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CANADIAN COMMERCIAL REAL ESTATE MANUAL

McDermott

Release No. 1, March 2024

Publisher's Special Release Note 2024

The pages in this work were reissued in February 2024 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the February 2024 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

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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), 14 (Condominium Mortgages), 21 (The Nature of Assessment in Ontario), 36 (Construction and Development), 38 (Acquisitions and Dispositions), and 40 (Special Agreements).

Highlights

Mortgages — Equitable Mortgage — Promissory Note — Note Specifying That Lender Entitled to Mortgage Upon Default — Post-Default Conduct of Borrower Not Negating Common Intention — Where the promissory note on a loan provided that upon default, the borrower would grant a mortgage to the lender, the legal principles applicable to equitable mortgages were applied in finding the lender was entitled to a valid equitable mortgage. In this case, a company controlled by the mortgagee made a loan to the property owner of \$125,000, and the loan was guaranteed by the property owner's principal and by the brother company. The maturity date was September 2019. The parties agreed that if the property owner failed to repay this loan and accrued interest by the maturity date, it would grant a fourth mortgage to the mortgagee's company. The owner defaulted, and failed to register a fourth mortgage on the property. Execution creditors obtained a judgment against the owner and registered a writ of seizure and execution against its property. The property was sold with the proceeds of the sale held in trust pending a decision on the distribution. The parties disagreed on whether the mortgagee and her company had an equitable fourth mortgage over property that took precedence over the writ of execution. The mortgagee's company brought an application for a grant of a fourth mortgage. The application by the mortgagee's company was dismissed: *Greenspan v. Van Clieaf*, 2023 CarswellOnt 15780, 2023 ONCA 681 (Ont. C.A.) reversing in part 2022 ONSC 6394, 2022 CarswellOnt 16696, 51 R.P.R. (6th) 337 (Ont. S.C.J.).

Condominium Mortgages — Common Law Condominiums — Proposed Sale to Developer — Petition by Majority Owners — Petition Under *Partition of Property Act* — Lack of “Good Reason” — Where the petitioners, who represented a majority interest in the common law condominium complex sought to sell the complex to a developer, their petition was denied as the transfer documents provided that they would not sell each other's interests in the property, and the physical condition of the complex did not warrant order-

ing the sale of the property. In *CGT Management Corp. v. Mackenzie-Moore*, 2022 BCSC 2195, 51 R.P.R. (6th) 300, 2022 CarswellBC 3542 (B.C. S.C.), the residential complex was comprised of 177 units in 20 buildings situated on about 9.5 acres of land (the “lands”). Its form of land ownership and management had been structured to create something akin to condominium ownership and governance, but outside of the statutory regime that governed strata developments. The ownership structure known as a “common-law condominium” was created through the filing of individual titles for “undivided fractional interests” in the lands of determinable grants of fee simple that were bound, through the right of reverter of fee, to comply with various covenants, rules and management structures. Specifically, the title document for each undivided fractional interest was subject to a “Transfer of Undivided Interest in Land and User Agreement” that attached as Schedule 1 a “User Agreement”. The parties variously called aspects of these transfer documents the “Right of Reverter” and the “User Agreement”. This ownership structure had since been prohibited by s. 73(4) of the *Land Titles Act*, R.S.B.C. 1996, c. 250, but this complex was exempted under the Act. The petitioner C Corp. acted as the management company for the complex. The other petitioners were the owners of an undivided 68,426/100,000th interests in the lands. The respondents were registered owners of the remaining 31,574/100,000th undivided fractional interests in the complex. The petitioners brought a petition for an order to sell the lands as whole to a developer on terms set out in a purchase and sale agreement (PSA) signed by C Corp. and the developer, pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 (PPA). The petition was dismissed.

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