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Canadian Commercial Real Estate Manual

The *Canadian Commercial Real Estate Manual* addresses the unique requirements of the commercial real estate industry. It covers the critical stages of development from acquisition through property management. The primary tabs are: Remedies (Mortgage), Financing, Taxation and Investment Analysis, Development and Conveyancing, Agreements, Precedents and Checklists.

This release features updates to the case law and commentary in Chapter 6 (The Law of Mortgages), 8 (Remedies), 14 (Condominium Mortgages), 36 (Construction and Development), and 38 (Acquisitions and Dispositions).

Highlights

Mortgages — Equitable Mortgage — Badges of Fraud — Fraudulent Conveyance — Mortgage Void — Where the vendor sold his property to the purchaser, and unknown to the purchaser, a mortgage was registered in favour of the vendor's brother prior to the closing, and the mortgage was not enforced for five years, there was a presumption of fraud and, as there was a failure to establish an equitable mortgage, the mortgage was

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declared to be void. In this case, the purchaser purchased a property from the vendor under an agreement of purchase and sale dated March 20, 2013. The sale transaction closed on June 28, 2013. A title search conducted by the purchaser's counsel did not disclose a mortgage because it was registered by the vendor after the date of the search. None of the purchaser, his lawyer, or the lawyer acting for the vendor on the real estate transaction were made aware of the intervening registration of a mortgage in the amount of $340,000 in favour of the vendor's brother on June 14, 2013. The vendor's brother never took any steps to enforce or foreclose on, or seek repayment of, the debt allegedly secured by the mortgage. The brother died in February 2015. The mortgage was first discovered by the purchaser in his efforts to renew the first mortgage with a bank in 2018. The brother's estate took the position that the mortgage was valid and enforceable. The executors of the brother's estate were the brother's siblings being the vendor and his sister. The purchaser applied for a declaration that the mortgage was void and for an order directing the Land Registrar to discharge the mortgage. The purchaser's application was granted.

The existence of an equitable mortgage over the property in favour of the vendor's brother prior to the month that the mortgage was registered had not been established by the executors on the record on a balance of probabilities. It was simply not plausible that the brothers intended to register a mortgage dating back to 2007, and that both of them forgot or neglected to do so earlier. The executors did not produce any document or instrument evidencing the existence of an equitable mortgage. In absence of such, the registration of the mortgage in favour of the vendor's brother raised the presumption of fraud. The badges of fraud included the secrecy of the registration of the mortgage, the close relationship of the vendor and his brother, and the timing of the registration prior to the closing. The explanations offered by the executors regarding the identified badges of fraud were unsatisfactory. The parties' retroactive characterization of loans from the vendor's brother to the vendor as an equitable mortgage did not make it such. They were lacking sufficient foundational or corroborating evidence of a common intention to grant security in the property to the vendor's brother to meet their burden on this issue. The mortgage was void and unenforceable as against the purchaser by virtue of s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29. The executors had not rebutted the presumption of an intention to defeat, hinder or delay the vendor's unsecured creditors through the registration of the mortgage. The purchaser had standing to challenge the registration of the mortgage as a fraudulent conveyance. The purchaser was, at the time of registration of the mortgage, a party to whom contractual obligations were owed by the vendor, including his undertaking to discharge any existing mortgages. The breach of such obligations would render the purchaser someone with a

claim for damages who would rank as a creditor. The vendor's breach of his obligations to the purchaser was irrefutable: *Mohammed v. Makhlouta* (2020), 30 R.P.R. (6th) 147, 2020 ONSC 7494, 2020 CarswellOnt 18066.

Mortgages — Standard Charge Terms — Renewal — Increased Rate of Interest — No Notice to Second Mortgagee —— First Mortgagee Not Providing Discharge Statement — First Mortgagee Having Full Priority — Where the assignee of the first mortgage renewed the mortgage at an increased rate of interest, and the subject property was sold by the second mortgagee, upon default under its mortgage, the assignee had full priority as the standard charge terms contemplated renewing the mortgage at an increased rate of interest without notice. Although the assignee failed to provide a mortgage discharge statement, s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40, did give the right to demand an arrears statement to a subsequent mortgagee. In this case, on December 8, 2016, a first mortgage was registered against the subject property in the amount of $2.3 million. On the same date, a second mortgage was registered in the amount of $825,000 in favour of 249 Inc. The first mortgage later went into default, and before the property was taken into possession, the original first mortgagees and 263 Inc. entered into assignment of the original first mortgage. The mortgagor entered into an agreement with 263 Inc. to renew and amend certain terms of the original first mortgage, which included increasing the interest rate from 8 percent to 11.5 percent ("renewed first mortgage"). The increased interest rate was not registered on title. The mortgagor defaulted under the second mortgage at around same time he fell into default under the original first mortgage, and 249 Inc. obtained judgment on consent against the mortgagor and a writ of possession. 249 Inc. entered into an agreement to sell the property, with the intent to pay out and discharge the renewed first mortgage from the proceeds of the sale of the property. However, the mortgagor fell into default under the renewed first mortgage. 249 Inc. and 263 Inc. entered into agreement with respect to the proceeds of sale to facilitate the sale of the property. 263 Inc. refused to provide a discharge statement to 249 Inc. during the course of various proceedings. 249 Inc. brought an application for a judicial determination as to whether the increased interest rate, and the disputed charges claimed under the renewed first mortgage took priority over payment of the sums under the second mortgage.

The disputed charges from, and the increased interest rate under, the renewed first mortgage were enforceable, and had priority over the outstanding indebtedness under the second mortgage. The disputed charges included three months' bonus interest, marketing fees and legal fees related to the default judgment. The court was satisfied that the charges were actually incurred to satisfy the total indebtedness due to the first mortgage. The increased rate of interest did not violate s. 8 of the

Interest Act. The increased rate of interest charged under the renewed mortgage applied to the principal, and not as a penalty on any arrears. Although 249 Inc. had no actual notice of the increase in the interest rate, and the increased interest rate was not registered on title, the standard charge terms of the first mortgage permitted the mortgage to be renewed in writing with or without an increased rate of interest notwithstanding there might be subsequent encumbrances. It was not necessary to deliver for registration any such renewal to retain priority. The standard charge terms were deemed to be incorporated into the registered mortgage pursuant to s. 78(4) of the *Land Titles Act*, R.S.O. 1990, c. L.5.

The purpose of s. 22 of the Mortgages Act was to permit the mortgagor, who was in default, to obtain a statement setting out the amount of the default so that the mortgagor could put the mortgage back into good standing by paying the amount of the arrears only; this provision did not mention a discharge statement, nor did it give the right to demand an arrears statement to a subsequent mortgagee. Section 22 of the Act had no application to 263 Inc. or the renewed first mortgage. 263 Inc. was not disentitled from claiming the full amount due under the renewed first mortgage by reason of having declined to provide a discharge statement to 249 Inc: *2495940 Ontario Inc. v. 263346 Ontario Inc.* (2020), 31 R.P.R. (6th) 157, 2020 ONSC 7937, 2020 CarswellOnt 19154.

Acquisitions and Dispositions — Risks — Zoning — Residential Rental Properties — Municipal By-law Restricting Evictions During Renovations — By-law Compatible With B.C. *Residential Tenancies Act* — In British Columbia, the city's by-law regulating evictions by landlords renovating or repairing residential rental properties was *intra vires* the *Community Charter*, S.B.C. 2003, c. 26, and was complementary to the rent control and eviction scheme in the *Residential Tenancy Act*, S.B.C. 2002, c. 78. In this case, the city amended its rental unit by-law to restrict the ability of landlords to evict tenants in order to accommodate renovation work. The by-law required a renovating or repairing landlord either to enter into a new tenancy agreement with the tenant in respect of a comparable unit in the same building on the same, or better, terms or make other arrangements for the tenant's temporary accommodation and return at the same rent when the work was complete. The landlord was the recent purchaser of a four-storey residential building with 21 suites, 12 of which were currently occupied. The landlord alleged that the building required upgrades and general maintenance, and that vacant possession of all 21 units was required for a minimum of one year to perform the renovations. The landlord contended that the restriction in the by-law amendment was *ultra vires*, and beyond the legislative jurisdiction of the city. The landlord argued the Legislature had intended to create an exhaustive scheme to govern rent control and evictions in the *Residential Tenancy Act* such that

the by-law was unauthorized by the *Community Charter*, which required harmonization between provincial and municipal legislation and should be interpreted in a manner that upheld the Legislature's intent. The landlord brought an unsuccessful petition for judicial review.

The judicial review judge found the by-law amendment fit within the jurisdiction granted by ss. 8(3)(g), 8(6), and 63(f) of the *Community Charter*. The amendment established rules that constituted regulations or requirements in relation to the business of the renting of apartment units. The landlord appealed, and its appeal was dismissed. The city's decision to enact the impugned by-law was based on a reasonable interpretation of its statutory authority under ss. 8(3)(g) and 8(6) of the *Community Charter*. The *Community Charter* reflected a flexible and forward-looking approach to municipal powers. The residential tenancy legislation was remedial and must be interpreted liberally to ensure the realization of its objects. The city's decision that it had the authority to enact the by-law was grounded in, and was consistent with, the text, context, and purpose of the enabling statute. Its interpretation was consistent with the principles of subsidiarity and presumed coherence of statutes enacted by the same government. The city had a long-standing concern with the need to preserve local affordable rental housing and had recently become particularly concerned with a perceived increase in the risk of renovictions. The *Residential Tenancy Act* contemplated the prospect of overlapping and complementary jurisdiction, and it did not expressly grant the landlords the statutory right to charge market rent when the tenant exercised his or her right of first refusal following renoviction: *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 CarswellBC 1322, 2021 BCCA 176, 17 M.P.L.R. (6th) 1, 29 R.P.R. (6th) 181, 52 B.C.L.R. (6th) 1, affirming (2020), 33 B.C.L.R. (6th) 149, 2020 CarswellBC 3142020 BCSC 16397 M.P.L.R. (5th) 59.

Special Agreements — Leases — Tenant Leasing Department Store in Shopping Mall — Lockdown Resulting from COVID-19 Pandemic — Lease Requiring Rent to Continue to be Paid — Relief from Forfeiture Granted — Despite the COVID-19 pandemic, as the terms of the lease required the tenant to pay rent as and when due, without abatement or set-off, the landlord was justified in terminating the lease due to non-payment of rent; however, relief from forfeiture was granted on terms that the tenant paid the full amount of the rent outstanding. In this case, the commercial landlord leased out space in its mall to the department store. At the outset of the COVID-19 pandemic in March 2020, the store was forced to close for some two months. The store did not pay the rent agreed upon in the lease in April 2020. The landlord demanded the rent, which the store claimed it could not pay due to the financial effects of the pandemic. The store continued to refuse the monthly demands by the landlord. In September 2020, the store claimed the landlord was in default of the lease for failing to

provide high-quality premises. The store requested an abatement of rent. The landlord responded by issuing a notice to terminate the lease agreement. The landlord claimed that the store was in wrongful possession of the premises. The landlord commenced a petition against the store for a declaration that the parties' lease had been terminated and for a writ of possession. The parties reached an interim consent order for the rent. The landlord claimed that the lease should be terminated, on the facts before the court. The store applied for an interlocutory injunction prohibiting the landlord from terminating the lease or re-entering the premises. The store claimed that there were outstanding issues requiring a full trial, so that the petition should not be granted. In the alternative, the store claimed relief from forfeiture. The landlord's application for petition relief was dismissed; the store's application for relief from forfeiture was granted.

A tenant must continue to pay rent, without abatement or suspension, unless the lease provided otherwise or something was done by the landlord that amounted to an eviction of the tenant. In this instance, the terms of the lease did not relieve the store from paying the full rent of $78,036 per month, without abatement, set-off or deduction. Regardless of whether the pandemic constituted an "unavoidable delay", the tenant's obligation to pay was not suspended. However, the circumstances of the COVID-19 pandemic made the subject case an appropriate one for relief from forfeiture. The store was a long-term tenant with significant investment in the property. The landlord had been paid partial rent of 50 per cent through the interim agreement, and the remaining 50 per cent had been paid to the store's counsel in trust. Forfeiture of the lease would cause reputational damage to the store, and the store would lose its investment in the premises. The landlord's loss was only the time value of the delayed payments. The relief was granted on terms that the tenant paid the full amount of the rent, with the rent paid into trust being remitted to the landlord. Whether the landlord was itself in breach of the lease had no bearing on the tenant's obligation to pay rent: *Cherry Lane Shopping Centre Holdings Ltd. v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI*, 2021 CarswellBC 1949, 2021 BCSC 1178, 30 R.P.R. (6th) 220, 54 B.C.L.R. (6th) 168.