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Real Estate Conveyancing

Lamont

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This 2nd edition of Donald Lamont's classic work on real estate practice covers various legal issues that arise in buying and selling real estate. It examines leading case law and relevant statutes for each stage of the real estate transaction including signing the listing agreement, negotiating the Agreement of Purchase and Sale, submitting Requisitions, closing the transaction, the document registration procedure under electronic registration, and remedies where the vendor or purchase is in default.

This release features updates to the case law and commentary, based on the reissued publication materials, in the following chapters: Chapter 4 (Offer to Purchase), Chapter 7 (Outline of Some Real Estate Statutes), Chapter 9 (Cottage and Rural Conveyancing), Chapter 13 (Land Titles Procedure), Chapter 20 (Remedies When Vendor or Purchaser in Default), Chapter 22 (Liens, Charges and Potential Claims), Chapter 24 (Remedies of Foreclosure and Sale), Chapter 25 (Power of Sale Pursuant to Mortgage Provisions), and Chapter 28 (Building Restrictions).

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Highlights

Offer to Purchase—Latent and Patent Defects—Former Basement Leak Remediated—No Longer Defect—Current Leak Discovered by Purchaser's Inspector—Patent Defect—Where there was a former leak in the basement that was fully remediated, the vendors had no duty to disclose it to the purchaser as it was no longer a defect, while the current leak that was discovered by the purchaser's inspector was a patent defect with no concealment that was remediated prior to the closing. In this case, shortly after the plaintiffs took possession of their new home that was built in 2018, a minor pinhole crack and leak was formed in the foundation. The builder fully remediated this leak (2018 leak). The plaintiffs did not disclose the 2018 leak up front to their realtor. The plaintiffs entered into a residential real estate purchase and sale contract with the purchaser in 2022. The purchaser's inspection discovered a leak in the basement (2022 leak), which was remediated in time for the closing. During the remediation of the 2022 leak, information came to fruition regarding the 2018 leak. The parties signed an amending agreement containing a $10,000 hold back if the plaintiffs failed to remediate the 2022 leak, and failed to provide the purchaser with a full report on the remediation. The purchaser refused to close. The plaintiffs sold the property to a second buyer within 55 days of the original closing date, claimed lost profits, and sought damages for the mortgage rate interest differential costs. The plaintiffs brought an action for breach of contract, and the purchaser counterclaimed for breach of contract, negligent or fraudulent misrepresentation, and non-disclosure of defect. The plaintiffs' action was allowed in part; the purchaser's counterclaim was dismissed. The deposit funds of $30,000 held in trust were to be released to the plaintiffs.

The plaintiffs lost profits were not compensable. It was not reasonable or foreseeable to place the burden of additional costs/damages regarding the plaintiff's financing on the purchaser. The purchaser repudiated the contract, and the plaintiffs had no alternative but to treat the contract as terminated. The plaintiffs never actively concealed or made any misrepresentations regarding the 2018 leak as it was not a defect, and was not required to be disclosed to the purchaser. The purchaser did not establish the elements of fraudulent misrepresentation with clear, convincing and cogent evidence. There was no duty to disclose the 2018 leak as it was a former defect that was remedied, and did not render the property uninhabitable, unfit, or dangerous. The 2018 leak was no longer a defect *per se*, and did not need to be disclosed. The 2022 leak was a patent defect that was duly discovered by the purchaser's inspector, and was fully remediated prior to the closing with the required report delivered in a timely manner as per the amending agreement. The purchaser did not establish the elements and indicia of active concealment, incomplete disclosure or deceit by the plaintiffs. There were no defects present: In *Urbanczyk v. Yager (Fairweather)*, 2024 CarswellAlta 1561, 2024 ABCJ 135, 59 R.P.R. (6th) 195 (Alta. C.J.).

Offer to Purchase—Option to Purchase Agreement—Lack of Consideration When Option Granted—Only Past Consideration—Option Unenforceable—Although the alleged optionee might have assisted the owner in leasing the subject property prior to their option to purchase agreement, there was no valid consideration given for the option agreement at the time agreement was made, and therefore it was unenforceable. In this case, the subject

property had been in the Chomlak family for over 50 years. The owner inherited sole title to the property in March 2015, after her mother's death. An option to purchase agreement was entered with the applicant some six months later, after an event which was being held to celebrate the owner's mother's life. The applicant's father was the owner's cousin. The applicant's mother acted as witness to the agreement. The agreement gave the applicant the right to purchase the property for $160,000. The property had been rented and farmed by non-family members since at least 2000. At the time the option agreement was signed in September 2015, the property was subject to a five-year lease agreement from 2014 to 2019. At the end of the lease, and four years after the option agreement was signed, the applicant secured same renters, and entered a lease on the owner's behalf. The applicant paid some property taxes on the property, and claimed that he promised to keep the property in the family. The owner's husband was given power of attorney over her affairs as she was declared incapable, and he refused to sell the property to the applicant for the agreed amount. The applicant brought an application to enforce the option-to-purchase agreement. His application was granted in part; the applicant was awarded some damages.

There was no valid consideration given for the option to purchase, and it was unenforceable. The five-year lease was arranged over a year before the applicant entered into the option agreement in October 2015. Even if the applicant helped secure that lease and drafted its terms, this was at best "past consideration". There was no evidence that the owner requested that the applicant assist her with this, or more importantly, that the assistance to the owner was a condition of a future agreement to grant him an option to buy the property. There was also no evidence that the parties agreed at the time of the agreement to payment of the property taxes as consideration for the future option to purchase. There was no direct evidence from anyone other than the applicant that keeping the property in the family was important to the owner. In any event, the agreement failed because it lacked sufficient specificity on exclusivity, irrevocability, and as to how an eventual contract of sale would be created by the option holder. As the applicant was unsuccessful in arguing that the option to purchase was enforceable, there was no contractual basis on which he could claim damages. However, the applicant argued in the alternative that he was entitled to compensation for the amounts paid towards property taxes because the owner has been unjustly enriched. The applicant was deprived of $4,143.20 he paid in property taxes, and the owner correspondingly enriched. There was no juristic reason why the owner should continue to have the benefit of those funds. The applicant was awarded $4,143.20 in damages on that basis: *Chomlak v. Myer*, 2024 CarswellAlta 1972, 2024 ABKB 463, 60 R.P.R. (6th) 187, [2024] A.J. No. 949 (Alta. K.B.).

Cottage and Rural Conveyancing—Water Licence—Access to Water Works—Driveway/Access Road—Amount of Travel Not Sufficient for Public Road—Equitable Easement Not Available as Historic Trail—*Water Sustainability Act* Not Granting Interest in Land—Although the plaintiff's water licence authorized access to water works in the area, the amount of travel over the neighbours' driveway/access road to reach the water system was insufficient to constitute a public road, and entitle him to an equitable easement over it as a historical trail. In this case, the parties owned large, adjoining rural properties and the parties' homes were close to one another. The neighbours' property covered either side of the EG Road, the main road through the area. The plaintiff's property had no direct route to the EG Rood. The

plaintiff and pervious owners of his property accessed the EG Road through the neighbours' property using an access road, which was part of the neighbours' driveway. Both parties received all of their water from a nearby creek from April to the end of September each year. The plaintiff claimed that his water licence authorized ownership of related works in the area under s. 7 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (WSA). The plaintiff alleged the right to enter his neighbours' private land to use the works as authorized in the licence. The plaintiff also alleged damages for lost revenue due to the lack of irrigation water after the neighbours' urgent repair of their lower water system in 2014. The neighbor alleged that the plaintiff always opposed shutting off the main valve for any period of time. The neighbours notified the plaintiff that he was no longer permitted to use the driveway and, constructed fencing across the plaintiff's entrance to the driveway. The plaintiff accessed the road from another access road, which was far longer than the driveway. The plaintiff brought an action for declaration that the driveway/access road was public highway under s. 42 of the *Transportation Act*, S.B.C. 2004, c. 44, and that he was entitled to an equitable easement as a historical trail. The neighbour claimed damages related to the 2014 flood from the leaking water system and their domestic water reinstatement, including the plaintiff's trespasses and his damage to their fences. Their claims were both dismissed.

The plaintiff's claims that the access road was a public highway was dismissed, as the amount of travel on the road was insufficient to meet the requirement for a travelled road of historical use, and there was no recognition of it as a necessary route. In addition, the plaintiff's claim for an equitable easement over the driveway/access road, and historical trail claim was dismissed. The information that the neighbourss had when they purchased their property was not notice of an unregistered equitable easement. Assuming the acquiescence of the previous owners was sufficient, the evidence did not establish that the plaintiff relied on it to his detriment or that it would be unconscionable for the neighbours to "go back on" the assurance. Section 7 of the WSA did not expressly grant ownership or an interest in land where the works were located on private property. Moreover, the maps showed the authorized ditches for the water system were in a different location from the authorized pipe on the neighbours' property. The underground water system on the neighbours' property was a fixture on their property and was therefore owned by them. The plaintiff had not bothered to contact the neighbours about connecting to the water access point, and so his lack of irrigation damages claim was dismissed.

The evidence did not meet the common law requirement of an intention to dedicate the access road to the public for use as a highway. There was no evidence of an express dedication by the previous owners of the neighnbours' property and no evidence of public use apart from an unspecified part of it being used by a school bus for turning around. It could not be inferred from the use by one class of users that the previous owners whose own children used the school bus intended to dedicate their driveway to the public for use as a highway. The same was true of use by persons living at the plaintiff's property, and tenant farmers. Given the location of the parties' properties in a remote rural area, caution should be exercised about inferring a dedication from the evidence that more likely reflected the owner's neighbourly tolerance although dated remained apt. The neighbours' claim for damages related to the 2014 urgent repair and their domestic water reinstatement were dismissed. The neighbours, were however, awarded damages against the plaintiff for the emergency or flood-related repair, the leak mitigation and the trespasses: In *Horst v. Purcell*, 2024 CarswellBC 1966, 2024 BCSC 1217, 60 R.P.R. (6th) 218, [2024]

B.C.J. No. 1263 (B.C. S.C.).

Remedies When Vendor or Purchaser in Default—Remedies—Deposit—Relief From Forfeiture of Deposit—Sophisticated Homebuilder—Vulnerable Purchaser—Closing Date Postponed Several Times—Purchase Misled as to Options Regarding Closing Date—Homebuilder Suffering No Apparent Loss—Unconscionable to Keep Deposit—Where the high standard for unconscionability in the sale transaction was met, considering the vendor's sophistication as a homebuilder, its conduct in misleading the purchaser about her options regarding the closing date, and the purchaser's personal circumstances, the court granted relief from forfeiture of the purchaser's deposit. In this case, in 2016, the purchaser signed an agreement to purchase a newly constructed home from the homebuilder for $629,900. The closing date was postponed several times at the homebuilder's request, eventually being rescheduled for April 23, 2019. When the transaction did not close on that date, the homebuilder claimed the purchaser breached the contract, terminated the agreement, and forfeited the purchaser's deposit of $82,916. The purchaser sued for the return of her deposit, and the motion judge granted summary judgment in her favour, finding it appropriate to relieve her from the forfeiture. The homebuilder appealed, arguing the motion judge applied the wrong legal test for granting relief from forfeiture. The homebuilder's appeal was dismissed.

The appellate court found the motion judge correctly applied the factors from the decision in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374 (C.A.) which considered (i) whether the forfeited deposit was disproportionate to the vendor's damages and (ii) whether it would be unconscionable for the vendor to retain the deposit. The motion judge found the high standard for unconscionability was met, considering the homebuilder's sophistication as a homebuilder, while the purchaser was a widow who worked two jobs, while undergoing cancer treatment, to save enough money to put down a deposit on the home. A further factor was that the homebuilder had apparently suffered no loss as a result of the transaction not closing. The motion judge also found the homebuilder deliberately misled the purchaser into thinking she had no choice but to set new closing date after previous postponements. It was not a precondition for obtaining relief from forfeiture that the party seeking relief demonstrate they were not to blame for the contractual breach. Although the purchaser's conduct was often highly relevant to whether it was unconscionable to permit the vendor to keep the deposit, it was only one factor to be considered. In addition, costs of $12,500 were awarded to the purchaser: *Naeem v. Bowmanville Lakebreeze West Village Ltd.*,2024 CarswellOnt 7037, 2024 ONCA 383, 51 B.L.R. (6th) 199, 60 R.P.R. (6th) 183, [2024] O.J. No. 2324 (Ont. C.A.).