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Recent Cases

PRODUCT SPOTLIGHT

Be sure to check out the commentary on construction liens written by Anna M. Esposito and Maria Ruberto of Pallett Valo LLP starting at ¶30,335.

EXERCISE DUE DILIGENCE — NOT BLIND RELIANCE — WHEN DEALING WITH MUNICIPAL AUTHORITIES

— James C. Mosher of McInnes Cooper Lawyers

On May 2, 2014 the Supreme Court of Canada decided a party can't rely on a municipality's actions – or lack of actions – to defend itself against charges it violated a municipal zoning by-law. Parties dealing with municipal authorities should exercise due diligence – and not blind reliance.

The municipality charged a public parking lot owner for violating a zoning by-law. The owner defended itself with the estoppel defence: it said the municipality's own actions over the years precluded it from asserting the lot violated the by-law. For example, the municipality:

- paid the owner when municipal activities prevented use of some of the parking spaces
- charged property taxes on the lot at the non-residential rate
- installed a sign on city property directing the public to the lot

The SCC disagreed, confirming that a municipality can't deviate from its by-law or authorize a party to do so (unless there is legislation permitting it) – and it can't be forced to do so through estoppel:

- A party can't rely on estoppel to defend itself against a regulatory offence in the face of a valid and explicit law – like the zoning by-law here
- Courts have only applied the doctrine of estoppel against public authorities where the representative's promises were lawful or were consistent with a statutory discretion
- Estoppel could force a public authority to exercise a discretion in a particular way, but ensuring by-law compliance and by-law enforcement are not discretionary

Wolters Kluwer CCH

The decision was based on a Quebec by-law, but the estoppel defence and the principles apply across Canada. The message is a simple one – proper due diligence is key:

More Than Zoning By-Laws. The by-law in this case was a zoning by-law, but the decision likely applies equally to any type of municipal by-law.

Independent Verification. Owners (and purchasers) of residential or commercial property should verify the acceptable property uses by referring to the applicable zoning by-law, municipal plan or rural plan – and not relying on a municipal official's confirmation that the use of the property is acceptable.

Municipal Officials' Scope. An individual or company (or their legal counsel) should review the applicable laws and satisfy themselves that a municipal official is permitted to give the advice or grant the discretion in the matter in which it's sought – or be unable to rely upon the advice given.

James C. Mosher is a Partner in McInnes Cooper's Saint John, New Brunswick office whose practice focuses on corporate and business, property, municipal, and wills and estate law. He provides legal services to individuals, private corporations, partnerships, sole proprietors and other entities on the establishment of business structures, corporate reorganizations, purchase and sale transactions, estate planning, business succession planning, corporate financing and other matters. He represents several municipalities providing legal services on by-law review, by-law enforcement, contractual, property and other municipal matters.

RECENT CASES

Action Statute-Barred Under *Limitations Act, 2002*

Ontario Superior Court of Justice, April 22, 2014

Capital Direct Lending Corp. ("Capital Direct") was in the business of lending money to homeowners in exchange for mortgages and selling the mortgages to investors who then assumed the risks and benefits of the mortgage. In June 2007, the plaintiff investor (the "Investor") purchased a second mortgage from the defendant on a property owned by a third party homeowner. Earlier in 2007, the homeowner had applied to Capital Direct for the second mortgage and reported that its property was valued at $210,000 with an existing mortgage of $83,226 with Maple Trust Company ("Maple Trust"). Capital Direct purchased a policy of title insurance from the co-defendant, Chicago Title Insurance Company ("CTIC"), in the amount of $83,100. The policy contained an exclusion that it would not insure against loss or damage arising by reason of the first mortgage of land in favour of Maple Trust. Prior to the assignment of the mortgage from Capital Direct to the Investor, the Investor obtained a disclosure statement that strongly urged her to obtain independent legal advice. It also confirmed the first mortgage amount of $83,226, and stated that the loan-to-value ratio ("LVR") was 79 per cent on the second mortgage. In January 2008, Capital Direct learned that the first mortgage balance was actually $203,044, the LVR was 136 per cent, and the homeowner had forged her initial application to Capital Direct. In April 2008, Capital Direct told the Investor's husband that the homeowner had altered paperwork, Maple Trust knew about the fraud, and that the mortgage had always been in the higher amount. Capital Direct offered the Investor $500 to seek legal advice. The Investor renewed the mortgage in January 2009 and 2010, believing her interests were being protected and she would suffer no damage as long as the homeowner made payments. In June 2010, the homeowner made an assignment into bankruptcy. Maple Trust sold the property under power of sale and all net proceeds were paid to the first mortgagee.

The Investor commenced an action claiming negligence, breach of contract and breach of fiduciary duty against Capital Direct. The Investor also sought a declaration from CTIC that the insurance policy covered her loss and an order for CTIC to pay her for her loss. Capital Direct and CTIC moved for summary judgment to dismiss the Investor's claim as having been brought outside the limitation period and on the basis that the insurance policy excluded the claimed loss, respectively.

The motions were allowed. To determine if there was a genuine issue requiring a trial, the Court applied rule 20.04(2) of the *Rules of Civil Procedure* and the recent decisions *Hryniak v. Mauldin*, 2014 SCC 7 and *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8. Pursuant to *Mauldin*, the overarching issue to be answered when ruling on a motion for summary judgment is "whether summary judgment will provide a fair and just adjudication." The Court found that Capital Direct and CTIC's motions were appropriate for determination through summary judgment as most of the relevant factual matters were not in dispute.

Turning to the limitation period issue, the Court dismissed the Investor's argument that the applicable limitation period was the 10-year period under section 43(1) of the *Real Property Limitations Act*. The Investor's action did not meet the requirement that it be an action "upon a covenant contained in an indenture of mortgage," as it was not based upon rights she received through a mortgage or an assignment of mortgage from Capital Direct. Rather, it was based upon Capital Direct's promises and representations to her outside of those documents. Accordingly, the two-year limitation period under sections 4 and 5 of the *Limitations Act, 2002* applied. The Court found that the wrongful act occurred in June 2007 when Capital Direct assigned the mortgage to the Investor. The Investor discovered her claims on or before April 2008, when the Investor's husband learned of the fraud and that Capital Direct or CTIC might be liable. At the time the Investor chose to renew the mortgage, she knew that the LVR continued to exceed 100 per cent. Since the Investor commenced the action three years and seven months after April 2008, the action exceeded the two-year limit and was statute-barred.

With regard to CTIC's motion, the Court found that the clear language of the insurance policy excluded the Maple Trust mortgage. The policy was intended to cover the validity and priority of the second mortgage, which was not at issue in the action. Accordingly, pursuant to rule 20.04(2), there was no issue requiring a trial.

Zabanah v. Capital Direct Lending Corp. et al., 2014 OREG ¶59,039

Damages Awarded for Interference With Right of Way

Ontario Superior Court of Justice, April 23, 2014

In1994, the plaintiff acquired title from its corporate predecessor of a four-storey mixed residential and commercial building with a vacant lot (the "Lot") at the rear. The plaintiff used the Lot for parking for its tenants, and for garbage removal purposes. Access to the Lot was through a right of way in favour of the plaintiff over the property owned by the defendant (the "servient property"). In approximately 1991, the servient property was part of a parcel of land being assembled by Stuart Holdings Limited ("Stuart Holdings") for a proposed hotel development. Existing structures on the servient property were removed, leaving a vacant lot. The proposed hotel construction would materially interrupt the plaintiff's right of way access. The plaintiff and Stuart Holdings entered into an agreement pursuant to which the existing right of way over the servient property would be temporarily closed and the hotel complex, once constructed, would contain a new route to the plaintiff's Lot to substitute for the old right of way. Under the agreement, alternate parking was provided for the plaintiff's tenants at a different location, and Stuart Holdings agreed to reimburse the plaintiff for the costs of parking there. Stuart Holdings excavated the servient property, leaving a large hole. Stuart Holdings was subsequently placed into bankruptcy and ceased reimbursing the plaintiff.

The servient property was foreclosed by the bank and the defendant purchased the servient property from the bank in 1995. The defendant commenced construction of the hotel and the plaintiff's right of way was restored four years later, in 1999. The size and nature of the right of way was altered, however, and had become a tunnel through the hotel building, measuring 9'11" where it was previously 11' and 13'11½" where it was previously 15.7'. A height restriction where there was none before was also imposed, limiting front-end loaders' access to the plaintiff's Lot, and impeding the plaintiff's ability to remove garbage. The plaintiff sought damages for interference with its right of way. The damages represented loss of apartment and commercial office rental income, and loss of parking income.

The claim was allowed. Citing case law, the Court found that the permanent structure that was the hotel represented an interference with the right of way that was originally granted in favour of the plaintiff's Lot, and the interference was actionable against the defendant. Further, pursuant to case law, wrongful interference with a right of way constituted a nuisance. The Court rejected the defendant's argument that it acted reasonably upon purchasing its property by attempting to obtain all the necessary documentation to proceed with the construction of the hotel and restoration of the right of way. The Court found that the defendant knew or should have known that its purchase of the property was subject to the right of way in favour of the plaintiff and that obligations flowed from it. The fact that it took four years before the right of way was restored resulted in the plaintiff taking on obligations that should have been dealt with by the defendant. The Court stated that the defendant should have made accommodation for the plaintiff for parking and garbage removal as the 1991 agreement had provided. The Court concluded that a grace period of one year should be given and the defendant's obligation for damages payable to the plaintiff began flowing as of January 1996 until the time the right of way was restored in 1999.

To calculate the quantum of damages, the Court accepted the defendant's argument that the plaintiff had a duty to mitigate and reduce its vacancy rate by providing parking at a nearby area. The Court estimated that the loss from 1996 to 1999 amounted to $166,400. The Court further accepted expert evidence that the depreciation in the value of the plaintiff's property due to the limited right of way was $225,000 and the plaintiff's cost of grading its parking lot was $50,000. As a result, the defendant owed total damages of $441,400.

Fountas v. Melo, 2014 OREG ¶59,040

Family Law Act Does Not Prohibit Imposition of Collateral Charge on Matrimonial Home

Ontario Superior Court of Justice, April 24, 2014

In a matrimonial action, the respondent was ordered to "grant, execute, and deliver to the Applicant's counsel [a] collateral mortgage against the Respondent's home to stand as security for all indebtedness, now or in the future owing to the Applicant". The respondent signed the collateral mortgage. However, since the respondent was married, his home was a "matrimonial home" pursuant to the *Family Law Act* (the "Act"), so the land registrar's office required that the respondent's wife to consent to the collateral mortgage or that the applicant obtain an order dispensing with the need for the consent. The respondent's wife was not prepared to consent to the registration of the collateral mortgage. The applicant therefore brought a motion to dispense with the respondent's wife's consent.

The motion was allowed. The Court referred to subsection 21(1) of the Act, which states that a spouse shall not dispose of, or encumber an interest in, a matrimonial home unless the other spouse consents, or the court authorizes the transaction. The purpose of the section was to limit the right of a spouse to encumber a matrimonial home, not to limit the right of the court to encumber the home to secure the respondent's financial obligations to the applicant. The Court stated that this interpretation is supported by section 21(5) of the Act, which provides that section 21(1) does not apply to the acquisition of an interest in property by operation of law. In this case, the Court, not the respondent, had created the liability of the collateral mortgage, so the encumbrance arose by operation of law. The Court concluded that section 21(1) restricts a spouse's intentional act to encumber a matrimonial home, but it does not restrict a court from imposing a charge against the matrimonial home to enforce the titled spouse's obligations. As a result, the Court held that there was no requirement that the respondent's wife must consent to the registration of the charge.

Watkins v. Watkins, 2014 OREG ¶59,041

Landlord Entitled to Damages for Tenant's Failure to Occupy Premises

Ontario Superior Court of Justice, April 29, 2014

The defendant tenant operated a private vocational business school. In June 2006, the defendant entered into a lease to operate its business out of a shopping centre owned by the plaintiff landlord. The lease term ran until May 31, 2011. Under the lease, the tenant agreed to pay monthly rent, to operate its business "continuously, diligently and actively on the whole of the Leased Premises at all times", and to repair and restore the premises at the tenant's cost. The tenant vacated the premises in December 2007 after giving the landlord notice. The landlord commenced an action in June 2008 seeking rent arrears and payment for the tenant's alleged failure to occupy and carry on business at the property from January to June 2008. The parties settled the action two months later and, under the agreement, the tenant was obligated to resume occupation of the premises by October 1, 2008, with all of the terms of the lease to continue. The tenant failed to occupy the premises but paid rent to the landlord, although there were deficiencies in the June 2010 and May 2011 rental payments. The landlord commenced a second action in February 2012, seeking to recover arrears of rent, damages for the tenant's failure to occupy and carry on business between October 1, 2008 to May 31, 2011, and damages for the tenant's failure to restore the premises to the required condition at the end of the lease term. The tenant moved for summary judgment to dismiss the action on the grounds that the arrears of rent had been paid and that the landlord's remaining claims were time-barred. The parties agreed that summary judgment was appropriate in regard to the issues raised by the tenant's motion.

The motion was allowed in part. As the tenant had already paid the rent arrears, that portion of the landlord's claim was dismissed. The Court next examined whether the *Limitations Act, 2002* (the "LA"), which provides for a limitation period of two years, or the *Real Property Limitations Act* ("RPLA"), which provides for a limitation period of six or 10 years, applied to the landlord's remaining two claims.

With regard to the landlord's claim for restoration of the premises, the Court found that the tenant's end-of-lease obligations did not arise until the end of the lease, namely May 31, 2011, and the landlord could not file an action pursuant to the breach until that time. Accordingly, the landlord's claim arose within the applicable limitation period of both the LA and the RPLA and was not time-barred.

Turning to the landlord's claim respecting the tenant's failure to occupy and carry on business for the period required, the Court considered whether the landlord's claim was for "rent" such that the claim fell under sections 4 and 17(1) of the RPLA. Pursuant to section 1 of the RPLA, "'rent' includes all annuities and periodical sums of money charged upon or payable out of land." In reviewing the historical meaning of "rent," the Court stated that "rent" can refer to rent charged and rent reserved. In section 4 of the RPLA, which allows for a 10-year limitation period, the Court sated that as the phrase "land or rent" is used. The term "rent" does not appear on its own, which indicates that the section does not cover rent reserved and does not apply to an action to recover rent due under a lease between a landlord and a tenant. The term "arrears of rent" in section 17(1) of the RPLA provides a six-year limitation, "as it applies to rent service or rent reserved, means the payment due under a lease between a tenant and landlord as compensation for the use of land or premises." The Court rejected the landlord's argument that the payment due for the tenant's failure to occupy was "rent" simply because the lease defined it as "rent." "Rent" in the RPLA, the Court stated, was not intended to be an "empty vessel" that could be applied to arbitrary sums. The Court concluded that the landlord's claim was one for damages, not rent. Accordingly, the LA, not the RPLA, applied.

Under the lease, the landlord was deemed to have suffered damage for each day that the tenant failed "to commence to do or to carry on business as herein provided." Pursuant to case law, the landlord acquired a new cause of action each day that the tenant failed to occupy and carry on business between October 1, 2008 and May 31, 2011. Applying the two-year limitation period of the LA, the landlord's claim was therefore time-barred, except for the portion that related to damages accumulated between February 16, 2010 — two years prior to the commencement of the action — and May 31, 2011.

Pickering Square Inc. v. Trillium College Inc., 2014 OREG ¶59,042

Condominium Corporation's Conduct Found to be Oppressive

Ontario Superior Court of Justice, May 9, 2014

In 2005, the applicants entered into an agreement of purchase and sale with a condominium developer for the purchase of a residential unit in Ottawa. Due to the lack of spaces in their building, they also entered into an agreement to purchase a parking space and storage unit in the adjacent building that belonged to the same developer. In 2010, the declaration for the respondent condominium corporation of the adjacent building was amended to add articles that prevented use and ownership of parking and storage units by nonresidents of the building. The applicants were the only individuals affected by the new provision. The respondent did not enforce the provision against them, and allowed the applicants to grandfather their use of the parking space and storage unit for as long as they owned their unit.

When the applicants wished to sell their residential unit, they were prevented from selling the parking and storage space with the unit. Between November 2011 and August 2013, the applicants created two listings for their unit; they received no offers for the listing that did not include parking or storage units, but did receive offers when the residential unit was offered with the parking and storage, but conditional on the applicants obtaining an amendment to the respondent's declaration. The applicants attempted to obtain an amendment that would exclude them from the restriction but were unable to secure consent signatures of 80 per cent of the members of the respondent corporation. The applicants alleged they suffered oppression as a result of the respondent's actions, and sought an order under section 135 of the *Condominium Act, 1998*, asking the Court to direct the respondent to amend its declaration.

The application was allowed. The Court set out section 135 of the Act, which allows a court to make an order prohibiting oppressive or unfairly prejudicial conduct by an owner, a corporation, a declarant, or a mortgagee of a unit, or an order requiring the payment of compensation. The test for determining oppressive conduct was the same whether the action related to condominium law or corporate law. Pursuant to *BCE Inc. v. 1996 Debentureholders*, 2008 SCC 69, to be oppressive, the conduct has to "(a) undermine the reasonable expectations of the parties and (b) be coercive, abusive, or unfairly disregard the interests of the applicants."

The Court stated that there was no evidence that the residential owners of the adjacent building, in rejecting the applicants' proposed amendment, knew that a court might make a finding of unfair treatment that would subject them to substantial monetary damages. The Court found that the applicants would not have purchased their residential unit without parking or storage units, and, furthermore, they would not have purchased their residential unit if they had known that they would be unable to sell it with the parking and storage units associated with it in the respondent's building. The effect of the amendment, therefore, was that the applicants' reasonable expectations were undermined and their interests were unfairly disregarded. The applicants were severely prejudiced since the buildings were located some distance from the economic centre of Ottawa, and required a resident to have a car and parking space. The Court concluded that the respondent's conduct in amending the declaration was oppressive. The Court ordered that the respondent make a further amendment to the declaration that excluded the parking and storage unit owned by the applicants from the declaration's rule against ownership by nonresidents.

Grigoriu v. Ottawa-Carleton Standard Condo. Corp. No. 706, 2014 OREG ¶59,043

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For Wolters Kluwer CCH

Rose McConnell, BSc, LLB, Analyst
Law & Business
416-224-2224, ext. 6438
email: Rose.McConnell@wolterskluwer.com

Dionne Cheong, Marketing Manager
Law & Business
416-228-6153
email: Dionne.Cheong@wolterskluwer.com

Rita Mason, LLB, Director of Editorial
Law & Business
416-228-6128
email: Rita.Mason@wolterskluwer.com

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Wolters Kluwer Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 · 1 800 268 4522 tel
416 224 2243 · 1 800 461 4131 fax
www.cch.ca