



Real Estate News

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Can a Bank Be Liable to a Non-Customer Third Party?

Banks will be waiting for the upcoming trial following *Dupont v. Bank of Montreal and the Bank of Nova Scotia*, 2009 CanLII 2906 (ON S.C.).

Over a 4-year period a dishonest bookkeeper fraudulently wrote 478 cheques to himself, forging the signature of Dupont's president. The cheques ranged from \$700 to \$900 and totalled about \$385,000.

The cheques were drawn on Dupont's account with the Bank of Montreal ("BMO") and were deposited in the bookkeeper's account with the Bank of Nova Scotia ("BNS"). The number of deposits and withdrawals averaged 11 times per month, sometimes as many as 20 times.

Dupont alleges that BNS breached its own "Know Your Customer" policy and that it breached its obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. Dupont argued that the frequency of the deposits, the random use of multiple ABMs and the cash withdrawal after each deposit, should have alerted BNS to the suspicious activity in the account.

Dupont agreed that:

...it is settled law that a bank collecting a forged cheque cannot be liable for conversion. While a collecting bank may be liable on a forged endorsement on a cheque ...whether the signature of a drawer is forged, the cheque is a "worthless piece of paper" and not a valid bill of exchange as required to establish the tort of conversion...This legal distinction appears to be supported by the rationale that while the drawee bank [BMO] is in a position to detect a forged cheque since it ought to be familiar with its customer's signature and cheque form, no party is in a better position than the other to detect a forged endorsement.

Dupont agreed that there was no cause of action against BNS for conversion but argued that BNS was guilty of negligence. Dupont argued that a bank has a duty to detect unusual and potentially fraudulent transactions in its customer's account and that the *Proceeds of Crime Act* imposes a statutory duty on banks to establish procedures to detect illegal activity.

The Court dismissed BNS's motion for summary judgment. The Court held that "a bank may, in certain cir-

cumstances, owe a duty of care to a third party to detect indications of fraud in its own customer's account...whether a duty to care exists on the facts of this case should be determined on a full evidentiary record...the impact...of the anti-money-laundering legislation on the bank's duty of care is a novel issue that should not be explored without the benefit of that full record".

An Easement is an "Encumbrance"

In *Hallinan v. Coughlin*, [2009] O.J. No. 1313 the Buyer agreed to purchase one of five row houses. All five lots were subject to an easement over all of the rear yards, for no specified purpose, in favour of each of the five unit owners. The Seller's backyard was entirely taken up by a deck. The Buyer's real estate agent, after inquiry, advised the Buyer that she could not erect a fence to enclose the backyard because other homeowners had to have access across the back of the property. Paragraph 10 of the Agreement of Purchase and Sale provided, in part, that closing by the buyer is conditional upon "the title of the property [being] good and free from all restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this agreement." Upon learning of the easement the Buyer refused to close and sued for the return of her \$15,000.00 deposit.

The Court found that the easement was an "encumbrance" as contemplated by the Agreement of Purchase and Sale. The Seller argued that the Buyer should have been able to deduce that the easement existed because she had been advised that she had to permit access to her neighbours to pass through her backyard. The Court rejected this argument:

“that sort of informal information acquired in such a fashion is insufficient to put the [buyer] on notice that there is a registered encumbrance of which she should be concerned. Furthermore, paragraph 10 of the agreement provides, in plain terms, that the title to the property is good and free from all registered encumbrances”. The Seller also argued that the easement would not adversely affect the Buyer’s use and enjoyment of the property so she would receive substantially what she contracted for. The Court rejected this argument:

...it is clear that the use and enjoyment of the property in this case would be adversely affected by the easement. The owner of the property would always be subject to the possibility that the entire backyard can be accessed by any one of four neighbours, who may require use of the backyard for unspecified purposes. It is unclear as to what sort of equipment and over what period, might be required to be moved through the backyard. The owner would never be certain as to whether it would be necessary to dismantle the deck in the back in order to permit such access.

Editor’s Comment: A common undertaking provided by buyers’ lawyers for signing by the sellers includes an undertaking “To pay off and discharge all existing mortgages, liens, executions and other **encumbrances** affecting the subject property which are not being assumed by the purchaser.” *Black’s Law Dictionary* defines “encumbrance” as “any right to, or interest in, land which may sub-

sist in another to diminution of its value...[and includes] a claim, lien, charge, or liability attached to and binding real property; eg. a mortgage; judgment lien; mechanics lien; lease; security interest; **easement** or right of way...” Unfortunately sellers rarely have the ability to obtain a release of an easement and, accordingly, would be unable to fulfil such an undertaking.

Condominium Unit Owner Allowed to Install a Hot Tub

In *WCC No. 198 v. McMahon*, 2009 CanLII 9764 (ON S.C.), the condominium corporation sought an order that a unit owner had to remove a hot tub that he had placed on his exclusive use, common area, back patio without the approval of the condominium board. Section 98 of the *Condominium Act*, 1998, provides that a unit owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the Declaration, but only if the Board has approved the addition, alteration or improvement and the owner has entered into an agreement with the corporation. The Court noted that there was no caselaw as to whether a hot tub is covered by s. 98.

The Court found that the word “addition” means something that “is joined or connected to a structure.” The Court held that “the hot tub is not an addition as it is not something that sensibly can be seen as being joined or connected to the structure...the hot tub is designed to be removed from the property...it is not a permanent fixture on the property”.

The Court found that “alteration” means something that changes the structure. But the Court found that a

hot tub is not an alteration as it does not change the structure of the property. “The hot tub may alter the landscape but such alteration does not cause any permanent change to the structure.”

The Court found that the word “improvement” means “the betterment of the property or enhancement of the value of the property...to be an improvement there must be an increase in the value of the property”. But the Court held that “the hot tub is not an improvement as it does not increase the value of the condominium unit. It is not a fixture that is attached to the property that becomes a part of the property. Thus, it cannot increase the value of the property”.

The Court found that the unit owner does not require the approval of the Board to place the hot tub in the exclusive use common element area on his patio.

The First Home Inspection Can Be Free

Lunney v. Kuntova, [2009] O.J. No. 742 (ON S.C.) is just another Seller Property Information Statement (“SPIS”) case in which the Seller, her real estate agent and broker are sued when the purchased home turns out to have a defect (a crumbling stone foundation). The Buyer was not successful because she could not prove that the defendants were aware of, or tried to conceal, the defect. The Court found, as a fact, that the Seller and her agent were not aware that the foundation had deteriorated to the extent that it no longer supported the dwelling.

Of greater interest was the Buyer’s claim that because a previous prospective buyer had terminated his

conditional agreement to purchase following a home inspection, the Seller had to have been aware that the stone foundation would no longer support the building. Unbeknownst to the Seller, the previous prospective buyer's Home Inspection Report indicated that the foundation was crumbling.

The Court held that there was no evidence that the Seller or her agent had any specific knowledge of the reasons why the prospective buyer had elected to cancel his agreement for non-satisfaction of his home inspection cause. "If they [the Seller and her agent] knew anything, they knew only that he was not satisfied with the premises. In particular, there is no evidence to warrant a finding that the defendants were aware of the serious issues with the foundation."

Are Easements and Other Interests in Land Now in Greater Peril?

Subsection 22(4) of Bill 152, the *Consumer Protection and Service Modernization Act, 2006*, received Royal Assent on December 20, 2006 amending ss.113(2) of the *Registry Act* to provide that only a Notice of Claim in the prescribed form can revive an otherwise expired claim. Merely referring to an easement (or other interest in land) will no longer be sufficient. Thus this amendment overturns the Court of Appeal's decision in the *Ramsay* case 2005 CanLII 23211 (ON C.A.) which held that a notice of an interest in land can be given either by registration of an instrument referring to the interest or the registration of a Notice of Claim (Form 32). A claim to an interest in land will expire 40 years from the date that the instrument that created

that claim was registered. Only registration of Form 32 will preserve a claim regardless of how many times that interest was mentioned in deeds registered during the past 40 years. However, if a claim has expired, it can be revived by registering a Notice of Claim provided that there has not been an intervening conflicting claim by a purchaser **in good faith** for valuable consideration of the property.

But what does "a purchaser in good faith" mean? Some suggest that the purchaser must not have knowledge of the claim in order to qualify as a "good faith" purchaser. But it is certainly arguable that a purchaser who does have knowledge of a claim which has expired is proceeding in "good faith" simply because the purchaser knows that the claim has expired – otherwise, why have a 40 year rule? If the legislature had intended "in good faith" to mean "without actual knowledge" then it could have used those exact words which are already contained in s.26(2) of the *Registry Act*. Did the legislature intend something different by not using that phrase in the revised ss.113(2)? We will have to wait for the courts or the legislature to make the meaning clear.

If an easement (or other right) has expired, then it is no longer registered – does this mean that it is exempt from the effect of s.113 by ss.113(5)(iv) as an unregistered easement or other right that the person is openly enjoying and using? Alternatively, will the *Road Access Act* allow passageway for all those owners in cottage country (or elsewhere) to reach their landlocked properties once their easements have expired?

All persons owning property or having an easement (see Registrar's Bulletin 2007-02) or any other interest in land that is still registered in the Registry System where the instrument that created the interest is approaching 40 years old (or more), should register a Notice of Claim to protect those interests.

Editor's Note: We published an article on the new ss. 113(2) shortly after it was proclaimed in force. This is a summary of an article that I was asked to write for the Ontario Bar Association. ■

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