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MORTGAGE AND REAL PROPERTY LAW REPORT

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BRITISH COLUMBIA COURT OF APPEAL FINDS PRINCIPAL SUM OF LOAN STILL REPAYABLE WHERE INTEREST RATE DOUBLE THE CRIMINAL RATE

WHAT IS CRIMINAL WITH INTEREST RATES?

Under section 347 of the Criminal Code everyone who charges an interest rate that exceeds 60% per year is guilty of an offence.

In interpreting this section of the Criminal Code previous courts have held that loans in which a criminal rate of interest was charged were absolutely void and could not be enforced by the lender. Not only would the lender lose the right to collect any interest but the borrower would be released from any obligation to repay any principal. This section of the Code was recently revisited by the British Columbia Court of Appeal in the case of Eha and Genge, [2007] B.C.J. No. 1021.

Mr. Eha lent money to Mr. Genge. The rate of interest charged was 120% per year. However, Mr. Eha and Mr. Genge had both an ongoing relationship as business joint venturers and personal friends. In addition to this Mr. Eha did not believe that there was anything criminal about charging the rate and at no time did Mr. Genge make any suggestions to Mr. Eha that he saw the rate as objectionable.

At trial the judge ruled in favour of Mr. Genge. However, a three judge panel of the British Columbia Court of Appeal overturned the trial judge's decision.

The Court of Appeal found that where parties were not involved in an illegal scheme or did not intend to charge a criminal rate of interest the court will strongly favour ordering the borrower to repay the principal amount of the debt rather than give the borrower a windfall by declaring that the debt is absolutely void and does not have to be repaid at all. However, the Court went on to hold that interest must be calculated not at 120% but at the rate provided for in the Rules of Court. The Court of Appeal also refused to give the lender his costs of the successful appeal because the rate charged by him was twice the amount allowed by the Criminal Code.

IN THIS ISSUE

INCREASED DELAYED OCCUPANCY COMPENSATION FOR PURCHASERS

Tarion Warranty Corporation has adopted new rules governing delayed occupancy closings for new condominium units, including an increase in the compensation that a purchaser is entitled to in the event that the delay exceeds the time limits permitted. Currently, the compensation is limited to $100 per day for living expenses, meals etc. with a maximum of $5,000. The new limits are $150 per day with a $7,500 maximum. The new rules are intended to come into force in 2008.

SALE OF AN UNDIVIDED 50% INTEREST IN LOTS DOES NOT TRIGGER DEVELOPER'S RIGHT OF FIRST REFUSAL

Can a party who has a contractual obligation to provide a "right of first offer" to sell additional building lots to another party avoid triggering the right of first offer by selling an undivided 50% interest in those building lots rather than the lots themselves? In a very recent case of the Ontario Superior Court of Justice, Ducharme J. held that such a seller can in fact sell a 50% undivided interest without being in violation of the right of first offer.

In 2056668 Ontario Inc. and Fernbrook Homes (Majormac North) Limited et al, Fernbrook Homes (Majormac North) Limited ("Fernbrook") had sold a parcel of property to 2056668 Ontario Inc. ("Osmington"). Osmington granted to Fernbrook as a collateral advantage to the agreement of purchase and sale an irrevocable right of first offer ("RFO") to purchase additional lots from Osmington. The thrust of the RFO was that Osmington was obligated over a period of 60 months, if Osmington wished to sell all or any portion of certain additional lots to a third party, to offer those lots to Fernbrook prior to offering them to the third party. If Fernbrook should choose not to accept the offer, Osmington would then be entitled to sell the lots to the third party, provided that the terms were not materially more advantageous than those terms offered to Fernbrook.

Osmington subsequently entered into a transaction with Aspen Ridge Homes ("Aspen Ridge") whereby Osmington would sell an undivided 50% interest in some additional lots to Aspen Ridge and thereafter Osmington and Aspen Ridge would enter into a Co-Owners Agreement to jointly finance, market and construct their proposed residential development. Since Osmington was not selling all or any portion of the additional lots, Osmington contended that it was not required to offer the lots to Fernbrook. Fernbrook sued for breach of the RFO.

Mr. Justice Ducharme agreed with Osmington. He maintained that the intent of the parties and the purpose of the clause was for Osmington to offer Fernbrook an opportunity to purchase any additional lots that Osmington did not want to develop on such terms as Osmington might offer to another party at arm's length. Although there were no Canadian authorities produced by the parties at court, Mr. Justice Ducharme was of the view that judgement in favour of Osmington would produce the "sensible commercial result". The Justice felt that "a right of first refusal is not to be construed liberally" and that the exercise of same must accord strictly with the terms set out in the agreement.

Given this strict judicial interpretation of RFOs, it is imperative that parties seeking to receive the benefit of an RFO obtain a contractual covenant that stipulates specifically which dealings with a parcel of property that is subject to an RFO are prohibited by the Vendor. The beneficiary of the RFO fails to do so at his peril because the RFO may be rendered unenforceable.

VENDOR REQUIRED TO PROVIDE FULL AND COMPLETE INFORMATION

This case involves a couple who bought a house in London, Ontario in 1981. In 2004 they discovered for the first time water damage problems in several locations throughout their house.

It was determined that the water damage was caused by

"ice-damming", a result of especially bad snow and ice conditions throughout southwestern Ontario during the winter of 2003-04. The melt water penetrates the roof and can cause serious water damage inside the house.

The owners decided to list their house for sale in the late Spring of 2004 with a listing price of $495,000. As part of the listing arrangement, the vendors signed a "Seller Property Information Statement" (SPIS) which apparently is a routine practice of the London Real Estate Board but is not required.

"the non-disclosure was tantamount to false representations"

The SPIS stated there were no water problems. The purchasers offered to purchase the property for $485,000 in July 2004. The SPIS was appended as part of the agreement of purchase and sale.

When the purchasers discovered that there was a water problem they withdrew from the deal. The vendors eventually sold the property to someone else for the reduced price of $380,000 and sued the purchasers for the difference. The purchasers counter-claimed on the basis that the vendors breached their contractual obligations to provide full and complete information about the true condition of the premises under sale.

Justice G.P. Killeen concluded that "the plaintiffs deliberately withheld information from the purchasers in the answers to questions.... [in] the SPIS, information that was strongly relevant to the purchasers in deciding whether to sign the agreement". His Honour further ruled that "since the SPIS form was incorporated in the agreement, the non-disclosure was tantamount to false representations as to the condition of the home and justifies rescission." The vendors' action for damages was dismissed and the agreement was declared rescinded. Vendors beware.

Kaufmann v. Gibson
[2007] O.J. No. 2711

OAKDALE DINNER

The firm's 34th annual Client Appreciation Evening was held at Toronto's Oakdale Golf and Country Club on Monday, June 18, 2007.

The weather cooperated this year for the barbecue and a thoroughly enjoyable evening was experienced by all our guests. We were honoured to have as our special guest speaker the newly confirmed Liberty Party candidate for the Montreal riding of Papineau, Justin Trudeau.

Mr. Trudeau has now emerged from the shadow of his famous father. His talk on a wide range of issues from the environment to the current Canadian political landscape, was well received and many guests commented that we will be watching his career with great interest during the next election campaign and in the years to come. We thank all those who made this year's Oakdale evening another great success.

LIMITATION PERIODS AND DEMAND NOTES

Lenders Be Careful

A recent decision of the Ontario Court of Appeal has confirmed that unless an action on a demand note is commenced within two years from the later of the date the funds are advanced or the date of last payment made on the loan, the claim will be statute barred.

Before 2004, under the previous *Limitations Act* in Ontario, an action on a demand note had to be commenced within six years from the date the cause of action arose.

New Limitation Period – Two Years

In 2004, new limitations legislation went into force in Ontario in an attempt to streamline the multitude of limitation periods for various actions.

The new *Limitations Act,* 2002 established a "basic limitation period" of two years from the date a claim was discovered or discoverable. Did this change the date the limitation period would run from for demand notes to the date of

demand rather than from the date of the advance?

Majority Decision

In the recent decision of *Hare v. Hare*, the majority of the Ontario Court of Appeal was not convinced that the change in the wording in the previous *Limitations Act* from the date the cause of action arose to the date a claim was discovered or discoverable changed anything.

In this case a lender made a demand for repayment on a demand promissory note and then commenced an action within two years following the date of the demand; however, more than two years had elapsed from the date of the issuance of the note. The defendant submitted that the lender could not collect on the note on the grounds that the action was statute-barred under the new *Limitations Act*.

Justice Gillese writing for the majority noted that "There is nothing to be discovered by the lender before he or she becomes aware of the claim." The majority held that the lender who commenced an action more than two years from the date of issuance of the note was statute barred and lost its right to sue on the note. The majority was of the view that to change the law so that the trigger for the limitation period would be the demand for repayment could potentially lead to "a limitless liability".

Dissenting Decision

The decision of the three-Justice panel of the Ontario Court of Appeal was not unanimous. Justice Juriansz wrote a strong dissenting judgment.

"a claim based on a demand loan cannot be discovered until a debtor defaults following a demand for repayment"

Justice Juriansz was of the view that the effect of the new legislation reducing the limitation period from six years to two years had to be that the new limitation period would run from the date on which the claim was discovered and not when the cause of action arose. Justice Juriansz did not agree that the claim was "discovered" when the loan is made but rather "a claim based on a demand loan cannot be discovered until a debtor defaults following a demand for repayment."

Lenders must now be careful that they do not lose their right to sue with this shortened limitation period of two years. If the demand loan is not "refreshed" by repayments during the years from the date the funds were advanced the lender may be statute barred from recovering its debt.

Hare v. Hare
277 D.L.R. (4th) 238
(Ontario Court of Appeal)

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Newsletter Editor - Jeffrey J. McKay

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