



Real Estate News

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How Not to Draft a Promissory Note

In *Moore v. Dexter*, [2009] O.J. No. 510 (ON S.C.) the promissory note was dated December 15, 2006 and provided that \$75,000.00 (only \$54,735.00 was actually advanced) was payable at the rate of 30 per cent in a lump sum payment on March 16, 2007. The monies were being forwarded to fix up a home which would then be sold. On the facts of the case the Court found that, notwithstanding the wording of the note, the actual agreement was that the note would be due when the project was complete. The home was renovated and subsequently sold on June 6, 2007. Prior to the sale of the home, a construction lien had been filed against the property so, in order to complete the sale, the borrower was required to pay a substantial sum of money into Court in order to have the lien lifted.

The Court held that interest of 30 per cent of the amount loaned after only three months exceeded the maximum annual rate of 60 per cent allowed pursuant to s.347 of the *Criminal Code*. Furthermore, the Court found that the completion date was June 6, 2007, when the house was sold and not when the construction lien case, which was scheduled for later that year, would be decided. Even with a completion date of June 6, 2007, the

Court found that a 30 per cent rate over a little less than six months still contravened the provisions of the *Criminal Code*.

Section 4 of the *Interest Act* provides that whenever any interest is, by the terms of a written contract, payable at a rate for a period less than a year, no interest exceeding 5 per cent per annum is payable unless the contract contains an express statement of the equivalent annual rate. Since this promissory note did not contain any equivalent annual rate, the lender could not charge more than 5 per cent per annum. Section 3 of the *Interest Act* provides that whenever interest is payable and no rate is fixed by agreement or law, the rate of interest shall be 5 per cent per annum: "in this case there was a rate fixed by the agreement but it was an illegal rate. Effectively, no rate was fixed and therefore under s.3, the interest rate is 5 per cent per annum."

The borrower had offered to pay \$19,500.00 on June 15, 2007 but the lender refused to accept it and insisted upon payment in full. The Court held that interest at 5 per cent per annum is payable on \$54,735.00 from June 6 to June 15, 2007 and on \$35,235.00 from June 15, 2007 to the date of judgment and thereafter until paid.

Time Limit to Enforce a Promissory Note

Pursuant to s.45(1)(g) of the former *Limitations Act*, the limitation period for enforcing a promissory note was six years from the date the note was delivered. Recently, lawyers were concerned when the Court of Appeal in *Hair v. Hair*, 2006 CanLII 41650 decided that pursuant to s.5(1)(a)(i) of the *Limitations Act, 2002*, the limitation period for enforcing a promissory note was two years from the date the promissory note was given.

Pursuant to section 1 of Schedule "L" to the *Budget Measures and Interim Appropriation Act, 2008 (No. 2)* which received Royal Assent on November 27, 2008, and given retroactive effect back to January 1, 2004, the two-year limitation period commences once a demand for repayment has been given and dishonoured ("(3) For the purposes of subclause (1)(a)(i), [of the new *Limitations Act, 2002*] the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made").

Bank Prevails Over a Non Arms-Length Lease

In *Bank of Montreal v. Silvera*, [2009] O.J. No. 442 (ON S.C.) the Bank sought a declaration against the tenants of a residential dwelling that it was entitled to vacant possession of the property. Jacqueline Silvera was the registered owner of a residential dwelling. She sold the house to an individual named Persaud on December 11, 2007. Persaud had arranged a mortgage with the Bank of

Montreal, whose mortgage was registered on the same day as his purchase. In her declaration of possession, delivered to Persaud, Jacqueline declared that there were no leases affecting the property and she undertook to deliver vacant possession on closing. The next day Persaud entered into a lease agreement with Jacqueline and her husband for a year with a right of automatic renewal. The day before the trial, the tenants disclosed a Declaration of Trust confirming that Persaud acquired the property as a trustee for Jacqueline who was the beneficial owner. Persaud made the first two mortgage payments and then allowed the mortgage to go into default.

The Court held that because Persaud was a bare trustee and that the beneficial ownership in the property remained with Jacqueline at all times, it was, in fact, a rental agreement between Jacqueline as the beneficial owner and Jacqueline and her husband as “tenants.” The Court thus held that the Silveras were in possession of the property as mere occupants which entitled the Bank to vacant possession of the property.

Section 52 of the *Mortgages Act* provides that the Superior Court of Justice may vary or set aside a Tenancy Agreement (or any provisions therein) entered into by a mortgagor in contemplation of or after default under the mortgage with the object of discouraging the mortgagee from taking possession of the residential complex on default (or adversely affecting the value of the mortgagee’s interest in the residential complex). The purpose of s.52 is to protect mortgagees who are vulnerable to a mortgagor entering into a “sweetheart”

deal between the mortgagor and a cooperating tenant. The Court found, under the circumstances, that the “rental agreement” was made in contemplation of default by Persaud, under the terms of the Bank of Montreal mortgage. Thus even if the Rental Agreement was valid, it was entered into in contemplation of Persaud’s default under the mortgage and could be set aside.

Landlord Estopped from Denying Renewal

A landlord may, by its conduct, waive the requirement in the lease that the tenant give written notice of its exercise of its option to renew the terms of the lease. The sublease in question required the tenant to give the landlord written notice of the exercise of her option to renew two months prior to the expiry of the current term. The tenant, Ms. Li, had a conversation with her landlord, Mr. Ye, advising that she wished to exercise her option to extend the term. Mr. Ye advised that the lease would be renewed but that he would get back to her about the rent. This was confirmed by Mr. Ye on two further occasions. Finally the landlord advised Ms. Li to contact his lawyer at which time she was advised that, as no written notice had been given, a new lease would have to be signed. When the tenant refused, the landlord re-let the premises to a new tenant. Justice C. Gilmore found that had the landlord, Mr. Ye, been upfront with the tenant and advised her that verbal notice was insufficient, the tenant would have taken steps to protect her rights. Instead she was led to believe that a negotiation was ongoing when it in fact was not. In finding for the tenant, the Court relied upon *Re The Directors Film*

Company Ltd v. Vinifera Wine Services Inc. et al, 38 O.R. (3d) 212 (OCGD). Justice Gilmore found that the communications with the tenant were sufficient to equate to an unequivocal renewal, and further found that if the Court was wrong in this regard, that the conduct of the landlord estopped him from asserting his right to rely upon the strict terms of the renewal. *1651788 Ontario Inc. v. 1628093 Ontario Inc.*, 2008 CanLII 45395 (ON S.C.)

Landlord Penalized for Delaying Approval

In *Cvokic v. Belisario*, 2008 CanLII 35269 (ON S.C.), Justice Festeryga required the landlord defendant to pay to the tenant the entire purchase price of an aborted sale of the tenant’s business. The tenant accepted an offer to sell its pizza business in the amount of \$27,500. The offer was conditional on the landlord’s consent to the assignment of the lease to the purchaser. The sale was aborted as a result of the landlord’s failure to move expeditiously to acquire the necessary information to satisfy itself on the assignment. The tenant then obtained a second offer in the amount of \$10,000 but that purchaser walked away when the landlord refused to permit the tenant to assign its parking rights in the lease to the prospective purchaser. The Court found that the landlord had acted unreasonably in denying its consent and in insisting on changing the terms of the existing lease as a condition to that consent; accordingly, the Court awarded the tenant damages in the amount of \$27,500.

Tenant Fails to Clear Sidewalk – Sues Landlord

A tenant entered into a lease to rent one apartment in a building of six apartments. The landlord's standard form lease provided that the tenants are responsible for keeping their common walkways and stairways clean including snow removal. The tenant slipped and fell on ice and snow that had accumulated on the walkway, suffering permanent damage to her hand. The tenant issued a Statement of Claim alleging that the landlord had negligently failed to keep the walkway free of snow and ice. The landlord argued that the tenant was responsible for the removal of ice and snow pursuant to the terms of the lease.

Section 24 of the *Tenant Protection Act*, 1997 provides that a landlord is responsible for providing and maintaining a residential complex, including the residential units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing, and maintenance standards even if the tenant is aware of a state of non-repair or a contravention of a standard before entering into the Tenancy Agreement. Section 2(2) of Ontario Regulation 198/98 requires the landlord to ensure that maintenance standards are complied with. Section 26 of the regulation states that exterior common areas shall be maintained in a condition suitable for their intended use and free of hazards including "unsafe accumulations of ice and snow." Section 16 of the *Tenant Protection Act*, 1997 provides that any provision in a Tenancy Agreement "that is inconsistent with the *Act* or the regulation is void."

On a motion for a determination of a question of law, the landlord argued that the *Act* and its regulations do not specifically require a landlord to personally complete snow removal but rather a landlord is only obligated to "ensure" that the snow is removed. The landlord further argued that this obligation can be fulfilled by delegating snow removal to others.

Applying principles of statutory interpretation, the Court found that to interpret the *Act* and its regulations to mean that a tenant could never be responsible for snow removal would lead to an absurd result. Accordingly, the provision in the lease is not inconsistent with the *Act* and therefore it was not void. The case citation is *Montgomery v. Van*, 2009 CanLII 1146 (ON S.C.).

Obligation of Title Insurers to "Save Harmless" Lawyers

In the mid 1990s the Lawyers' Professional Indemnity Company (once known as LPIC, now called LAWPRO) recognized that the practice of real estate law was a high risk area and imposed a \$50.00 Transaction Levy for each transaction to offset the claims against the insurance program related to real estate practices. In 1998, LAWPRO provided an exception for the Real Estate Levy if the lawyer obtained title insurance and provided that the title insurer agreed to indemnify and save harmless the lawyer from and against any claims arising under the title insurance policy and waived its right to maintain a negligence action against the lawyer except for the lawyer's gross negligence or wilful misconduct. On March 9, 2005, Stewart Title entered into an agree-

ment with LAWPRO wherein it agreed that where a title insurance policy is issued in favour of buyers and mortgagees/chargees obtaining an interest or charge against land, it would indemnify and save harmless the lawyer and the lawyer's law firm "from and against any claims arising under the title insurance policy(ies), except for the member's gross negligence or wilful misconduct" and agreed to release Stewart Title's right to maintain a negligence action against the lawyer (except for the member's gross negligence or wilful misconduct).

Stewart Title agreed that it had an obligation to indemnify the lawyer for the costs of defending a claim, but took the position that that obligation only arose at the end of an action when a court has found that a claim has been established under the Title Insurance Policy or when the action is settled.

The Court held that the language of the 2005 agreement imposes two obligations on Stewart Title:

I accept the [lawyer's] submission that the obligation to "save harmless" means that a LSUC member should never have to put his hand in his pocket in respect of a claim covered by the terms of the 2005 Indemnity Agreement. Accordingly, the 2005 Indemnity Agreement requires Stewart Title to pay for the member's on-going costs of defending a claim that falls within the coverage of agreement. This interpretation not only is consistent with the plain meaning of the phrase "indemnify and save

harmless”, it also is consistent with the case law, the business sense underpinning the 2005 Indemnity Agreement, and the reasonable expectations of the parties.

Accordingly, the Court held that “the terms of the 2005 Indemnity Agreement, in particular the phrase ‘indemnify and save harmless’, require Stewart Title to fund, on an on-going basis, the reasonable defence costs of a LSUC member against whom a claim is made arising under a title insurance policy issued by Stewart Title, except in cases of the member’s gross negligence or wilful misconduct. The case citation is *Stewart Title v. Zeppieri*, 2009 CanLII 2329 (ON S.C.). ■

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