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Actual Notice Deemed Insufficient Notice; Seller Avoids Bad Deal

Can a seller get out of an improvident multi-million dollar real estate deal simply because the buyer technically failed to give notice in a certain manner? That was the question for the Ontario Court of Appeal in a case called *High Tower Homes Corporation v. Stevens*.

The seller owned two adjacent pieces of property. To maximize the price, he decided to sell them together; to optimize his tax position, he also wanted one property to be priced much lower than other. A clause in the agreement made the sale of the lower-priced property ("Blue Water") conditional upon the sale of the second, higher-priced one ("Avondale"). After back-and-forth negotiations with the buyer, the seller offered Blue Water for what the court called a "bargain price" of $1 million, and offered Avondale for $4.5 million.

But what the seller did not realize is that the buyer had altered the offer along the way. At some point, the buyer had revised the agreement to delete the dual-sale condition, but had not specifically brought it to the seller's attention. Unaware of the change, the seller accepted what turned out to be the buyer's offer for the lower-priced Blue Water only. He was later stunned to learn that the buyer had taken advantage of his mistake.

To try to get out of the deal entirely, the seller relied on a technicality: a clause in the agreement stipulated that any notices from one party to the other were to be given *personally*. However, the buyer's lawyer had purported to give a certain notice (which waived specified conditions for the buyer's benefit) by way of *fax* – which was not one of the agreed-to methods. Strictly speaking, according to the seller, the notice was never delivered to the seller *personally* as required, so the deal was at an end.

The buyer sued, claiming either specific performance or $5 million in damages. The buyer's motion for summary judgment was unsuccessful.

On later appeal, the Ontario Court of Appeal rejected the buyer's claim. It agreed with the motion judge that the "entire agreement" clause in the contract precluded the buyer from claiming that there were implied terms as to the manner in which notice was to be given, and that notice by fax or any other unstipulated method would suffice. As the court put it: "The device of implying contractual terms is to be used sparingly and with caution".

Here, the agreement expressly provided the seller was to be served personally; the buyer had made no effort to do so. There was nothing to suggest that faxed notice was contemplated, nor any indication that the seller had waived or abandoned the right to insist on getting notice personally, as the agreement prescribed. The appeal was accordingly dismissed; the deal was at an end. See *High Tower Homes Corporation v. Stevens*, 2014 (ONCA).

Does a Fraudulent Mortgage Discharge Affect Subsequent Lenders' Priority? Can the Parcel Register No Longer be Relied Upon?

In a recent Ontario case the court was asked to consider the effect of a duly-registered, yet completely fraudulent mortgage discharge on the rights of subsequent mortgagees.

Computershare loaned money to the borrowers in 2008, and secured the loan by way of a first mortgage. About a year later, and unbeknownst to Computershare, the borrowers managed to fraudulently register a mortgage discharge on title. Still, in order to conceal their fraudulent conduct they continued to make regular payments for about 4 ½ years, at which time the mortgage went into default.

Meanwhile, prior to that default, the borrowers proceeded to obtain financing elsewhere. By keeping silent about Computershare's security and their own fraud, they arranged additional loans from two other lenders: CIBC, which was content to advance $250,000 under what it considered was a new first mortgage; and Secure Capital, which advanced $32,000 under an ostensible second mortgage.

When the borrowers also defaulted on those later mortgages in 2013, both CIBC and Secure Capital commenced power of sale proceedings. At this point, Computershare discovered that the mortgage it thought it held had actually been discharged fraudulently. The borrowers made an assignment in bankruptcy shortly after; the home was sold and proceeds amounted to just under $300,000, which was insufficient to satisfy all three lenders.

The court was essentially asked to prioritize the interests of three innocent lenders, to determine which of them should be prejudiced by the fraudulent discharge of which the lenders were unaware at the time the loans were made.

The court considered each party's position. CIBC, in seeking to be the "new" first mortgagee, asked for a court order declaring it to have first-ranking charge against the property, in priority to any interest under the Computershare mortgage. Secure Capital also asked to have its mortgage interest declared in second position – effectively relegating Computershare's rights to third place. In support, both lenders claimed that in deciding whether to advance funds, they should be able to rely on the integrity of the information found in the Land Titles register, regardless of whether (as in this case) the information reflected an underlying fraud.

Not surprisingly, Computershare asked to have the purported discharge declared fraudulent, to be reinstated to first-ranking position, and to have the land titles register rectified to show a valid mortgage in its favor. CIBC and Secure Capital would thus revert to having only second- and third-ranking charges, respectively.

After considering the arguments, the court held in favour of Computershare. First, it found that the borrowers must have been privy to the fraud: they continued to borrow additional funds by offering new lenders first and second mortgagee positions – all the while making mortgage payments on the Computershare mortgage which they knew still existed. In light of their own fraudulent conduct, they were not eligible to obtain clear title in this manner.

Next, the court examined the legal ramifications of having the purported discharge registered on title. Clearly, it was a "fraudulent instrument" within the meaning of the land titles legislation; by extension, this meant that the mortgages subsequently given to CIBC and Secure Capital were likewise fraudulent instruments (though, the court hastened to add, this was not because either of the lenders had acted other than in good faith).

CIBC thus became an "intermediate owner", and having obtained its interest in title from a fraudster, it was in the best position to avoid the fraud by making inquiries before the fake discharge went on title. As a result, the court concluded that the Computershare mortgage kept its priority as the first charge on the property, and that the CIBC and Secure Capital charges ranked second and third, respectively. The land titles register was rectified accordingly. See *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada*, 2015 (ONSC).

Privacy Act Blocks Creditor's Enforcement of Writ of Seizure & Sale

A recent Ontario Court of Appeal judgment focuses on interpreting federal privacy legislation, and whether a mortgage discharge statement is "information about an identifiable individual" which is protected from disclosure without the borrower's consent.

The Trangs were in default on their mortgage with Scotiabank. They also defaulted on a loan with Royal Bank of Canada ("RBC"), which obtained court judgment against them for about $26,000. RBC filed a writ of seizure and sale, but faced with the Trangs' non-cooperation in the enforcement process, it asked the sheriff to sell the Trangs' property so that it could collect on its judgment. The sheriff refused to do so unless Scotiabank could provide a mortgage discharge statement. Scotiabank, in turn, claimed it was precluded from doing so without the Trangs' consent, citing the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), which legislation is designed to protect individuals' right to privacy in their personal information.

RBC failed on a motion for a court order compelling Scotiabank to produce the statement; it then appealed to the Ontario Court of Appeal. Its position was that the mortgage statement it sought from Scotiabank was not "personal information" within the meaning of PIPEDA.

A 5-member panel of the Court of Appeal considered these arguments and, in a 3-2 split decision, disagreed with RBC. First, the court confirmed that the mortgage discharge statement – which is not otherwise publicly available – amounts to "personal information" that under PIPEDA should not be disclosed without the Trangs' approval. As the court put it:

> *Undoubtedly, the amount the Trangs owe on their mortgage is, to them, personal information… The balance owing on a person's mortgage can be an important piece of private information that opens a window to many aspects of that person's financial profile. It indicates financial worth. It measures how a person deals with financial liabilities. It opens a portal to a person's financial stability or instability. …*

Under PIPEDA, this type of personal information could be disclosed by Scotiabank "only for purposes that a reasonable person would consider are appropriate in the circumstances." This approach demonstrates the Act's goal of balancing individuals' right to privacy against the needs of organizations such as Scotiabank – not third-parties such as RBC – to collect, use, and disclose information in its commercial activities.

Any disclosure by Scotiabank would ordinarily require the Trangs' consent, which is normally obtained at the time the information is collected. Admittedly, PIPEDA does acknowledge that "implied consent" might be appropriate when the information is "less sensitive", but that sensitivity assessment is still highly context-dependent, and is evaluated against the overall relationship between Scotiabank and the Trangs. Scotiabank simply cannot invoke the implied consent option in order to advance the interests of a third party such as RBC.

Finally, the reasonable expectations of the Trangs had to be factored in: the discharge statement contained sensitive financial information that the Trangs would not have expected Scotiabank to disclose to a third party without their consent – and for a purpose unrelated to enforcing the original mortgage. The court also noted that RBC, in hindsight, could also have obtained the Trangs' advance consent for disclosure, by inserting a term in the loan agreement, which it did not do.

In the end, the information in a mortgage discharge statement was held to be sensitive personal information, and disclosure by Scotiabank to third-party judgment creditors like RBC would legally require the Trangs' express consent. Absent such consent or a court order, Scotiabank's disclosure would be in breach of the provisions of PIPEDA. See *Royal Bank of Canada v. Trang*, 2014 (ONCA).