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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 Chapter 3 (Listing Agreements and Commissions), Chapter 4 (Offer to Purchase), Chapter 5 (Offer to Purchase—Rights and Obligations), Chapter 6 (Practical Description of Common Terms), Chapter 13 (Land Titles Procedure), Chapter 16 (Closing the Transaction), Chapter 20 (Remedies When Vendor or Purchaser in Default), Chapter 22 (Liens, Charges and Potential Claims), and Chapter 27 (Condominiums).

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Highlights

Listing Agreements and Commissions—Fiduciary Duty of Agent—Purchaser Failing to Close Transaction—Purchaser Forfeiting Deposit—Vendor's Agent Not Owing Duty to Purchaser—No Obligation to Insist Upon Purchaser Obtaining Independent Legal Advice—The vendor's agent had no obligation or duty to the purchaser to recommend or insist upon the purchaser obtaining independent legal advice on the consequences of defaulting on the terms of the APS. In this case, the vendor was in process of building new homes. On March 11, 2017, the vendor entered into an agreement of purchase and sale (APS) with the purchasers for the sale of a property for $776,400 for which the purchasers paid a deposit of $50,000 in three instlments. The first tentative closing dates were August 23, 2018 and December 6, 2018, and later a firm closing date of March 28, 2019 was extended at the purchasers' request to May 28, 2019. However, the purchasers failed to provide the closing funds, and the documents on that date. The vendor advised that as result, the APS was terminated, and the deposit was forfeited to the vendor. The property was re-sold at the list price of $699,900 to a third party, closing on September 18, 2019. The vendor brought a motion for summary judgment seeking a determination that the APS was terminated by the purchasers' breach, and the deposits paid were forfeited to the vendor. The vendor also sought damages as a result of related expenses incurred during the 113 days between the purchasers' closing date, and the third party's closing date. The purchasers argued that they were victims of predatory tactics by the vendor's real estate agent who convinced them to enter into the APS without explaining consequences of a default, and that they signed the APS without the opportunity to properly read it or take it home and review it with a lawyer The vendor's motion was granted.

The purchasers' complaints were regarding their own agent, who was not a party to the litigation, and who was not associated with the vendor or the vendor's agent. The purchasers were under no compulsion to sign the APS, and they relied on the advice of their own agent. There was no evidence that the vendor or its agent contributed to the purchasers not taking the opportunity to obtain independent legal advice or carefully review the APS. The purchasers failed to provide supporting case law regarding the vendor's agent's duty to the purchaser to insist on independent legal advice on the consequences of defaulting on the terms of the APS. Moreover, part of the APS was an Agency Disclosure Acknowledgment, which informed the purchasers of the agency agreement between the vendor's agent, and the vendor, and explained that the agent acted only for the vendor, and must represent the vendor's best interests at all times. The APS was a valid contract and on the final closing date, the vendor was ready, willing and able to close. Furthermore, the vendor was contractually permitted to extend the closing date as it did. Thee vendor was compliant with the timelines and deadlines set out in the Tarion Warranty Corporation Addendum that the formed part of the APS, and the purchasers were kept apprised of the closing date extensions. The purchasers failed to deliver the required funds, and documents to close the transaction, and by failing to complete the transaction, were in the breach of APS. As a result of the purchasers' breach of the APS, the vendor terminated the APS, and the purchasers forfeited their deposit to the vendor. The vendor was also entitled to damages: In *Lecco Ridge Developments Inc. v. Vaquero*, 2022 ONSC 6547, 2022 CarswellOnt 16890, 50 R.P.R. (6th) 101 (Ont. S.C.J.).

Offer to Purchase—Erroneous Closing Date—Mutual Mistake—Valid Contract for Sale of Land—Commercially Reasonable to Close by Expected Closing Date—Where the parties executed an offer to purchase in December 2010, and erroneously wrote in a closing date of February 2010, it was commercially reasonable to assume that the purchaser would be required to pay the purchase price by the expected closing date of February 2011. In this case, the purchaser was involved in road construction. The vendors owned farmland, which they no longer wished to farm, and which contained a sizeable amount of aggregate. In August 2010, the purchaser made an initial offer to purchase the vendors' farmland for $2 million, which offer was rejected by the vendors. In December 2010, the purchaser made a third offer to purchase that stipulated a purchase price of $2.5 million, which was the asking price, and a deposit of $100,000, but erroneously identified the closing date as February 2010. The offer was subject to the purchaser obtaining financing on or before January 31, 2011. The vendors executed the document. The vendors through their lawyer subsequently indicated that they did not believe the purchaser had a binding offer to purchase on the sale of their land, and accordingly, had no intention of proceeding with the sale. The vendors also argued that the purchaser did not fulfil the conditions imposed upon it by the offer to purchase, As a result of the purchaser's failed attempt to purchase the farmland, the purchaser had to purchase other land as an alternate source of aggregate for its construction business. The purchaser issued its statement of claim seeking to enforce the third offer, and directing specific performance of its terms, or in the alternative, damages from the alleged breach of contract. The purchaser's action was allowed, and it was awarded damages of $1.5 million in lieu of specific performance, as well as the return of its deposit in the amount of $100,000.

The third offer satisfied the minimal requirements of a valid contract for the sale of land. The closing date had been handwritten into the offer, and both parties later realized their mistake. In this instance, the third offer stipulated a firm closing date, albeit erroneously identified, and it was commercially reasonable to assume that the purchaser would have been obliged to pay the .of a sale were plainly set out the in third offer, and the conditions, which included the purchaser's testing of the aggregate, and arranging financing were satisfied by January 2011. The residence clause in the third offer allowed the vendors to remain in residence for a reasonable transition. There was no evidence which would remotely suggest that either the vendor wanted to continue residing in their respective residences after July 2011, and accordingly, the vendors' arguments that residence clause was so uncertain as to render the third offer wholly unenforceable were rejected. While there was a basis to impugn certain aspects of this contract, those deficiencies were not so substantial or sufficient as to render the third offer invalid and unenforceable. To now order specific performance more than a decade after the third offer was repudiated would prejudice the vendors, even though they caused the breach of contract in the first place. It was a case in which ordering, at that time, the vendors to deliver the property to the purchaser in accordance with the terms of the third offer would be unfair, and pose an undue hardship to them: *101034761 Saskatchewan Ltd. v. Mossing*, 2022 CarswellSask 391, 2022 SKQB 193, 49 R.P.R. (6th) 51, [2022] S.J. No. 306 (Sask. Q.B.).

Practical Description of Common Terms—Certificate of Pending Litigation—Jointly Owned Family Homer Transferred to Wife—Husband Subsequently Indebted to Lenders—Sufficient "Badges of Fraud" Pre-

sent—Lenders Granted CPL— Where the husband was indebted to the lenders based on unpaid promissory notes signed by him and others, and the husband transferred the family home that was jointly owned to his spouse alone, the lenders were granted a CPL as there were sufficient "badges of fraud" present to demonstrate a triable issue with respect to whether the transfer was carried out with the intent to defeat or delay creditors. In this case, the plaintiff lenders sought to recover three unsecured demand loans dated September 20, 2019, that had matured and upon which demand had been made. The notes were signed on behalf of the debtor DMCC Group, and by PM and his business partner, NS, personally. On September 21, 2021, the plaintiffs, by their lawyers, made demand for payment for the amounts then purported to be outstanding of CDN $4,710,269, and US$1,698,128. On January 13, 2017, PM and his wife ,TM, had transferred their residential property to TM alone, The lenders sought a declaration that the transfer of the property was void as against the lenders, and all other creditors of the debtors, and sought an order deleting the transfer from title. This action was brought pursuant to the provisions of the *Fraudulent Conveyances Act*, R.S.O. 1990, c.F.29 and the *Assignment and Preferences Act*, R.S.O. 1990, c.A.33. The motion was granted.

There was sufficient evidence before the court to demonstrate a high probability of success that some amounts would be found to be owing by PM and others. PM and TM were spouses and were not therefore at arm's length. The transfer was made after over 11 years of joint ownership. The consideration for the transfer was $2.00 and did not correspond with the value of the property. PM continued to live at the property. The transfer divested PM of a significant asset. There was evidence that PM's indebtedness increased after the transfer. For the purposes of this motion, there were sufficient "badges of fraud" present to demonstrate a triable issue with respect to whether the transfer was carried out with the intent to defeat or delay creditors. Not granting the CPL would risk the dissipation of PM's alleged interest in the property to the prejudice of the lenders. There was no evidence of prejudice to the PM and TM if the CPL was granted. In his affidavit, PM indicated he and his wife had their home for many years, and planned to remain there for years to come. They had never marketed the property, and have no intention of doing so in the foreseeable future. The court was satisfied that the balance of convenience favoured the granting of a CPL: *Hands-On Capital Investments Inc. v. Matharoo*, 2023 CarswellOnt 19917, 2023 ONSC 7181 (Ont. S.C.J.).

Remedies When Vendor or Purchaser in Default—Deposit —Forfeiture of Deposit—Purchaser Backing Out of Deal—Purchaser Not Paying Deposit—Property Resold at Lower Price—Vendor's Loss Less Than Deposit—Vendor Entitled to Judgment For Amount of Deposit—Where the purchaser repudiated the agreement of purchase and sale within hours of delivering her acceptance, and had not paid the agreed-upon the deposit, and the vendors resold the house with a loss that was less than the amount of the deposit, the purchaser was nevertheless liable for the amount of the deposit. In this case, the action arose from a failed residential real estate transaction. The main issue was over forfeiture of the deposit. Two features in the facts in this case made it unique:

1. The purchaser backed away from the deal almost immediately after delivering her acceptance of the vendors' counteroffer. She changed her mind within hours.
2. The purchaser never paid the agreed-upon deposit of $40,000 as required.

The first of the above factors was exceptional; the second occurred infrequently. After the purchaser repudiated the agreement, the house remained on the mar-

ket and in one week the vendors found another buyer who paid $12,473 less than the purchaser had agreed to pay. The purchaser admitted that she entered into a binding agreement of purchase and sale (APS) and that she breached the contract when she backed away from the deal. The main question in this action is whether the purchaser must pay $12,473 (the damages incurred) or $40,000 (the deposit she agreed to pay). The court's subjective reaction to the facts was that it is unfair for the vendors to receive judgment for $40,000. The events between the parties amounted to little more than a hiccup for the vendors. For about ten overnight hours, they thought they had a deal. During those hours, the listing status on MLS never changed from "for sale" to "sold." Judgment for $40,000 was a $27,527 windfall to the vendors. However, in circumstances where the deposit was reasonable and the purchaser agreed to pay it, it could not be concluded that forfeiture of the deposit was unconscionable.

A thorough review of the jurisprudence showed that in cases like this one, when the sale did not proceed due to the fault of the purchaser, it was all but impossible for the buyer to recover its deposit. Neither the purchaser's position nor the court's sense of fairness in this case were reasonably supported in law. The court performed a deep review of relief from forfeiture in deposit cases. The jurisprudence contained unsettling disharmony, and trial judge believed that the area would benefit from further appellate analysis. However, the Canadian courts did not seem to struggle with deposit cases: when a sale did not proceed due to the purchaser's default, purchasers were routinely required to forfeit their deposits. The court therefore granted judgment to the vendors for $40,000: *Gagliardi and Spillane v. Al-Karawi*, 2023 ONSC 6853, 2023 CarswellOnt 19051 (Ont. S.C.J.).

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