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DEBT LITIGATION

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Debt Litigation is a comprehensive work dealing with default and summary judgments relating to debtor-creditor law and practice. It includes annotations and commentary on topics such as the fiduciary duties of solicitors, including negligence and conflict of interest, spoliation of evidence and e-discovery and conventional mortgages and guarantees.

What's New in This Update

The author has added new commentary and case law regarding mortgages, procedure, defences, solicitors, lender liability, settlement, enforcement, fraudulent conveyances, and bankruptcy. Notable cases are summarized below.

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Highlights

- Possession of mortgaged premises may be taken after default and such possession may be peaceable where the premises are vacant: *New Haven Mortgage Corporation v. Codina*, 2022 A.C.W.S. 5697, 2022 ONSC 7036, 2022 CarswellOnt 18365 (Ont. S.C.J.) at paras. 18, 31-32, additional reasons 2023 ONSC 788 (Ont. S.C.J.). [Mortgages 2:3]
- As a general proposition, it is universally accepted that neither the common law nor equity will permit a court to make substantive change to the terms of a valid contract. A high-risk loan was always going to exact a high rate of return for the lender and interest at the contractual rate on the principal amount calculated from the date of demand is proper: *Century Services Corp. v. LeRoy*, 2022 A.C.W.S. 5695, 2022 BCCA 239, 2022 CarswellBC 1816 (B.C. C.A.), leave to appeal refused 2023 CarswellBC 669 (S.C.C.). [Mortgages 2:4]
- A mortgage obtained by fraud does not constitute a valid or enforceable charge on title to land and a mortgage granted by a party who lacks valid authority to grant the mortgage is invalid: *Le v. Chan (Trustee)*, 2023 BCSC 1654 (B.C. S.C.) at para. 34 and *St Pierre v. North Alberta Land Registry District (Registrar)*, 2023 A.C.W.S. 1987, 2023 ABCA 153, 2023 CarswellAlta 1155 (Alta. C.A.). [Mortgages 2:5]
- In the context of a receivership, a request to redeem a mortgage will be denied if a court-approved sales process has been conducted properly. The balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process must take into consideration all affected economic interests in the properties in question, not just those of one creditor: *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, 2023 CarswellOnt 12803 (Ont. C.A.). [Mortgages 2:11]
- There is no duty on the part of the selling mortgagee to miscellaneous third parties with an interest in the proceeds of sale through the mortgagor but no proprietary interest, see *CPF One Ltd. & Anor v. OSF (UK) II Ltd. & Anor*, [2023] EWHC 2102 (Ch). [Mortgages 2:12]
- A court is entitled to conclude from the parties' conduct that there has been a novation, the test being "whether that inference is necessary … to provide a lawful explanation or basis for the parties' conduct... The test is objective, and does not depend on the subjective intention of the parties": *Rolls-Royce Holdings Plc v. Goodrich Corporation*, [2023] EWHC 1637 (Comm). A novation by conduct may be established notwithstanding clauses in the novated contract requiring prior written consent ("no oral modification" wording) before any

novation: *Musst Holdings Limited v. Astra Asset Management UK Limited*, [2023] EWCA Civ (Comm). [Mortgages 2:16]

- An equitable mortgage may be available where the parties have agreed in writing that a legal mortgage shall be granted under certain circumstances but the intended mortgagor refuses to sign the mortgage, which would have interfered with the rights of pre-registered execution creditors: *Greenspan v. Van Clieaf*, 2022 A.C.W.S. 5736, 2022 ONSC 6394, 2022 CarswellOnt 16696 (Ont. S.C.J.), reversed in part 2023 ONCA 681 (Ont. C.A.). [Mortgages 2:36]
- In considering the issue of a reasonable excuse for the delay in ﬁling the defence the court must consider both the delay in filing a defence, and the delay in applying to set aside the default judgment: *Halifax County Condominium Corporation No. 38 et al. v. Meshal*, 2023 NSSC 288 (N.S. S.C.) additional reasons 2023 NSSC 318 (N.S. S.C.). [Procedure 4:1]
- An appraiser may owe a duty of care to the purchaser but only in regard to a dwelling house of modest value and not to unusual or expensive properties or in commercial situations: *Partridge & Anor v. Healys LLP*, [2023] EWHC 2340 (KB). [Defences 6:7]
- Regarding undue influence as a defence, the relevant consideration is whether there is a relationship of influence by reason of vulnerability; vulnerability alone will not suffice: *Azam v. Molazam*, [2023] EWHC 2202 (Ch). [Defences 6:15]
- The rules concerning where a lender is put on inquiry respecting the probable undue influence of the debtor's husband:
  (1) The general rule is that a creditor is put on inquiry where the relationship between surety and debtor is non-commercial.
  (2) [A marital relationship is non-commercial.]
  …
  (4) The threshold for placing the creditor on inquiry is a low one where the monies advanced were for the benefit of the husband alone.
  (5) Once the creditor is put on inquiry, it becomes incumbent upon the creditor to investigate the risk of undue influence in relation to the loan or alternatively be fixed with constructive notice of the undue influence of the husband.
  Waller-Edwards v. One Savings Bank PLC, [2023] EWHC 2386 (Ch). [Defences 6:19]
- A bank's duty of care does not include notification to the client of information that it had received from a foreign bank regarding the particular type of suspicious transaction to which the customer had fallen victim because "the defendant cannot be liable for a risk of injury against which he did not undertake to protect": *Foodinvest Limited v. Royal Bank of Canada*, 2020 ONCA 665 (Ont. C.A.). [Lender Liability 8:27]

- Where a bank breaches its account agreement with the client by (a) permitting the negotiation of instruments with just one signature instead of the two which are formally required and (b) simultaneously allows transactions in excess of the maximum permitted by the account agreement, it may become liable in negligence ("failing to exercise reasonable prudence in the execution of the instructions received") for the loss occasioned by a fraudulent transfer. This will be particularly so where the transactions are unusual, given the normal and ordinary course of the client's business, where the bank has institutional knowledge of certain types of fraud: *Alfagomma Inc. v. HSBC Bank Canada*, 2022 QCCS 3655 (C.S. Que.). [Lender Liability 8:27]
- Liability for dishonest receipt will make a defendant liable, as an express trustee, to account for profits: *Novoship (UK) Ltd. v. Mikhaylyuk*, [2015] QB 499 at paras. 79-84. "[T]he acid test is one of unconscionability, namely whether the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt": *Shovlin v. Site Civils and Surfacing Ltd. & Anor (Re SPH Trust)*, [2023] EWHC 1658 (Ch), together with interest at an appropriate rate: Watson v. Kea Investments Ltd., [2018] EWHC 2483. [Lender Liability 8:30]
- If the defence of *bona fide* purchaser for value without notice is to be relied upon, the relevant consideration must be proven to have been paid in full, *Adams & Ors v. FS Capital Ltd. & Ors*, [2023] EWHC 1649 (Ch): "In each case the purchase price has not been paid in full, and the purchaser cannot claim to be a bona fide purchaser for value without notice until the purchase price has been paid in full." [Lender Liability 8:31]
- The immediate disclosure rule respecting settlements in multi-party litigation states that settlement agreements reached between some parties, but not others, need to be immediately disclosed to non-settling parties if they entirely change the litigation landscape of the proceeding: *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234 (Ont. C.A.). [Settlement 9:7]
- Factors relevant to landscape change forcing immediate disclosure are:

  a. the configuration of the litigation;

  b. the claims between the parties;

  c. the relationship between the parties and their orientation in the litigation;

  d. the terms of the agreement;

  e. whether the agreement is inconsistent with the pleadings or with the position taken during litigation;

  f. whether the terms of the agreement alter the apparent relationships between the parties to the litigation that would

otherwise be assumed from the pleadings or expected in the conduct of the litigation;

g. whether the agreement changes the adversarial position of the parties into a cooperative one whereby the party is incentivized to cooperate with a former adversary;

h. whether the agreement impacts litigation strategy of the non-settling party; and

i. the values the rule is meant to advance.

Bennington Financial Corp. v Medcap Real Estate Holdings Inc., 2023 ONSC 2742 [Settlement 9:7]

- Where six or more years have elapsed since the plaintiff's judgment, Ontario Rule 60.08(2) requires the plaintiff to obtain leave to issue a notice of garnishment and it must explain the delay such that the court may conclude that the plaintiff has not waived its rights under the judgment or otherwise acquiesced in non-payment of the judgment. The Court of Appeal in Ontario has confirmed that "a very low evidentiary threshold applies to a judgment creditor who requests leave and that it is a rare case where a judgment creditor cannot meet the test.": *Brawinger Group Limited v. Spring*, 2023 ONSC 4832 (Ont. S.C.J.). [Enforcement 10:3]
- Sale of real property pursuant to a registered judgment in British Columbia is accomplished through s. 86 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 (which abolishes writs of execution); sections 92-97 of the *COEA* contemplate a three-step process for a judgment creditor to apply for the sale of a judgment debtor's interest in land to satisfy a judgment:

  1. A show cause hearing for the judgment debtor to show why their interest should not be sold. If the judgment debtor cannot show why their interest should not be sold, a reference must made to the Registrar to determine:
     - the interest of the judgment debtor in the land and their title to it;
     - what judgments form a lien and charge against the land and priorities among them;
     - how proceeds of the sale are to be distributed; and
     - to report these findings to the court.

  2. A hearing before the Registrar to sign the report prepared by the creditor ("Registrar's Report") confirming the above information.

  3. An application to the court to confirm the Registrar's Report. The judgment creditor may then obtain an order to sell based on the Report. There are two options depending on what type of report from the Registrar sought. On a "certification", the final decision for appeal purposes is the decision of the Registrar, but on a "report and recommendation", it is the decision of this Court. It would be a final order at that point.

Bevilacqua v. Robinson, 2023 BCSC 1548 (B.C. S.C.). [Enforcement 10:40]

- Ontario Rule 60.18(6) permits the examination in aid of execution of a non-party (including spouses) and the production of documents from other non-parties, an option which arises where the judgment debtor refuses pertinent questions on their own examination or there is any other difficulty enforcing an order, provided that the persons who are strangers to the litigation are not unduly harassed by examinations. The non-party witness may be examined in relation to the following matters set out in Rule 60.18(2):

  (a) the reason for nonpayment or nonperformance of the order;

  (b) the debtor's income and property;

  (c) the debts owed to and by the debtor;

  (d) the disposal the debtor has made of any property either before or after the making of the order;

  (e) the debtor's present, past and future means to satisfy the order;

  (f) whether the debtor intends to obey the order or has any reason for not doing so; and

  (g) any other matter pertinent to the enforcement of the order.

  Brawinger Group Limited v. Spring, 2023 ONSC 4832 (Ont. S.C.J.). [Enforcement 10:41]
- Cash-flow insolvency differs from balance sheet insolvency, which entails a comparison between (i) the assets held by the debtor and (ii) the liabilities of the debtor. "Put simply, the cash-flow test requires a determination of whether the relevant trust is able to pay its debts as they fall due": *Adams & Ors v. FS Capital Ltd. & Ors*, [2023] EWHC 1649 (Ch). [Fraudulent Conveyances 11:4]
- In New Brunswick, s. 2 of the *Assignments and Preferences Act*, R.S.N.B. 2011, c. 115 can be used to declare an improper transfer to be null and void: *Sasha Contracting and Renovation Inc., Ruscana Intertrade Inc., Alexandr Petukhov, Alexander Petukhov and Alexandr Sasha Petukhov v. Anirban Ghosh and Jaya Ghosh*, 2023 NBCA 75 (N.B. C.A.). [Fraudulent Conveyances 11:14]
- A secured creditor has the options in respect of a claim in bankruptcy:

  Under s.69.3(2) of the *Bankruptcy and Insolvency Act* ("the Act"), the bankruptcy does not prevent a secured creditor from enforcing their security in the normal course. It does not have to prove its claim...

  Alternatively, the secured creditor can proceed under s. 127(1) of the Act. Under this section, where a secured creditor realizes its secured interest and there is anything left due and owing, it may prove that remaining amount as a claim in the bankruptcy...

> Thirdly, if a secured creditor surrenders its security to the trustee for the general benefit of the creditors, it may prove its entire claim in the bankruptcy: s. 127(2). The surrender of the creditor's security may be expressed or inferred from a course of conduct …
>
> Respecting the issue of surrender of its collateral, the burden of proving that the mortgagee irrevocably, unequivocally and unconditionally intended to surrender its security is a question of fact: *Saugeen Economic Development Corp v. Peuser*, 2023 ONSC 5037 (Ont. S.C.J.). [Bankruptcy 12:15]

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