



Real Estate News

Lawrence Bremner

Importance of Registering a Lease

In *CMHC v. Seetarram*, 2008 CanLII 10379 (On. S.C.), the residential tenant entered into a five year lease in February, 2004 and took possession of the dwelling. The landlord/owner then sold the house to a new owner who mortgaged the property in favour of the Royal Bank of Canada, which insured the mortgage with CMHC. The mortgage went into default and CMHC proceeded to exercise the power of sale proceedings. The tenant argued that its lease had priority over the RBC mortgage. CMHC argued that RBC had not had actual notice of the lease which had not been registered on title. It was agreed that CMHC stood in the shoes of the RBC.

Section 71 of the *Land Titles Act* provides that any person entitled to or interested in any unregistered interests in land, may protect that interest by registering notices, cautions, etc., on the register and thereafter every person who has title from the owner (except encumbrances registered prior to the registration of such notice etc.) is deemed to have notice of the unregistered interest etc. Section 72 provides that no person (other than the parties named in the instrument) shall be deemed to have any notice of the contents of any instruments except those instruments recorded in the register. Section 44(1), paragraph 4 of the *Act* provides that all land is

subject to any “lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it”.

The Court found that since CMHC did not have notice of the lease, which was not registered, the lease was not enforceable against it. The Court ruled that the tenant had the status of a month-to-month tenant and was ordered to cooperate fully with the CHMC’s exercise of power of sale. The Court further ordered that if CMHC entered into a sale agreement with a purchaser seeking vacant possession on closing, then CMHC was to give the tenant “as much notice as reasonably possible” [and not the “60 days before the date specified in the notice of termination which date must be the last day of a rental period” as required by s. 44 of the *Residential Tenancies Act, 2006*].

Landlord Awarded Damages Against a Smoker

A Landlord and Tenant Board ruling in *Cebula and Davidson* (TSL-01010, TST-00092, TST-00096) issued February 25th, 2008 will be of interest to residential landlords. The landlord brought an action against the tenant for damages to the rental unit caused by the tenant who smoked, or allowed others to smoke, in his furnished suite, contrary to the “no smoking” provisions in the lease.

Section 62(1) of the *Residential Tenancies Act, 2006* allows a landlord to terminate a tenancy if the tenant or another occupant of the rental unit wilfully or negligently causes undue damages to the rental unit.

The tenant objected that since the term “rental unit” is not defined in the Act, it should not be interpreted as referring to furnishings which are contained within the unit. The Board applied a broad definition to “rented unit” to include furnishing and to include more than mere physical space. The words “any living accommodation indicates that the Act contemplates different types of living accommodation. It could be furnished accommodation or unfurnished...”

Next, the tenant argued that the smell of cigarette smoke does not constitute “damage” since no visible damage had occurred. The Board adopted the ordinary meaning of the word to mean “physical injury that makes something less useful, valuable, or able to function and...a harmful affect on somebody or something”. The Board held that one must consider the purpose for which the rental unit was intended to be rented – in this case, the landlord rented high-end furnished suites to executives needing short-term accommodation who insist upon a non-smoking environment. The Board held that “if smoking in the unit causes a persistent smell of smoke in the unit, the function of the unit as a non-smoking unit would be impaired...the persistent smell of cigarette smoke would constitute damage within the meaning of ss 62(1) of the Act”.

Next, the tenant contended that it could not be evicted for simply breaching a term of the lease. The tenant argued that the lease did not

provide any sanctions for a breach of the no smoking clause and that he could only be evicted if the smoking interfered with the substantial enjoyment of the landlord or another tenant (s. 64(1) of the Act). But the Board found that it is lawful to include a no smoking clause in a rental agreement and that such no smoking clauses are not expressly prohibited by the *Act* nor contrary to the purpose of the *Act*. Section 64 not only protects the reasonable enjoyment of a residential complex, it also protects other rights, privileges or interests of the landlord or another tenant. “In this case, the landlord sought to protect her business of short-term rentals to executives or individuals who need a short-term accommodation, as well as the resale value of the rental project, by including a no smoking clause in the lease”.

Based on the evidence provided, the Board was satisfied that the tenant smoked or permitted invitees to smoke in his suite.

The Board awarded compensation to the landlord of \$10,958.85, but reduced the award to \$10,000.00 being the board’s maximum monetary jurisdiction. Damages were awarded for such things as painting the walls with a stain killer primer and repainting, reupholstering chairs, steam cleaning the broadloom, replacing the queen size box-spring and mattress, replacing linens, sheets, cushions, duvet cover, etc. and \$2,052.00 representing one month’s rental to compensate the landlord for lost rent during the renovation of the suite.

The Equitable Right of Subrogation

The right of equitable subrogation is based on the principle of fairness for a lender who gives a new mortgage but mistakenly, inadvertently or neg-

ligently does not realize that there is already an existing mortgage (or writ of execution, lien, certificate of pending litigation, etc.) prior to the new mortgage which is paid out by the proceeds of the new mortgage. The new mortgagee is subrogated to the rights of the prior mortgage (or other claim) for that portion of the principal secured by the new mortgage that is used to pay off the original mortgage (or other claim) and stands in the shoes of the prior mortgagee or claimant.

In *O’Brien v. Royal Bank*, [2008] CanLII 6422 (ON S.C.), the mother (“M”), father (“F”) and daughter (“D”) each owned a one-third interest in a condominium unit. D conveyed M’s and F’s interest to herself using the power of attorney that F had given to her and forging a power of attorney from M to herself. She then mortgaged the unit in favour of the Royal Bank and her lawyer paid out roughly \$150,000.00 to retire an existing first mortgage and paid some tax arrears. D disappeared with the remaining \$51,500.00. The Ont. S.C. set aside the fraudulent conveyance of M’s interest as it was obtained by fraud. But the Court did not set aside the transfer of F’s interest because his power of attorney was legitimate (although D may have breached her fiduciary duty to F). So M ended up with a one-third interest and D with a two-thirds interest in the condominium. The Court held that M was entitled to have the Royal Bank mortgage set aside on the authority of *Lawrence v. Maple Trust*. The Bank sought an order that it held an equitable charge against the property.

M argued that “an equitable charge arises only where there is a ‘common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances where

that common intention is unenforceable under the strict demand of the common law”’. M argued that there was never a common intention to charge the property to the Royal Bank. The Court disagreed: “there was a common intention on the part of the three owners of the property to charge it in favour of First National [the existing first mortgagee which was paid out by Royal Bank]. Equitable subrogation will arise in these circumstances where the bank’s mortgage is unenforceable, but the mortgage it replaced was enforceable. The chargors have benefited from removal of the First National mortgage, and they will be enriched if they are not required to repay the indebtedness associated with that mortgage. It would not be fair to permit the Bank to enforce the entirety of the First National charge against [the mother’s] one-third interest in the property, and then enforce the balance of its claim against the two-thirds interest of [the daughter]. This would have the effect of imposing the loss occasioned by [the daughter’s] fraud on [the mother], rather than on the Bank”. The Court recognized that M would lose the property but pointed out that she did not own the property by herself and where the underlying fraud is committed by one of the co-owners of the property, then the other co-owners will suffer collateral damage. “This is unfair, to be sure, but it is unfairness wrought by [the daughter’s] fraud. It is not unfair as between the Bank and [the mother]. Rather, it balances their interests, and precludes enrichment of [the mother] at the expense of the Bank”.

The Court ordered that the Bank should have an equitable charge, that the property be sold and that the proceeds be applied:

a) first, to the reasonable and actual

costs of the sale;
 b) second, to the Bank of the sum that it paid for real estate taxes and condominium fees;
 c) third, \$149,179.32 which the Bank paid to discharge the First National mortgage; and
 d) fourth, the balance to be paid into court to be distributed in accordance with the findings of a future reference to determine the entitlement of all interested parties to the net sale proceeds.

Damages in Lieu of Specific Performance

It is interesting to see what factors that courts take into consideration to determine whether a real property is unique, which is one of the criteria for the remedy of specific performance. In *Smith v. Bedard*, [2008] O. J. No. 1442, the Sellers wrongfully refused to complete their agreement to sell. The Buyers sued for specific performance or damages in the alternative. The Court found that the residential dwelling was unique, and therefore that the remedy of specific performance was available, due to:

- 1) close proximity to the buyer's sister-in-law with whom a close relationship was shared;
- 2) its affordability (\$99,500);
- 3) its physical amenities having regard to the Buyer's pet; and
- 4) its "move-in" condition.

The Buyers having abandoned their claim for specific performance, the Court considered the damages claimed by the Buyer:

- 1) the Buyer was entitled to damages equal to the increase in the value of the property between the date the Agreement was entered into and the date of trial (\$13,930.00);

- 2) the Buyer eventually purchased another home which was approximately twice the size of the Seller's home – the Buyer requested damages to compensate him for increased costs incurred for hydro, heating, taxes, financing, insurance, and land transfer tax but the Court refused to award these damages since it was the Buyer's decision to acquire the larger house and because the expenses could not be attributed to the Sellers' breach;

- 3) the interest on the Buyer's new mortgage had risen slightly above the rate in the mortgage which he had arranged to buy the Seller's house. He originally planned to finance \$97,000.00 of the purchase price. The Court awarded the increase in the interest charges on \$97,000.00 for the initial five year term of the mortgage, which amounted to \$727.50;

- 4) the Buyer was awarded \$315.00 for storage costs for his furniture;

- 5) the Court awarded \$4,000.00 for emotional distress;

- 6) finally, the Buyer claimed mileage expense of \$210.30 and the time he expended, at \$25 per hour, searching for a replacement home. The Court reduced the damages claimed from \$4,720.00 to \$1,500.00;

- 7) the Buyer was awarded damages totalling \$20,682.80 plus legal costs and disbursements totalling \$9,648.25.

Province Sets Aside Clothesline Restrictive Covenants

Premier Dalton McGinty has lifted the ban on outdoor clotheslines effective Friday, April 18th, 2008. Modern subdivisions often contain prohibitions against owners placing outdoor clotheslines on their property. Ontario Regulation 97/08, made under the *Energy Conservation Leadership Act, 2006*, now specifically permits the

use of clotheslines and clothestrees on residential property that is the owner's place of residence.

Hamilton Landlord Jailed for Violations of the Fire Code

In case you missed the article in the April 19th issue of *The Hamilton Spectator*, Stephen Birch, a residential landlord, has been jailed for 135 days for nine violations of the Ontario Fire Code (15 days for each conviction). Birch had previously served 70 days for seven prior violations. Violations included failure to construct a second exit from the basement, second and third floors of a building, failure to install exit signs or post a fire safety plan, and failure to install an interconnected smoke alarm system.

Tarion says Flippers May Have to Register

In one of his recent *Toronto Star* articles, Bob Aaron reported on a couple who purchased a new house in Wasaga Beach. On closing they received a warranty certificate from Tarion. Although the couple intended to move into the new home, circumstances changed and they resold to a third party without ever having occupied the home. Six months later, a Tarion representative advised the couple that they should have registered the house with Tarion when they resold it. The *Ontario New Home Warranties Plan Act* (the "Act") calls for a fine up to \$25,000.00 or imprisonment for up to a year or both if a new home is sold but not registered. Tarion was prepared to forgo laying charges if the couple registered the house at a cost of \$600 and posted a \$10,000 performance bond. Mr. Aaron suggests that thousands of new homes and

condominiums in the Toronto area have been “flipped” by speculators who have never occupied the homes. He wonders if Tarion is embarking upon “a campaign to extract a double set of registration fees and performance bonds (or fines) from investors who buy and sell without moving in?”

Editor’s Note: “Vendor” is defined in the *Act* as any “person who sells on his, her or its own behalf a home not previously occupied to an owner”. “Owner” is the “person who first acquires a home from its Vendor for occupancy and the person’s successors in title”. Thus, a person who purchases a new home but does not occupy it does not qualify as an “owner”, and if that person sells the house then that person becomes a “vendor” for the purposes of the *Act*. Banks and other mortgagees or chargees selling homes from builders who have defaulted on their loans also become “vendors” for the purposes of the *Act* and must register with Tarion and post a performance bond.

A Tarion representative explained to your Editor that the purpose of the double registration is to ensure that the purchaser (the first “Owner”) has the full benefit of the Tarion warranties. Otherwise, in the situation described by Mr. Aaron, the second purchaser’s one year warranty that the home is free from defects in work and materials, is fit to live in and meets the Ontario Building Code requirements, would lapse only six months after their purchase (the resale having occurred approximately six months after the couple had first purchased the home from the builder). The same applies to the two and seven year warranties.

A Simple but Effective Fraud

Although not strictly related to a real estate fraud, lawyers should be aware of the following fraud directed at lawyers:

A foreign company contacts you claiming that a Canadian company owes it \$250,000.00. You are retained to write a simple demand letter. Your letter goes out and the debtor sends you a bank draft drawn on a major bank for the full amount made out to your firm in trust. You advise your client of your success and the client demands that you wire the funds to it right away. Suspicious, you phone the major bank using the phone number that appears on the bank draft. A very professional bank representative (actually, another accomplice) confirms that the bank draft is genuine. Satisfied, you then proceed to wire the funds to your foreign client. A few days later, the major bank advises you that it will not honour the bank draft because it is a forgery.

This very scheme was recently perpetrated, but was thwarted by the lawyer who became suspicious and contacted the bank directly and learned that, although the bank draft had appeared to be genuine, it was in fact a counterfeit.

LAWPRO’s New Real Estate Practice Coverage: Recent Changes to the Practice of Real Estate Law

This April, the Government of Ontario introduced numerous changes to the practice of real estate for lawyers in Ontario including:

a) the mandatory registration of all lawyers who intend to electronically register instruments into a land registry system;

- b) detailed protocols for the conveyance of land by power of attorney;
- c) together with the Law Society of Upper Canada’s recent amendments to the *Rules of Professional Conduct*, implementation of a 2-lawyer rule respecting the conveyance of land, with limited exceptions;
- d) limiting only those lawyers who have registered with the Province to register Transfers of land; and,
- e) the requirement to obtain mandatory Real Estate Practice Insurance Coverage (“REPIC”) for lawyers practising real estate law.

These initiatives have been implemented to respond to the Government’s stance on real estate and mortgage fraud through the passage of Bill 152 (now the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*).

Real Estate Practice Coverage

This latter initiative has consequences for lawyers practising family, estate, criminal law, etc., even if only a small a portion of their practice includes real estate law. REPIC, provided by LawPRO, is intended to protect the public against fraud committed by lawyers in relation to real estate practice. The premium for this insurance is \$500 annually; however, given that this requirement was introduced in April, the premium for 2008 has been correspondingly reduced to \$375.

Lawyers’ existing errors and omissions insurance does not insure against a lawyer’s fraudulent activity. As a result, REPIC seeks to insure against lawyers’ fraudulent, criminal, dishonest or malicious acts or omissions, in relation to real estate practice. It is not intended to replace title

insurance but work with it to ensure that the public and the Land Titles Assurance Fund are adequately protected and funded.

The Practice of Real Estate Law—Defined

Given that the payment of this premium is now a prerequisite to being able to practise real estate law in Ontario, it is interesting to note how broadly LawPRO defines “real estate law”. Here is the current definition:

REAL ESTATE LAW means the practice of the law of Canada, its provinces and territories, that concerns:

- i. the registration of any instrument under the LAND TITLES ACT; and/or
- ii. the actual or contemplated transfer, charging, insuring, or otherwise affecting, an estate, right or interest in land;

and may include, without limitation, any one or more of the following services by a solicitor: the receipt of instructions, preparation of documents, searches and/or the providing of one or more opinions or certificates with respect to the title, transfer or charge, and/or with respect to the issuance of any title insurance policy.

Consequences to the Bar

As you can see, this is very broadly worded, so that simple advice relating to conveyances of real property (even explaining title insurance or the process of acquiring land) requires a lawyer to obtain the new insurance. Even where Lawyer A takes the ini-

tial client instructions and passes the file work off to Lawyer B in the same firm, who will be conducting the registrations or giving the opinion, Lawyer A must have the REPIC. Designating a central lawyer in a firm to act as the registration catalyst *does not* circumvent the necessity of obtaining the REPIC for other lawyers in that firm.

This will have the greatest consequence for those lawyers who do not focus their practice on real estate law. Criminal and family law practitioners who advise on real estate matters and convey title sporadically will find themselves contravening the LawPRO requirements. The added costs of insurance, registration, Teraview licence fees and the 2-lawyer rule will make it difficult for lawyers in small firms or in sole practice to maintain real estate as part of the services they provide their clients, particularly if real estate is not a significant aspect of their practice.

Many lawyers have discussed and challenged the need for this coverage in light of title insurance, the Land Titles Assurance Fund and the relatively low instances of real estate fraud perpetrated by lawyers. Notwithstanding the protests, the coverage appears to be a necessary cost to ensure the survival of lawyers as central players in the conveyance and practice of Real Estate in Ontario.

Editor’s Note: Our thanks to Mark Giavedoni for preparing this last article at the request of the Real Estate Committee, which was concerned that some lawyers may be practising real estate without knowing it. LawPRO has a website at www.LawPRO.ca; go to “E & O Insurance”, and click on “Real Estate

Practice Coverage Option”. At the bottom of the screen you can click on “FAQs about the Real Estate Practice Coverage” option or “Self-assessment 2004 Real Estate Practice Coverage” option. ■

Lawrence Bremner practises Real Property Law at Gowling Lafleur Henderson LLP, and can be contacted at:

*One Main Street West
Hamilton, Ontario, L8P 4Z5
Tel: 905-540-3265
Fax: 905-523-2528
Larry.bremner@gowlings.com*