BAKER SCHNEIDER RUGGIERO LLP ● Barristers and Solicitors

MORTGAGE AND REAL PROPERTY LAW REPORT

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MORTGAGOR NOT ENTITLED TO INJUNCTION PREVENTING POWER OF SALE WHERE PURCHASER PREJUDICED

Because of the possibility that a mortgagor may apply to court to request an injunction to prevent a mortgagee from proceeding with the sale of a property by power of sale provisions contained in a defaulted mortgage, the typical agreement of purchase and sale for a property being sold by power of sale contains a clause entitling the vendor to terminate the sale agreement in the event that the mortgagor successfully obtains such an injunction or even brings an application requesting this form of relief.

Our firm was recently involved in representing an institutional lender in such a defaulted mortgage scenario in which the purchaser was adamant that he should be allowed to complete the purchase notwithstanding the termination clause and notwithstanding that the mortgagor was seeking to redeem the defaulted loan.

In Bridgewater Financial Services Ltd. and Idrus/Bleivik, the mortgagor sought an injunction to stay a pending sale under power of sale on the grounds that the mortgagor had funds in place to redeem the mortgage. The motion was brought only after summary judgement had been granted against the mortgagors and after the property was the subject of an agreement of purchase and sale, but prior to the closing date provided for in said agreement. The mortgage had been in default for six months and the mortgagor had not redeemed the mortgage despite having ample opportunity to do so.

On the motion, our firm argued successfully that in cases such as these, the general rule should be that once an unconditional agreement of purchase and sale has been entered into, the mortgagor no longer has the right to redeem the mortgage.

In accepting our position on behalf of the mortgagee, Mr. Justice McIsaac reached two noteworthy conclusions.

Firstly, he held that the mortgagor had not complied with the pre-requisites for obtaining a stay of proceedings under the Mortgages Act, namely, actual payment of the whole principal, interest and costs before the completion of sale. This finding was reached notwithstanding the fact that sufficient funds to discharge the mortgage had actually been advanced to the mortgagor's solicitor on the day prior to the motion. This is because Mr. Justice McIsaac noted that funds were not actually tendered on the mortgagee.

Secondly, Mr. Justice McIsaac held that in weighing the competing rights of mortgagor and purchaser, the prejudice to a purchaser who would be denied the right to buy a property exceeds the prejudice to a mortgagor who would be denied the right to redeem. Unlike the purchaser, the mortgagor, if he has suffered damages as a result of the mortgage enforcement, retains the right to commence proceedings for improvident sale.

This case was in part determined on its facts but is of interest since the rights of a purchaser superceded the rights of the borrowers who lost their property.

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MORTGAGE BROKER NEGLIGENT WHEN LIFE INSURANCE NOT OBTAINED

In a recent decision of the Ontario Superior Court of Justice, a mortgage broker and his employer who failed to ensure that life insurance was obtained in accordance with the wishes of their borrower clients, were held to be negligent when the insurance was not obtained and one of the borrowers died.

In St. Louis v. CIBC Mortgages Inc., the plaintiffs, of modest means, purchased a condominium which was their first real estate acquisition. Financing was arranged by the defendant mortgage broker. The husband requested the insurance and was of the impression that it had been arranged and that payments were included in the monthly mortgage payment. Although the plaintiff wife did not ask about insurance, she relied on information from her husband that it had been arranged and the mortgage would be paid off if anything happened to him. No waiver of insurance was ever signed.

In granting judgement for the wife in the amount of the mortgage, the Court held that the relationship between the borrowers and the mortgage broker was clearly fiduciary in nature. By not informing both borrowers of the lack of insurance, the mortgage broker fell short of satisfying his obligations. The broker's employer was held vicariously liable.

COURT OF APPEAL UPHOLDS RENEWAL OF COMMERCIAL LEASE

Notwithstanding that written notice from tenant to landlord pursuant to an option to renew a commercial lease is not provided as required, the lease can be deemed to be extended if the landlord makes a renewal offer/demand and the tenant makes, and the landlord accepts, payments as set out in said offer, according to a recent decision of the Ontario Court of Appeal.

In 1357277 Ontario Inc. v. Grekos, the tenant operated a coin laundry on leased premises. The lease was to expire on November 30, 2002 but contained an option to renew for two further five year terms. The tenant was required to notify the landlord in writing six months prior to expiry of the lease if it wished to renew and the tenant did not do so.

The tenant advised the landlord orally in September 2002 that it wished to renew. After two months of negotiations which followed, the parties could not reach an agreement. No steps were taken by tenant to leave or landlord to evict tenant until February 28, 2003 when landlord's solicitor requested by letter that the tenant vacate the leased premises. The tenant's solicitors responded by accepting the terms of renewal demanded by the landlord during the previous negotiations that had taken place and requesting the preparation of a renewal agreement.

In rejecting the landlord's motion for an order that the lease had been terminated, the trial court granted the tenant "relief from forfeiture".

The Court of Appeal did not agree that granting "relief from forfeiture" was open to the Motions Court Judge. Nevertheless, in dismissing the landlord's appeal, the Court of Appeal found that it was clear on the evidence that the landlord waived the written notice requirement and offered to renew the lease subject to the determination of rental terms. The tenant accepted the landlord's offer which was at no time revoked. After the February 28, 2003 demand, the tenant was paying and the landlord was accepting rent on the agreed upon basis.

MORTGAGEE RECOVERS FROM INSURER NOTWITHSTANDING PROPERTY VACANCY

In the Spring 2004 edition of our firm newsletter, we made you aware of the case of Royal Bank v. State Farm in which the

mortgagee/bank was disentitled from collecting from the insurance company as a result of the bank's failure to notify the insurance company that the property had become vacant.

However, if a mortgagor is aware that a property is vacant, and fails to notify either the insurer or the bank holding a mortgage on a property, could that knowledge of the mortgagor be attributed to the mortgagee and thereby disqualify the bank from collecting from an insurer relying on the vacancy exclusion in the standard mortgage policy?

The case of Healy v. Pilot Insurance Co. dealt with this very issue. In this case, the building on the property was seriously damaged by water damage on April 14, 2002. At that time, unknown to the mortgagee, the building on the property was vacant and had been so for at least six months. Pilot Insurance Co. denied that there was insurance coverage because the exclusions section of the policy stated that the insurer did not insure loss or damage "occurring after the dwelling has, to your knowledge, been vacant for more than 30 consecutive days".

Mr. Justice Polowin J of the Superior Court of Justice refused to accept the insurer's contention.

The Court held that the standard mortgage clause stated, in simple and untechnical language, that the insurance, as to the interest of the mortgagee, is and shall be in force notwithstanding any act, neglect etc. committed by the mortgagor.

In addition, the principles of "contra preferendum" require that coverage provisions are to be interpreted by courts broadly while exclusions are to be interpreted narrowly.

Finally, the Court found that its interpretation of the vacancy clause made economic sense. Economic chaos would be created if a mortgagee as a condition of maintaining insurance coverage would be obligated to ensure that premises are continuously occupied.

CO-TENANT REIMBURSED 50% OF HIS EXPENDITURES TO IMPROVE CO-TENANCY PROPERTY

Where one co-tenant makes development expenditures that have the effect of increasing the value of the property held in co-tenancy, the co-tenant is entitled to an accounting and allowance of 50% of his expenditures to improve the co-tenancy property, according to a recent decision of the Superior Court of Justice.

In Conrad v. Feldbar Construction Company Ltd., Feldbar and Conrad were co-tenant owners of certain lands. All of the lands were undeveloped and the landowners wished to have the lands rezoned and plans of subdivision approved and registered. As a condition of rezoning and approval of plans of subdivision, the municipality demanded that an east/west arterial road be constructed through the area. Because Conrad refused to make its proportionate contribution, Feldbar and Mayco, an adjacent land owner, each made a claim against Conrad. Feldbar claimed on a quantum merit basis against Conrad for a 50% contribution to costs expended. Mayco claimed from Conrad entitlement to 25% of the land costs and construction costs paid by Mayco in connection with construction of the road.

The Master found in favour of Conrad. Feldbar and Mayco brought motions to the Superior Court of Justice to overrule the Master's report. These motions were allowed.

Mr. Justice Ground of the Superior Court of Justice found that the Master erred in law in rejecting Mayco's claim of unjust enrichment. An expenditure on adjoining property which clearly improves the subject property can form the basis for a claim of unjust enrichment. The Master also erred in law in not accepting Feldbar's claim on partition for an accounting and an allowance of 50% of Feldbar's expenditures to improve the co-tenancy property. The Master misconstrued the nature of Feldbar's claim which was not based upon any legal or contractual obligation on the part of Conrad to pay a proportionate share of the construction costs paid by Feldbar but rather on the equitable remedy available to a co-tenant on partition to have an accounting and an allowance for the contribution of such co-tenant to an increase in the value of the co-tenancy property.

COURT ORDERS DISCHARGE OF MORTGAGE WHEN MORTGAGEE'S RIGHTS EXTINGUISHED BY LIMITATIONS ACT

The Superior Court has recently granted an application to discharge a mortgage and direct its deletion from title because the mortgagee's entitlement to enter upon the mortgagor's land and bring an action for the recovery of such land had been extinguished due to the expiry of the ten year limitation period.

In Deloitte & Touche, as liquidator of the Estate of Central

Guaranty Trust Company ("CGT"), et al v. Dadwani, CGT loaned money to Leo Dadwani and five others and took a first mortgage as security. The mortgagors borrowed additional monies on the security of a second mortgage which was ultimately assigned to Debbie Dadwani, the spouse of Leo Dadwani.

In 1990, the mortgagors defaulted on the first and second mortgages. Debbie Dadwani sued the mortgagors on their personal covenants but she took no steps to obtain possession of the property. Shortly afterwards, CGT exercised its power of sale and although Debbie Dadwani was served with the Notice of Sale, she was, through inadvertance, served only in her capacity as spouse of a mortgagor, not as holder of the second mortgage.

In 1991, CGT sold the property to Chan by power of sale. Ten years later when Chan attempted to obtain financing, he learned that the second mortgage and its assignment to Debbie Dadwani were registered on title in priority to the transfer from CGT to Chan. Chan and CGT's liquidator brought an application for an order rectifying the parcel register for the property by deleting the second mortgage.

The Court granted the application on the basis of the Limitations Act.

The Court held that the limitation period to take possession or to bring an action to recover land commences when the first default occurs. Except for the lawsuit against the mortgagors on their personal covenants, Debbie Dadwani failed to commence an action to obtain possession within ten years of the default of the second mortgage as required by Section 4 of the Limitations Act. Her rights under the second mortgage were barred by the operation of Sections 4 and 15 of the Act.

Accordingly, as the mortgagee's rights were extinguished, the Court ordered that the mortgage be discharged and the parcel register be amended to delete the second mortgage.

CANADA CUSTOMS GST CLAIM TAKES PRIORITY OVER SECURED CREDITOR

In BMO v. Attorney General of Canada, the issue before the Court was whether a Notice to Pay issued by Canada Customs and Revenue Agency (CCRA) and received by creditors of the tax debtor prior to the tax debtor's assignment in bankruptcy but remitted after the assignment, gives the CCRA priority over the tax debtor's secured creditors.

A garnishee that is received prior to an assignment in bankruptcy but that has not been executed does not take priority over the rights of secured creditors. Does s. 317 of the Excise Tax Act which creates a statutory garnishee yield the same result? According to the Ontario Court of Appeal, it does not.

The Court of Appeal, in this case, dismissed the appeal of the secured creditor and upheld the lower court ruling that once a Notice to Pay is served, funds that are acquired thereafter never become the property of the tax debtor and therefore never become the property of the bankrupt estate. As a result, the CCRA was victorious over the tax debtor's secured creditors.

WELCOME TO NEW LAWYER IN FIRM

We welcome Paul DeFrancesca who was called to the Bar in 2000 to our commercial real estate department. Paul's extensive background in real estate planning, development and financing, makes him a good fit with our firm's main areas of practice.

BAKER SCHNEIDER RUGGIERO LLP is engaged in various areas of law with particular emphasis on the following:

* Commercial Lending
* Subdivision and Condominium Development
* Mortgage Enforcement (Commercial and Residential)
* Debt Restructuring
* Real Property Litigation
* Commercial Litigation
* Corporate/Commercial/Leasing