BAKER SCHNEIDER RUGGIERO LLP ● Barristers and Solicitors

MORTGAGE AND REAL PROPERTY LAW REPORT

A Legal Newsletter for the Mortgage and Real Estate Industries

Vol. 13, No. 1 **Spring 2007**

ONTARIO COURT OF APPEAL RULES IN FAVOUR OF HOMEOWNER WHO WAS VICTIM OF MORTGAGE FRAUD

As we have previously reported in our news bulletin last month, a special five-judge panel of the Ontario Court of Appeal has essentially reversed the Court's own decision from 2005 in setting aside a fraudulent mortgage.

In this ruling, the Court of Appeal reversed its controversial decision in the case *Household Realty Corporation v. Chan* which found that a mortgage although fraudulently obtained, was valid and enforceable upon registration. In this recent decision, *Lawrence v. Wright* [2007] O.J. No. 381, the Court of Appeal acknowledges that the result and the reasoning in the *Household Realty* case was incorrect.

In the *Lawrence* case, ownership of a person's home is fraudulently transferred and mortgaged. The court acknowledged that even assuming that the homeowner and the lender are both innocent parties, in a contest between the two, the homeowner should win on the analysis that the homeowner has no opportunity to avoid the fraud where by contrast the mortgage company may have had an opportunity to avoid the situation.

Partly in response to public outcry from the rise in mortgage fraud and the problems associated with the *Household Realty* case in particular, the Ontario government passed the omnibus Bill 152 late last year. This legislation attempts to address mortgage fraud issues and, amongst other things, will allow the deletion of fraudulent instruments from the Land Register.

The Ontario government has also promised to improve the much criticized system of compensation administered through the Land Titles Assurance Fund which has been plagued from inception by administrative difficulties.

Lenders should note that it appears the Ontario courts will be examining their actions and vigilance in reviewing these mortgage fraud cases. Lenders will have to do their due diligence if they want to protect themselves from fraud.

As a result, the innocent borrowers will not lose their home and the innocent lender or purchaser will have to recover its funds from the Land Titles Compensation Fund.

The government is also attempting to improve the system of compensation from this fund which has up to now been set up and operated as a fund of last resort.

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BAKER SCHNEIDER RUGGIERO LLP ● Barristers and Solicitors
1000 - 120 Adelaide Street West ● Toronto ● Ontario ● M5H 3V1 ● Tel: 416-363-2211 ● Toll Free 1-800-268-2111 ● Fax: 416-363-0645

AN AMENDMENT TO EXTEND IS NO WAIVER TO TARION COMPENSATION

Purchasers Still Protected

Until the recent judgment of the Ontario Superior Court, most builders could rest easy when faced with claims for compensation arising from delayed closings where purchasers had executed amendments to their purchase agreements agreeing to extend the closing date. This nonchalant attitude was a direct result of the position of Tarion, a private corporation that was established in 1976 to administer the *Ontario New Home Warranties Plan Act* (the "Act") to protect the rights of new home buyers and regulate new home builders.

Tarion was of the view that executing an amendment extending the closing automatically defeated a claim for compensation. The reasoning behind such a position was that if a purchaser had voluntarily agreed to postpone its closing to some future date by agreement in writing, it would be unfair to penalize builders by requiring them to fork out "compensation" for a delay that was agreed. All of this has now changed with the decision in *Markey v. Tarion Warranty Corporation and 1353464 Ontario Inc.*

Markey, a professional photographer, entered into an agreement to purchase a condominium unit from Intracorp Developments Ltd. ("Intracorp"). Markey's agreement provided for a tentative closing of November 30, 2002. No confirmed closing date was ever slated. In November 2002, Intracorp extended the confirmed closing date to March 4, 2003 and thereafter twice more to July 22, 2003, by registered notice to Markey.

Finally by amendment agreed to by the parties, the confirmed closing date was extended to August 5, 2003, as Markey had advised Intracorp that he would be in Winnipeg at the time. In the interim and while awaiting possession of his unit, Markey sold his existing home in December 2002, as his purchaser was not prepared to wait. Markey claimed compensation for alternative accommodation and four months of storage.

Markey's understanding was that executing an amendment extending the closing did not affect his right to claim compensation for delayed closing from Tarion. Intracorp on the other hand contended that an amendment was only executed when notice periods under the Act were breached. Amendments "re-started the clock" and dissolved claims for compensation.

The right to compensation is a benefit conferred on purchasers

Justices Dunnet, Greer and Jarvis of the Divisional Court held that the intent of the Act was consumer protection. Keeping that intent in mind, it would be contrary to public interest if execution of amendments for extension automatically waived purchasers' rights to compensation under the Act.

No Waiver to Compensation

The right to compensation is a benefit conferred on purchasers by the Act. This right stems from builders' failure to provide the required notices for extensions where there is a delay to the occupancy date. The Divisional Court held that builders could circumvent statutory notice provisions for delay under the Act by obtaining executed amendments which was never the intent of the Act.

The Divisional Court went on to add that failing a specific waiver from a purchaser relinquishing his claim to compensation, an executed amendment extending the date of closing would not automatically defeat a claim for compensation on account of delayed closing.

Upgrades Are Not a Substitute for Compensation

Even before the Markey decision, recognizing the inconvenience delays cause, several builders with delayed closings had been offering incentives in the form of upgrades, extras or discounts for such upgrades or extras, which are costs absorbed by the builders to ensure happy purchasers.

Most builders did not feel the need to get any written acknowledgments waiving subsequent claims for compensation. However, in the wake of Markey, builders should paper benefits given to purchasers and obtain specific waivers setting off compensation claims against such benefits, thereby safeguarding themselves from possible claims under the Act.

Waiver to Compensation Required

The decision in Markey is clear. In the absence of a specific waiver of compensation claims under the Act, a stand alone amendment dealing solely with an extension to a closing date does not translate into an automatic waiver of claim for delay. The only resolution therefore to this issue is getting purchasers to execute an agreement and/or obtaining releases from any claims under Tarion, whether for delayed closing or otherwise.

Notwithstanding Markey, some builders still hold firm that a waiver may be more of a detriment than a benefit, given that it would have the effect of alerting otherwise passive purchasers to their rights under the Act. That is a risk they are prepared to take.

NEW LANDLORD AND TENANT LEGISLATION FOR ONTARIO

New Rights for Tenants

Effective January 31, 2007, the *Tenant Protection Act* (the "old Act") was repealed and be replaced by the *Residential Tenancies Act* (the "new Act"). Under the new Act the current Ontario Rental Housing Tribunal will be renamed the Landlord and Tenant Board (the "Board"). The new Act is more pro-tenant than the old Act.

Under the old Act if a tenant does not file a dispute within five days of being served with a landlord application the tribunal will issue a default order granting the landlord the relief it is seeking in its application. The new legislation has eliminated default orders and all matters whether disputed or not must go before the Board. Accordingly, we will be required to attend at the board whenever we file a landlord application.

Under the old Act if a landlord brings an application for termination of a tenancy for non-payment of rent and the tenant intends to defend the application the tenant must plead its defence in a dispute form or in a tenant application and file these with the tribunal prior to the hearing.

Now if a landlord brings an application for termination of a tenancy for non-payment of rent the tenant does not have to file a dispute form or tenant application. As well, at a hearing the tenant may raise any issue that could be raised in a dispute form or tenant application. Further, at a hearing the Board may make an order in respect of an issue it could have made had the tenant filed a dispute form or made a tenant application.

The result of this is that a tenant does not have to respond to our application, he can show up on the date of the hearing and raise defences to the application without giving us any prior notice of the defences. It is anticipated that knowledgeable tenants will do just this.

It is also anticipated that knowledgeable tenants will make allegations that the landlord has not properly maintained the property as a defence to a claim for rent arrears and termination of a tenancy. This will cause delays because inevitably we will have to seek adjournments so that we can gather evidence to refute the tenant's claims at a new hearing which may not be held for some time.

Under the old Act, when the tribunal gives an eviction order the order gives the tenant a specific date by which it must pay its rent arrears, for example, arrears must be paid by September 3, 2006. The order will go on to say that after September 3, 2006 the landlord may file the order with the sheriff and get an eviction date. Under the old Act a tenant cannot pay rent arrears after September 3, 2006 to avoid being evicted. A tenant may now avoid eviction by paying rent arrears at any time prior to the actual eviction taking place. However, the new law requires that tenants who pay arrears after an order has been sent to the sheriff must also pay any non-refundable payments made by a landlord to the sheriff for an eviction.

A tenant can now show up on the date of a hearing and raise defences without prior notice

The new legislation requires landlords to provide tenants with information relating to the rights and responsibilities of tenants, the role of the Board and how to contact the Board in a form to be approved by the Board in every written tenancy agreement. The Board has not yet produced its approved form.

Previously, when a sheriff evicted a tenant, a landlord could not dispose of property left behind by the tenant until forty-eight hours after the eviction. The new Act extends this time to seventy-two hours.

NO COMMON LAW DUTY TO CLEAN UP THE CONTAMINATED SITE BEFORE SALE

Buyer Beware

The ancient doctrine of *caveat emptor* or buyer beware remains alive and well in Ontario, even in cases of contaminated land.

In a recent decision of the Ontario Superior Court of Justice, a purchaser was found to be responsible for its own bargain.

The plaintiff in this case, Antorisa Investments Ltd., purchased four service stations from defendant, Imperial Oil. The agreement provided that the vendor would have no liability for the environmental condition of the property. Five years after the purchase, the plaintiff learned that one of the four service stations was contaminated and brought an action for damages to recover the clean up costs and the lost income associated with the remedial work.

Property Sold As Is

Notwithstanding the fact that the agreement provided that the property was purchased on an "as is" basis and that there was a "no liability" clause, the plaintiff alleged that employees of the vendor made misrepresentations which induced the plaintiff to enter into the agreement. It appears that the alleged statements implied that the properties were "clean". The vendor did undertake some testing prior to the closing and apparently learned that three of the four properties had some contamination.

Madam Justice Joan Lax held that in this case absent some provision in the contract providing otherwise, the purchaser was acquiring the property "as is". Her Honour found that the plaintiff had made the business decision not to demand a warranty as part of the agreement and chose not to conduct extensive environmental testing prior to closing. Justice Lax held that, "The common law does not imply any warranty that real estate is sold in any particular state or is fit for any particular purpose – to the contrary, the governing principle is *caveat emptor*."

"There was opportunity to negotiate the allocation of risk, but Antorisa preferred to purchase the property and accept the risk."

The court also found that the plaintiff failed to establish that the alleged oral representations induced the purchase. It appeared that the plaintiff would have proceeded with the purchase regardless of the statements made as to the state of the properties. The purchaser was a sophisticated commercial party and could have negotiated the allocation of risk regarding contamination if it had decided to do so, but instead accepted the risk.

Buyer beware.

Antorisa Investments Ltd. v. 179265 Canada Ltd. 82 O.R.(3d) 437.

FIRM DIRECTORY

Partners

Lewis Baker	Ext. 224
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Newsletter Editor - Jeffrey J. McKay

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- Commercial Lending
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- Mortgage Enforcement (Commercial and Residential)
- Debt Restructuring
- Real Property Litigation
- Commercial Litigation
- Corporate/Commercial/Leasing