BAKER SCHNEIDER RUGGIERO LLP ● Barristers and Solicitors

MORTGAGE AND REAL PROPERTY LAW REPORT

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LAND TRANSFER TAX
DETERMINING THE TRUE VALUE OF THE CONSIDERATION

The Ontario Ministry of Finance – Land Transfer Tax Section issued Bulletin LTT1-2006 in March 2006. The Bulletin caused a great deal of concern on the part of the real estate bar. Many lawyers who specialize in acting for purchasers of new homes seemed to think that the Ministry was increasing the land transfer tax payable by purchasers by adding new items on which land transfer tax was payable. The Ministry, however, has always maintained that the Bulletin was simply a clarification of the existing policy and was issued to provide guidelines to assist in understanding how to calculate the "value of the consideration" in the purchase of newly constructed homes.

Pursuant to Section 1(1) of the *Land Transfer Tax Act* land transfer tax is payable on the value of the consideration which is defined as follows:

"the gross sale price in the amount expressed in money of any consideration given or to be given for the conveyance by or on behalf of the transferee and the value expressed in money of any liability assumed or undertaken by or on behalf of the transferee as part of the arrangement relating to the conveyance and the value expressed in money or any benefit of whatsoever kind conferred directly or indirectly by the transferee on any person as part of the arrangement relating to the conveyance".

Traditionally, builders' lawyers have prepared the transfer showing the purchase price as set out in the agreement of purchase and sale and purchasers paid land transfer tax on that amount. The Bulletin reminds us that the definition of value of the consideration is broad, and is not limited to the purchase price stated in an agreement of purchase and sale

For example, purchasers of new homes often choose to purchase from the builder various upgrades and extras. The Bulletin makes it clear that the values of these upgrades and extras are to be included in determining the value of the consideration.

Some examples of upgrades and extras that are to be included are:

- upgrades for flooring, cupboards, doors, windows, counters, etc.
- finished basements
- fireplaces
- lot premiums
- driveway paving
- tree planting
- sodding and grading

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In many cases, the builder has assumed liabilities and incurred other miscellaneous costs which are passed on to the new home buyer. As these costs are assumed by the new home buyer as part of the transaction, they form part of the value of the consideration. Some examples are:

- lot levies
- development charges
- school levies
- Ontario New Home Warranty Plan fee

As well, in new homes, builders typically install gas, hydro and water meters. Where the builder adds the cost of the meters, and installation costs over and above the purchase price stated in the agreement of purchase and sale, the value of the meters and the installation costs are to be included in determining the value of the consideration.

In many cases, the builders deal directly with the purchaser with respect to upgrades and extras and the real estate lawyers are often not aware that a particular purchaser has chosen any upgrades or extras. As a result of the Bulletin, it is now important that we be advised of such upgrades and extras so that we can properly complete the transfer.

Court of Appeal: Increase in Interest Rate One Month Before Maturity Legal

The British Columbia Court of Appeal recently ruled in favour of a lender to allow a clause in a mortgage increasing the interest rate one month before the mortgage came due. The court held that the clause did not offend section 8 of the *Interest Act* (Canada), which prohibits lenders from charging borrowers a penalty by way of a higher rate of interest, if the increase occurs as a result of a borrower's default.

The original lender, Gibraltar Mortgage Ltd. which later assigned the mortgage to Reliant Capital Ltd., entered into a mortgage loan agreement in September 2001 with Silverdale Development Corp., and took a mortgage of $3.5 million. Silverdale is a B.C. developer whose intention was to replace existing financing and to subdivide and service an industrial park on 40 acres of vacant land in the District of Mission, B.C. Silverdale's ability to repay the loan was directly tied to the successful completion of the project.

The mortgage was for a term of 13 months and 22 days. The interest rate was 14% but would rise to 20% one month before the loan was to mature. Prepayment during the first 6 months was allowed upon payment of 3 months interest, in the 7th to 11th month of the term on payment of one month's interest, and in the last 30 days of the term without penalty or bonus.

Silverdale's project experienced unexpected costs and delays and payments went into default about 8 months into the term. Gibraltar assigned the loan to Reliant Capital Ltd., and in early June 2002, Reliant commenced foreclosure proceedings. The amount claimed included interest at 14% up to August 1, 2002 but 20% after August 1. At the time of the sale, the parties agreed that the question of whether the increase in the interest rate was enforceable would be decided later, with some $186,000 paid into court pending resolution of that issue.

At the initial motion and before a chambers judge at the first appeal, Reliant was unsuccessful, the master and judge holding that the increased rate was a penalty with no legitimate commercial purpose. Reliant appealed and won. The British Columbia Court of Appeal held that the provision did not violate the Interest Act and was not a penalty. It found that the Act does not prohibit a lender from charging higher rates of interest on arrears than on amounts owing that were not in arrears, it only prohibits an increase in the rate of interest which is dependant on default. In this case the higher rate of interest kicked in only based on the passage of time, not on default, and applied equally to monies in arrears and on all other amounts owing.

Reliant Capital Ltd. v. Silverdale Development Corp. [2006] B.C.J. No. 1028, B.C.C.A.

Insurer Liable to Pay Mortgagee in Possession for Damage Despite Owner's Actions

A mortgagee recently won its appeal against an insurance company at the Manitoba Court of Appeal, successfully defending a lower court's decision that the standard mortgage clause in the policy required that the insurer pay the mortgagee for damage caused by the mortgagor.

Assiniboine Credit Union Ltd. was the mortgagee of a residential property in Winnipeg beginning in 1999. Aviva Insurance Co. of Canada insured the property. At some point in the winter of 2001, without Assiniboine's knowledge, Aviva received a request for a vacancy permit for the property, which permit was renewed a number of times, but neither the insurer nor the mortgagor notified Assiniboine that the premises were empty. Payments under the mortgage lapsed in the spring of 2002, and Assiniboine went into possession in August, only to find

that the property had been damaged by water from burst pipes the previous winter. The damage to the property was about $26,000. Assiniboine claimed under the policy of insurance and Aviva denied coverage.

The lower court found Aviva liable to cover the damages because it should have notified the mortgagee that the premises were vacant to give it a chance to protect its security from damage. Aviva appealed, arguing that:

(1) the lower court had erred in finding it liable based on the absence of notice of the vacancy permit; and

(2) its policy specifically excluded "loss or damage caused by continuous or repeated seepage or leakage of water", and that the exclusion was not superceded by the standard mortgage clause in the policy which holds the insurer liable to the mortgagee "notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor..."

The Manitoba Court of Appeal held in Assiniboine's favour based on its reading of existing case law. The court held that since the closing words of standard mortgage clause stated that the clause would supercede any policy provisions in conflict with it, the intention was that specific exclusions would also be superceded.

The court agreed with the lower court judge's assertion that any other interpretation "would stand to defeat the very purpose of relying on the Standard Mortgage Clause." It also agreed with the lower court's assessment of the merits of having the lender protections of the standard clause, noting that the clause saves time and paperwork – and by extension, money – over a system where lenders and insurers would have to contract for separate coverage against damage occasioned by borrowers who the mortgagee can't control, and which would require mortgagees to ensure that premises are continually occupied and cared for.

Assiniboine Credit Union Ltd. v. Aviva Insurance Co. of Canada [2006] M.J. No. 176.

GST – The Brass Tacks of the Reduction to 6%

The 2006 Budget announced a reduction in the rate of GST from 7% to 6% effective July 1, 2006.

The hot topic of discussion since the announcement, has been GST in relation to new housing. The key dates being Budget Day (May 2, 2006) and Canada Day (July 1, 2006). Agreements executed from and after Budget Day get the benefit of the reduced tax rate. But all good things come with a catch. The reduced tax rate of 6% is not available should occupancy or title get transferred before Canada Day. Agreements executed pre-Budget Day, pay GST at the rate of 7% but are benefited from a payback of the extra 1% paid by claiming a "Transitional Rebate". The Transitional Rebate is not available where occupancy or title are obtained before July 1, 2006. The GST reduction therefore benefits those that buy post-Budget Day and get title after Canada Day.

Deposits paid in advance for services not yet rendered or billed are termed "Retainers". Trust obligations imposed by the law society require Retainers to be held in trust and not disbursed until invoiced. GST then applies at the rate prevalent on the invoice date.

How does the reduction affect lease payments? Most often payments are due on a certain date in terms of a written agreement. The rate applicable, is the prevalent rate on the date of payment due or made, whichever is earlier. Therefore if payment fell due on June 15th for the period June 15 to July 14, GST would apply at 7%.

Deposits paid under purchase agreements do not attract GST. Deposits are part of the total consideration for a service or supply. In cases of real property, the supply is the transfer of a home against consideration, which does not become due until the title transfer date. GST is then payable on the purchase price on such title transfer date at the rate then in effect.

OAKDALE DINNER

The firm's 33rd annual Client Appreciation Evening was held at Toronto's Oakdale Golf and Country Club on Monday, June 26, 2006. The weather cooperated this year for the barbecue and a thoroughly enjoyable evening was experienced by our clients and lawyers alike. The entertainment was well received and we thank all those who made this year's Oakdale evening another great success.

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Mortgage Enforcement Costs Must be Paid to Obtain Discharge

Typically in mortgage enforcement we will issue a claim against a mortgagor for the amount of the mortgage debt and possession of the mortgaged property. If the claim is not defended we will sign default judgment for the amount in our claim and costs and with applicable interest and file a writ of seizure and sale in the amount contained in our default judgment. There are, however, additional enforcement steps that we may take, for example, we may issue a notice of sale and attorn rents if the property is occupied by tenants. As well, a mortgagee may incur expenditures with respect to the mortgaged property after we have obtained default judgment, for example, property taxes and property management fees may have to be paid.

An issue can arise as to whether a mortgagee who has reduced his claim to a judgment for the amount owed under a mortgage can recover additional costs incurred after the date of the judgment.

This issue was recently litigated in the Ontario case of Violi v. McLeod [2006] O.J. No. 1924. The facts were straightforward. On November 2, 2005 McLeod the mortgagee signed default judgment against the mortgagor Violi for $19,000 and a writ of seizure and sale was filed in this amount. Subsequent to receiving judgment and filing its writ of seizure and sale the mortgagee incurred $5,000 in additional costs in enforcing its security. The mortgagor demanded a discharge statement from the mortgagee on December 13, 2005. The discharge statement produced by the mortgagee included the additional $5,000 in costs incurred by the mortgagee. The mortgagor refused to pay the additional $5,000 in costs and litigation ensued. The mortgagor argued that once a mortgagee's claim has been reduced to a judgment the mortgagee must withdraw its writ of seizure and sale and provide a discharge of its mortgage if the mortgagor tenders the amount of the judgment plus applicable interest.

The mortgagee argued that its standard charge terms contained a clause that provided that "...all costs, charges, legal fees and expenses that may be incurred in taking recovering and keeping possession of the land... shall be, with interest at the rate provided for in the charge, a charge upon the land in favour of the chargee..." Accordingly, the mortgagee argued that the expenses incurred by the mortgagee after it received judgment should be recoverable.

The court ruled partially in favour of the mortgagor holding that once a mortgagee has reduced its claim to a judgment the mortgagor is entitled to have a writ of seizure and sale filed against it removed upon tendering payment of the amount of the judgment plus applicable interest. However, the court accepted the mortgagee's argument based on its standard charge terms and ruled that the mortgagee did not have to provide a discharge of its mortgage until the mortgagor had also tendered the amount of the additional enforcement expenses incurred by the mortgagee after it received judgment.

The case underlines the importance of ensuring that a mortgagee's standard charge terms contain provisions as outlined above. Without it the mortgagee may well have not been able to recover the additional costs it incurred.

ANNOUNCEMENT

NEW LAWYER

We are pleased to announce the addition of Larry N. Ginsler to our Firm's Development Group.

Larry graduated from the University of Western Ontario Law School in 1974 and was called to the Ontario Bar in 1976. Larry has 30 years' experience in land development, with a particular emphasis in all areas of condominium law. As well, Larry specializes in commercial financing and has acted in the past for a wide variety of lenders. Larry is a member to the Greater Toronto Home Builders Condominium Section and is recognized as an authority in condominium law by the Canadian Condominium Institute.

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