action by the purchasers for specific performance of an agreement to sell land, the court held on the facts set forth that the purchaser and her assignee could require the closing of the transaction.

Fire Pit submits that King v. Urban "implicitly recognizes that the vendor's rights against the purchaser in respect of the purchase money would cease upon its acceptance of a mortgage from the purchaser's assignee". It submits that the operative principle in these circumstances would be novation, not merger. I think that this reflects the proper approach to the issue before us.

I do not think that this is a case of merger as that term is commonly understood. It does not involve the merger of a contract into the conveyance which is made in completion of it. I refer to the following well-known statement of Lord Russell of Killowen for the Privy Council in Knight Sugar Co. v. Alberta Railway & Irrigation Co., [1938] 1 All E.R. 266 at p. 269, [1938] 1 D.L.R. 321:

> [I]t is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. . . . The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied.

First, it cannot reasonably be said that the parties, Fire Pit and Gaber, intended that the obligation to assume the mortgage would merge into the deed. Quite the contrary, the intent was that it would be effective following the transfer. Second, the parties to the deed, Fire Pit and Yongolf, are not the same as those in the contract, Fire Pit and Gaber. The decision of Wachowich J. in Canada Deposit Insurance Corp. v. Canadian Commercial Bank, supra, in which the facts are similar to but not the same as those in the present case, bears on the question. In an agreement of purchase and sale of land the purchaser agreed to assume payment of an existing mortgage of the land when the transaction closed. The transfer was made in favour of a nominee of the purchaser. At p. 53 Wachowich J. said:

> The only remaining issue with regard to the merger question is whether an agreement entered into by two parties (here the individual trustee of the R.E.I.T. [the purchaser] and Daon [the vendor]) may be merged in a transfer with a third party (the C.C.B.). While in general this would not be possible, based on the particular terms of this agreement for purchase and sale which contemplated a nominee, it was possible.

The agreement in that case expressly provided that the transfer could be made to the purchaser or to its nominee. Wachowich J. held that the agreement was carried out according to its terms and that the doctrine of merger applied -- with the result that the purchaser was no longer liable on the agreement to pay the mortgage. But for the terms of the agreement in which the vendor indicated its intention to accept the legal obligation of a nominee the result would have been different. With respect, it may be that the doctrine of merger does not explain the result. It might be more accurate to say that the agreement of purchase and sale was carried out according to its terms and that the vendor received what was promised in the agreement.

The decision of Weatherston J. in Wandoan Holdings Ltd. v. Pieter Vos Ltd. (1974), 4 O.R. (2d) 102, 47 D.L.R. (3d) 202 (H.C.J.), is instructive on the general question before us. Wandoan Holdings was an

action by the plaintiffs for specific performance of an agreement for the sale of land by the defendant. One of the bases on which Weatherston J. held that the plaintiffs were not ready and able to complete on the appointed day was that the purchaser had assigned the agreement to another party, Torox Properties Limited, who was to give the mortgage back to the vendor in intended compliance with the terms of the agreement.

The case was similar to King v. Urban, supra, except that the purchaser in the agreement did not join in the mortgage by the assignee or guarantee performance of the assignee's covenant for payment. Weatherston J. said at pp. 109-10:

> The benefit of an agreement for the sale of land is unquestionably assignable, and the correspondence which I have referred to earlier makes it clear that Mr. Mortimer [the vendor's solicitor] expected that title might be taken in the name of someone other than Wandoan Holdings Limited [the purchaser in the agreement]. Nevertheless, a draft mortgage was never submitted to him so that he never was given the opportunity to take instructions from his client. During the course of argument, I stated that where apparently "paper companies" are involved, it would not be hard to convince me that there had been a novation of the contract, or that the covenant of the original contracting party was not material. This view is supported by authorities cited to me by counsel for the plaintiffs. In Corbin on Contracts (1951), vol. 4, the learned author says at p. 447:
> Even in cases like the above, however, the circumstances and expressions may show that the transaction was not one in which the personal credit of the party was material. If the vendee of land is to give his note for part of the price, with a mortgage back as security, it may appear that the vendor put no weight whatever upon the personal note of the vendee but relied solely upon the mortgage.

He then referred to and quoted from the reasons of the Supreme Court of California in Montgomery v. De Picot, 96 P. 305 (1908), a case in which specific performance in favour of the purchaser's assignee, who tendered a mortgage back to the vendor, had been granted.

Following this, Weatherston J. said, at p. 111:

> However, there must be some evidence that the covenant is not material, or that the parties have agreed to a novation of the contract. As Mr. Thomson [counsel for the vendor] pointed out, there is no evidence that Wandoan Holdings Limited is a "paper company", or that the defendant did not rely on its covenant. On the facts of this case, I am unable to distinguish the King v. Urban case.

Novation takes place where the promisee in a contract agrees to accept another person as the person to be bound in place of the original promisor. It is not difficult to conclude that there has been a novation in cases where the vendor accepts the mortgage back from the purchaser's assignee and closes the transaction. The purchaser has promised in the contract to deliver a mortgage back to the vendor which contains the purchaser's covenant to pay the balance of the purchase price. The vendor is entitled to refuse to accept the mortgage of the purchaser's assignee. In light of this, if the vendor, nonetheless, accepts the assignee's mortgage and closes the transaction, it may reasonably be inferred that it accepted this as being a performance of the agreement with the result that the purchaser's obligation to pay the purchase money is discharged.

As I have said, Fire Pit submits that discharge of the purchaser would have been the result in King v. Urban if the vendor had accepted the assignee's mortgage. This was the uncontested result in Prince v.

Gundy, [1936] O.W.N. 397 (C.A.). At p. 401 Henderson J.A. said:

> The vendors of the lands, with full knowledge of all the facts, accepted the covenant of the defendant Smith [the original purchaser] and subsequently accepted the covenant of William E. Gundy [Smith had requested that the property be conveyed to Gundy] to pay the unpaid balance of the purchase price; and the giving of the deed to William E. Gundy and the acceptance by the vendors of the mortgage executed by, and containing the covenant of, William E. Gundy constituted performance of the agreement of sale, and entirely superseded any right to bring action on the original contract even against Smith for the unpaid balance of the purchase price.

I turn now to the mortgage assumption (as opposed to mortgage back) cases which were brought to our attention. In Walker v. Dickson (1892), 20 O.A.R. 96 (C.A.), the vendor Rogers agreed to sell to Collins land which was subject to a mortgage in favour of Walker, the plaintiff. Collins, who was indebted to the defendant Milburn, directed that the conveyance be made to Milburn "in effect as a mortgage" (p. 97). In an action by the plaintiff on the mortgage Rogers, who was one of the defendants, claimed indemnification from Milburn alleging that the consideration for the conveyance to Milburn was Milburn's assumption of the mortgage. Rogers succeeded on this claim at trial but, on appeal, the claim against Milburn was dismissed. MacLennan J.A. said, at pp. 105-07:

> Nothing is better settled than that a purchaser is entitled to have the conveyance made to his appointee instead of to himself, and decrees for specific performance are always so drawn up. It is no concern of the vendor to whom the purchaser requires it to be made. In making it to the appointee, he is performing his contract with the vendee just the same as if he made it to himself. In doing so he is still dealing with his vendee. If that be said, it seems to follow, and I think it does, that the right of indemnity against a mortgage on the estate arises from the sale and not from the mere conveyance, and must be against the real vendee, and not against the person to whom the conveyance has afterwards been made. It is an equitable and not a legal right, and it is in the nature of a personal obligation on the purchaser not depending in any way on the legal title. The purchaser might take the conveyance to himself, and immediately afterwards convey the land away, but the obligation would remain. How can it make any difference, that instead of doing that he requests the vendor to convey directly to a third person?
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> . . . . .
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> In equity it is the contract which is the sale of the land, and for the purpose of this equitable obligation of indemnity it is the sale, that is the contract of sale, which gives rise to it, and therefore when Collins bought this land from Rogers by a contract in writing, he then became, and he alone became, liable to indemnify the latter. No doubt if the case had been that the contract between Rogers and Collins had been abandoned, and then the former had conveyed to Milburn, the conveyance would have been the sale and the latter would have been liable, but that is not what took place. Milburn never was, and never intended to be, a purchaser, nor anything more than a mortgagee, and I think we must therefore hold that he is not liable to indemnify Rogers, and that to that extent the appeal should be allowed.
>
> It is clearly proved that Milburn is a mere mortgagee and not the owner of the equity of redemption, that person being Collins. The plaintiff has unfortunately not brought the owner of the equity of redemption before the Court, and therefore the judgment, so far as it directs a sale of the land, can be of very little value.

This reasoning is some support for the continuing liability of Gaber notwithstanding the conveyance of the land to Yongolf but, in at least one important respect, the facts of Walker v. Dickson are different from those in the present case. The difference is that Yongolf, at least on the material before us, was ultimately intended to be the purchaser. There is no suggestion that it took the property simply as security. At the time that the transaction closed, it paid to Fire Pit $620,513.63. Milburn, in Walker v. Dickson, was known to the vendor Rogers to be taking the land only as security for his loan to Collins and Collins was the real purchaser.

Fire Pit also relied upon the statement of Williams C.J.Q.B. in Turchen v. Wood (1953), 11 W.W.R. (N.S.) 155 at p. 175, [1954] 2 D.L.R. 821 (Q.B.):

> The agreement of the male defendant [set forth in the agreement of purchase and sale] to assume the mortgage not being merged in the conveyance (see supra), he would be liable on it to indemnify the plaintiff in the event of default and the fact that it was not under seal would make no difference: Esser v. Pritzker, [(1926), 58 O.L.R. 537].

I have difficulty in seeing that any of the earlier cited cases (which appear to be on p. 169) precisely support this proposition. The closest case is Campbell v. Douglas (1915), 34 O.L.R. 580, 25 D.L.R. 436 (C.A.), affirmed 54 S.C.R. 28, 32 D.L.R. 734, which is very similar to Walker v. Dickson, supra. In any event, the conclusion that the male defendant's agreement to assume the mortgage survived the subsequent transfer to his wife is, in my view for reasons I shall give, in accord with basic principles.

The question has been considered by Montgomery J. in the Ontario Court (General Division) in Da Costa v. Maksymiw, [1991] O.J. No. 1943, in the context of a solicitor's negligence action. In this case, the plaintiffs agreed to sell property, which was subject to two mortgages, to an individual, for an amount equal to the mortgages. On closing, the purchaser directed that the property be conveyed to a corporation and it was conveyed to this corporation. Subsequently, both mortgages went into default. The first mortgagee sold under power of sale. The proceeds satisfied its mortgage and part of the second mortgage. The second mortgagee obtained a judgment against the plaintiffs. The plaintiffs claimed the amount of the judgment from their solicitor on the transaction. They alleged that he was negligent in not obtaining an indemnity agreement from the original purchaser to indemnify the vendors on their covenant in the second mortgage.

A solicitor gave expert opinion evidence on behalf of the defendant solicitor. In his opinion letter he said, in part:

> In my opinion, it was not the practice of a reasonably competent solicitor at the relevant time, namely the fall of 1980 or for that matter even today), to obtain an indemnification or assumption agreement from the purchaser named in the agreement of purchase and sale where title was directed by that purchaser to be taken by a third party on closing.
>
> However, it is the practice to obtain a guarantee or other form of indemnification from the purchaser named in the agreement of purchase and sale in respect of a vendor taken back mortgage where title is directed to a third party on closing.

The solicitor gave oral evidence at the trial which Montgomery J. set forth in his reasons as follows:

> [He] made it clear that there was a difference between this fact situation and the one where there is a vendor take back mortgage. In the case of assumption of mortgages, as was the case here, the obligation to indemnify the vendors on the mortgage covenant occurs on signing the offer to purchase. The obligation to assume the mortgages does not merge in

> the deed on closing. It is an obligation that survives closing. However, title was taken by Kensington [the corporation], thus assuming the covenant to pay the two mortgages.
>
> . . . . .
>
> The principle is that upon executing a contract of purchase and sale, the purchaser who assumes existing mortgages indemnifies the vendors on their covenants on the mortgages.
>
> [The solicitor] said that the obligation upon the [purchaser] was created upon the execution of the agreement of purchase and sale. There is no obligation against the solicitor for failure to explain the right of indemnity against the [purchaser] to the plaintiffs. The [purchaser] was liable in contract to the plaintiffs from 1980 to 1986. The plaintiff went to another solicitor in 1982 for advice. That solicitor brought suit but did not sue the [purchaser] within the limitation period.
>
> . . . . .
>
> It was alleged in paragraph 4 A of the statement of claim that the solicitor was negligent in allowing title to go into the name of Kensington. However, even the plaintiffs expert said that was not inappropriate. [The solicitor] said there was no merger of the [purchaser]'s indemnity on closing.
>
> At the conclusion of his reasons, Montgomery J. said:
>
> I have concluded that the plaintiffs did have an indemnity from the architect [the purchaser]. They did go to another solicitor eventually and he failed to sue the indemnitor.
>
> I therefore find no negligence on the defendant.

This judgment is based on the legal conclusion that the purchaser's agreement to assume the mortgages survived the conveyance to the corporation to which the purchaser directed the vendor to convey the property. The plaintiffs have appealed from the dismissal of their action but, according to their factum, on grounds unrelated to this conclusion.

Gaber has submitted in its factum that:

> There are two options available to a vendor when a purchaser of land which has undertaken to assume or give a mortgage as a portion of the purchase price directs that title be taken in the name of a third party: either accept the covenant of the third party or insist on a guarantee from the original covenantor. If the law were that the original covenantor were always liable on the promise in the agreement of purchase and sale to assume or give the mortgage, as claimed by Fire Pit, there would be no need for the rule established by this court.

King v. Urban, supra, is cited as authority for these statements.

For the reasons I have given, as a matter of basic legal principle, I do not see how these statements can apply to assumption situations. The "rule established by this court", which recognizes the role of a guarantee from the original covenantor, makes sense in mortgage back situations. It does not fit in assumption situations.

There is nothing in the agreement of purchase and sale in the present case that indicates that, if a third party took title, Gaber would cease to be liable on its agreement to assume the mortgage. Fire Pit was obliged to convey to Gaber's nominee, Yongolf: Walker v. Dickson, supra. Although the nominee would be liable to it under the implied obligation arising on the facts and not based on any promise (Waring v.

Ward, supra) Fire Pit was no more obliged to accept this in place of Gaber's contractual obligation than the vendor in King v. Urban was to accept the covenant in the mortgage given by the purchaser's assignee as part of the consideration.

As I have said, because the vendor in King v. Urban could have refused to accept the assignee's mortgage back as part of the purchase price it might be inferred that its acceptance would show that there had been a novation of the original agreement. Since Fire Pit was obliged to make the transfer in favour of Yongolf I do not think that its doing so indicates an intention on its part to accept Yongolf's implied obligation as performance of Gaber's express obligation under the contract.

Before concluding I should mention general submissions made on behalf of Gaber that there is strong evidence that the intention of the parties was that the obligation of Gaber to assume the Edelstein mortgage would not survive the closing with Yongolf. First, there is the unchallenged correspondence between the solicitors for Fire Pit and the solicitor for Yongolf, wherein it was pointed out that Yongolf was a company which would have no assets but the property being purchased. Second, the defendant Bernard Noik has sworn that "it was never the intention of Gaber to remain liable to assume the [Edelstein] mortgage after the property had been transferred to Yongolf and Yongolf had itself assumed the mortgage". Mr. Noik was not cross-examined on this statement. No evidence of the intention of Fire Pit was filed in opposition to the summary judgment motion.

It may be that the fact that Yongolf had no assets but the property purchased would make the continuance of Gaber's promise to assume all the more important. On the other hand, there were suggestions that Gaber itself had no assets except the agreement to purchase the property. In this circumstance, its covenant might not have been regarded as material: see Wandoan Holdings, supra, at pp. 110-11.

In any event, these considerations, as well as Mr. Noik's statement respecting Gaber's intention, to the extent that they ultimately may afford a defence to Gaber, are substantially questions of fact and, with respect to them, I do not think that it can be said, in favour of the moving parties, that there are no genuine issues for trial.

Disposition

For these reasons I would allow Edelstein's appeal, with costs, set aside the judgment dismissing its action against the personal defendants, and make an order dismissing their motion with costs.

I would allow Fire Pit's appeal with costs (one set), set aside the judgments dismissing its cross-claim and third party claim, and make an order dismissing both motions with costs (one set). All of the costs orders are made in any event of the cause.

Order accordingly.