BAKER SCHNEIDER RUGGIERO LLP ● Barristers and Solicitors

MORTGAGE AND REAL PROPERTY LAW REPORT

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ANTI REGISTRATION CLAUSE ENFORCEABLE, COURTS HOLD

One of the most critical clauses contained in an agreement of purchase and sale involving real estate is an anti-registration clause, i.e., a clause stipulating that the purchaser will at no time register or permit to be registered on title the agreement or notice of the agreement or a caution or a purchaser's lien or a certificate of pending litigation.

The clause is critical because if it is enforceable, the clause can, in the event of dispute between the purchaser and the vendor, prevent the registration on title of the agreement or any other document which could deny the vendor the right to re-sell the property until the registrant's claim for specific performance is dealt with.

Is the clause enforceable? Courts have come to different conclusions based on a number of factors including the wording of the particular clause in issue, but generally the Ontario courts have given effect to the clause thereby making it a very powerful tool for real estate vendors.

In the very recent case of Lariat Land Development Inc. and Chris Loukras and Carrie Loukras, (March 10, 2005), Mr. Justice Jenkins of the Ontario Superior Court of Justice once again ruled in favour of a vendor seeking to avail itself of the advantages afforded by an anti-registration clause.

In the Loukras case, Lariat agreed to purchase a development property from Loukras for the sum of $6,375,000.00. Due to zoning difficulties related to development within the Oak Ridges Moraine, the parties entered into an amending agreement dated February 27, 2004, providing that either party had the sole and unfettered discretion to terminate the agreement by written notice if certain development approvals had not been obtained within a six month period. Loukras terminated the agreement on August 26, 2004 and when Lariat discovered that Loukras had resold the property to a third party purchaser in November 2004 for $925,000.00 more than Lariat had agreed to pay, Lariat brought a motion requesting a certificate of pending litigation.

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In ruling in favour of the vendor Loukras, Mr. Justice Jenkins followed the decision in Chiu v. Specific Mall Developments Inc. (1998). In the Chiu case, Mr. Justice Himel ruled in part... "*if the provisions of an agreement of purchase and sale are clearly worded and prohibit the registration of a certificate of pending litigation, the court will give effect to such a clause even if it can be established that the vendor was in breach of the agreement or that the agreement is at an end.*".

Our firm has also been successful in defending a developer's right to rely on the anti-registration clause in a slightly different fact scenario.

In Clint Developments Inc. ats Tribrook Homes (North Hill) Ltd. (1999), the vendor had entered into an agreement of purchase and sale to sell 100+ fully serviced building lots to the plaintiff builder. When the plaintiff builder defaulted in making payment of deposit monies owing, the vendor terminated the agreement.

The purchaser brought a successful application for a certificate of pending litigation on an "ex parte" basis, i.e., without providing notice to the vendor of its application.

The vendor brought a motion in the Ontario Superior Court of Justice for an order discharging the certificate of pending litigation. Our firm represented the vendor in this motion.

We were successful in persuading Master Polika that the certificate should be discharged solely because the purchaser failed to make full and fair disclosure of all facts in his application for the certificate. Although the agreement of purchase and sale was attached to the purchaser's application, the purchaser did not bring the anti-registration clause to the Master's attention.

Master Polika found that there was material non disclosure sufficient to justify discharging the certificate regardless of the merits of the Plaintiff's case. Relying on Swallow v. The Midlands Corp. (1993), he held that "*a party who has been guilty of transgressing (the obligation to make full and fair disclosure) may lose the benefit of the order obtained thereby, even though the order would still have been made had there been full and fair disclosure*". The reason is that "*great injustice may be done if the requirement of honesty and candour is not strictly enforced*."

Given the case law that has emerged on the anti-registration clause, all vendors (but particularly developers/builders) should insist on the insertion of an anti-registration clause in all agreements of purchase and sale including those for the sale of a new home or condominium. Purchasers should seek to have this clause removed. If this is not possible, purchasers may reluctantly choose to accept the clause, for business reasons, but only with the realization that in the event of a dispute, the purchaser's remedies have been severely curtailed, and the obtaining of specific performance of the agreement, will be very unlikely.

BANK MORTGAGE CLAIM NOT STATUTE BARRED

In the previous issue of our firm newsletter, we reported to you that an application to discharge a mortgage and direct its deletion from title was granted because the mortgagee's entitlement to enter upon the mortgagor's land and bring an action for recovery had been extinguished due to the expiry of the 10 year limitation period.

A similar motion brought by mortgagors in the recent case of Toronto-Dominion Bank v. Rohatyn was not successful. In this case, a mortgage went into default in 1993. One of 3 defendant mortgagors made 69 payments between 1997 and 2003. The issue in this case was the effect of payments made by this defendant on the limitations defence raised by the other defendants. Given that the liability of the defendants was joint and several, the court held that the mortgagee was permitted to bring an action against any or all of the joint debtors provided that any of them had prior to the expiration of the limitation period made a part payment with respect to the debt or mortgage.

BORROWERS OBLIGATED TO PAY INTEREST ON MORTGAGE AFTER MATURITY DESPITE ABSENCE OF RENEWAL AGREEMENTS

Borrowers are obligated to pay interest on a mortgage after maturity despite the fact that renewal agreements are unsigned or invalid, according to a recent decision of the Ontario Superior Court of Justice.

In Lacroix v. Bank of Montreal, the applicant borrowers were joint tenants of a home on which they gave a mortgage to respondent in 1992. The balance due date was December 1, 1997. One plaintiff signed a renewal in 1998 and neither plaintiff signed renewals in 2000 and 2001. Alleging that the renewal agreements were improperly signed or not signed at all, the plaintiffs sought a declaration that no interest was payable after the maturity date of the mortgage. The court held that the renewal agreements were invalid. Nonetheless the original mortgage required payment of interest after maturity. The terms of the original mortgage were unaffected by the incompletely

executed renewal agreements.

GUARANTOR LIABLE FOR POWER OF SALE DEFICIENCY DESPITE REFUSAL TO SIGN RENEWAL AGREEMENT

In a recent ruling of the Ontario Court of Appeal, the Court has held that a guarantor is liable for his/her obligations stemming from an original guarantee, even in a case where the renewal of a loan was conditional on the consent of a guarantor (which was not given and was actually forged by the guarantor's husband/borrower) and even when the deficiency suffered by the mortgagee was partially or entirely due to circumstances arising after the maturity of the loan and during the renewal period.

In AGF Trust Co. v. Muhammad, the borrower borrowed money in 1992 on the security of a mortgage over a commercial property on which the borrower operated a government-funded nursing home for mentally handicapped adults. The interest rate was 10.25%, the mortgage term was 5 years and the borrower's wife guaranteed the loan. Independent legal advice was received by the guarantor.

In 1997, the borrower sought to transfer the property and to have the mortgage assumed by a third party. AGF did not accept the proposed purchase, but offered the borrower a number of renewal options, including a renewal for five years at a reduced rate of 7.5%. It was a condition of the renewal that the mortgage renewal document was to be signed by the guarantor. The borrower sought his wife's consent, but she refused and in order to comply with the lender's requirements, the borrower forged his wife's consent. AGF was not aware that the guarantor had not signed and it was not contested at the trial that had AGF known that the guarantor had not consented, AGF would not have renewed the mortgage.

Subsequent to the renewal, the nursing home fell on hard times. In 1999, the mortgage went into arrears and AGF proceeded to enforce its security. It appointed a receiver and ultimately sold the property under power of sale. A substantial shortfall was suffered due in large part to the timing of the sale and the cost of carrying the property until its sale.

At trial, on August 28, 2003, Mr. Justice Marshall of the Ontario Superior Court, granted judgement for AGF against the guarantor. He held that the effect of the guarantee clause was that the guarantor was to be bound until the monies originally advanced had been repaid.

The borrower relied on the Manulife and Conlin decision of the Supreme Court of Canada. In the Manulife case, the guarantee and indemnity clause in the mortgage referred only to extensions, whereas a separate renewal clause in the same document differentiated between renewals and extensions. The Supreme Court of Canada held that the agreement reached was a renewal, not an extension and that the guarantee and indemnity clause applied only to extensions and not to renewals. In order for the guarantor to be bound by a renewal agreement, the husband would have had to give his explicit consent to a renewal. As he had not done so, the claim against him failed.

In once again distinguishing this case from the decision in Manulife Bank of Canada v. Conlin, and restricting the Manulife ratio only to its narrow facts, the Court of Appeal affirmed the decision of the trial judge. The court pointed out that the guarantee clause was similar or identical to the guarantee clause in three other cases, all of which distinguished the Manulife decision, (on the basis that the guarantee provisions in these cases were clear and unambiguous and did not differentiate between renewals and extensions) two of which were at the Court of Appeal level (BMO v. Negin; Laurentian Bank v. Laurina Investments Ltd.; Tkachuk v. Boettger).

UNREMITTED GST PAYMENTS TAKE PRIORITY OVER SECURED CREDITORS, COURT OF APPEAL FINDS

In a recent decision of the Ontario Court of Appeal, it was held that unremitted GST payments take priority over the claims of secured creditors in proceedings under the Companies' Creditors Arrangement Act (CCAA) but interest and penalties on unremitted payroll deductions do not.

Attorney General v Fleet National Bank, is a case involving the insolvency of the Ottawa Senators. When the franchise was ruled insolvent in January, 2003, two of its major creditors were the Canadian Imperial Bank of Commerce and Fleet National Bank. In May, the court approved a sale of the franchise to Capital Sports & Entertainment Inc. for $100 million. From this amount, the two banks would receive about two-thirds of the amounts owed to them. In addition, $2 million was allocated for a potential claim by Canada Customs and Revenue Agency (CCRA) on account of unremitted payroll source deductions and GST.

Justice James MacPherson (on behalf of a unanimous panel which deals with GST) pointed out that there was a conflict between the provisions of the Excise Tax Act (ETA) and the CCAA.

Relying on a precedent setting 1997

decision (City of Verdun v. Dore), Justice MacPherson held that the "notwithstanding any other enactment" language contained in the ETA prevails over the same language in the earlier statute (CCAA). As a result, the CCRA was entitled to full payment of unremitted GST. It was decided that interest and penalties did not have priority. Counsel for the secured creditors expressed regret that the result in this case is inconsistent with the liberal interpretation generally afforded to the CCAA by courts to facilitate the restructuring of insolvent companies.

LAND TITLES APPLICATIONS: HOW TO EXPEDITE THE PROCESS

When the government of Ontario embarked on automation of registration and title searching, the government initiated the transfer of the bulk of the properties in the Province of Ontario from the Registry System to "Qualified Land Titles". However, in order for a condominium or plan of subdivision to be registered, the lands must be in "Land Titles Absolute". The application for entry into Land Titles is therefore critical in the development process.

Here are four ways that we can assist you in the process:

*** The draft reference plan:**

As part of the Land Titles application process, a new reference plan describing the subject lands must be prepared by a licenced surveyor and registered against title to the subject lands. Prior to registration, the draft reference plan must be thoroughly reviewed with the surveyor to ensure it accurately describes the boundaries of the subject lands and correctly reflects any encroachments, easements and rights of way.

*** Claims by Adjoining Landowners:**

The *Land Titles Act* requires that notice of the Land Titles application be served on all adjoining landowners. Adjoining landowners may respond by asserting ownership or easement claims over a portion of our client's lands. Potential claims from adjacent land owners should be anticipated and diffused in an expeditious and cost effective manner with litigation being avoided whenever possible.

*** The Land Titles Office:**

Our firm prides itself on having established positive relationships with the Land Titles Offices across southern Ontario. It is important to commence a dialogue with Land Titles staff prior to the submission of any documents to the Land Titles Office and to regularly meet with staff after submission to review the status of submitted applications. Despite the fact that staff are often backlogged, they often respond quickly to any questions, suggestions or concerns that are raised.

*** Review of title:**

When lands are converted from the Land Registry to the Land Titles Conversion Qualified system by the Ministry of Consumer and Business Services, the Ministry sometimes misdescribes the rights and obligations that bind an applicant's lands. It is important for the legal firm processing the application to review the title documents with a view to uncovering these errors and then to work closely with the applicant's surveyor and with Land Titles Office staff to ensure that an applicant's rights are protected and that any errors are corrected.

If you need to expedite a Land Titles Application, contact George Ruggiero or David Spencer of our office.

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