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Minden Gross Grafstein & Greenstein LLP

BARRISTERS & SOLICITORS

A CLIENT OVERVIEW OF LEGAL TRENDS AND ISSUES

WINTER 2000/2001

The Litigation Group at Minden Gross provides advice and representation at all levels of Ontario's judicial system and in the Supreme Court of Canada. The Group includes senior counsel with impressive credentials as well as younger associates, well trained and able to provide representation and assistance at appropriate levels in a cost-effective manner. Members of the Group have achieved some outstanding successes over the years, and are well-known among their peers and by our clients as skilled practitioners with a keen interest in managing cases efficiently and effectively, and in exploring with clients the alternatives that may exist in dispute resolution – even before proceedings are commenced. The Group's many successes have been well-documented in numerous reported cases, but in this issue of the newsletter, we share with you some of the recent decisions in which the Group has been involved.

A Horror Story ~ *Truth is Stranger Than Fiction*

The first paragraph of a recent decision of Madame Justice Epstein of the Ontario Superior Court of Justice states as follows:

> "In June of 1995, plaintiffs (the "Durranis") went out to purchase a lawnmower. In the course of a routine credit check they were shocked to learn about a sizeable judgment that had been registered under the Land Titles Act ("Act") against title to their home in Scarborough.

This was the beginning of what can only be described as a nightmare for the Durranis. They went on to learn that as a result of a fraud perpetrated upon them by someone who they had never met, their home had been sold out from under them in a series of transactions that included a mortgage being placed on the property in favour of the Royal Bank of Canada (the "Bank"). This action involves the competing claims to the Durranis' home (the "property") arising from this fraud."

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A Horror Story *(continued from cover)*

It appears that an individual named Gideon McGuire Augier ("Augier") was associated with a paralegal firm which provided services such as business promotion and "arranging marriages with Russian women". His association with the paralegal firm perhaps explained his knowledge of and access to the litigation system. Augier created a series of loan documents which purported to show that the Durranis were indebted to Augier for $158,000.00 in U.S. currency.

Not only did Augier create those documents, the court found that he forged the Durranis' signatures, and then commenced an action for foreclosure against the Durranis. No documents were ever served on the Durranis and because they were not served with any court documents they did not defend any action. Eventually a judgment was registered against the title to their home.

After Augier had obtained and registered the judgment of foreclosure against title to the Durannis' home, Augier attempted to sell the home through Joanna Jones ("Jones"), a real estate agent. When a sale arranged by Jones to a third party fell through Augier sold the property which was worth about $180,000.00 to Melanie and Sophia Zettler for $116,000.00. Melanie and Sophia were the teenage daughters of Jones. In order to close the transaction the Zettlers borrowed $87,000.00 from the Royal Bank and signed a mortgage to the Bank for this amount. The Bank was completely unaware of any improprieties or irregularities.

After the closing of the sale to the Zettlers on August 17, 1995, their mother, Jones, contacted the Durranis and ordered them to leave the house.

It was at this time that Mrs. Durrani retained our firm to take carriage of this action on their behalf. An injunction was obtained immediately to prevent Augier or Jones from doing anything to evict the Durranis. At the same time, a motion was brought to set aside the judgment against the Durranis and to permit the Durranis to clear up title to their home. These efforts were resisted by Augier. Throughout the proceedings Augier maintained that the Durranis signed all of the mortgage documents and in fact knew what was taking place.

In the course of those proceedings, it was discovered that Augier had committed the same type of fraud on numerous occasions in the past. By the time the trial took place in January, 2000, Augier had been convicted on a number of occasions of forging title documents and attempting to sell properties belonging to his victims. One of those victims who testified at the trial identified documents on which his own name had been forged, presumably by Augier, and which were registered on the title to his own property. These documents were almost identical in form to the documents registered on the title to the Durrani property.

Here is what Madame Justice Epstein had to say about Augier:

> "...Mr. Augier's entire story was quite unbelievable..."
>
> "...I found that it is beyond doubt that both the Collateral Security Agreement and the Additional Security Addition to be forgeries created by Augier in order to defraud the Durranis."
>
> "...The Durranis have claimed punitive damages against Mr. Augier. In my view, if there is any conduct worthy of the most severe sanction of the court it is the despicable conduct of Mr. Augier. Motivated by greed he used the knowledge he gained from experience as a paralegal with his obvious intelligence to defraud two hard working innocent elderly people. This wrong and the accompanying conduct was so malicious and oppressive and high-handed that it offends anyone's sense of decency."

There are two systems of registration in Ontario. Because the property happened to be registered under the Land Titles system rather than the Registry system, unfortunately for the Durranis, the task of clearing up the title was particularly complicated.

Under the Registry system, a document registered by fraud is a nullity, and any document registered thereafter in the same chain of title is also automatically void.

Under the Land Titles system, however, the situation is different. The Land Titles register is deemed to be accurate. If someone is a victim of fraud arising from the registration of a fraudulent document in the Land Titles system, that person's recourse is to look to the Land Titles Assurance Fund ("Fund") maintained by the government for victims of such frauds. For the Durranis, an application to the Fund was not a satisfactory answer. They were innocent victims. Mr. Durrani was not well. He was an insulin dependent diabetic. He had had a stroke. He and his wife did not want to be forced to vacate their home, nor to face the stress of moving from a home in which they had lived for over 25 years. They wanted to live in their home with free and clear title.

In order to ensure that they retain possession of their home, it was necessary for the Durranis to satisfy the court not only that they had been victimized by the fraud of Augier, but also that the purchaser, Jones, had notice of the fact that the transaction was irregular before she, in her daughters' names, closed the purchase transaction.

Fortunately, we were able to satisfy the court in this regard. Despite the fact that Jones contended that she and her daughters were bona fide purchasers, the court

found that Jones knew prior to closing that there was a serious dispute with respect to Augier's right to sell the property. She purchased the property without ever seeing it, let alone inspecting inside.
She bought the property at a price which was low compared to demonstrable property value. After a 6-day trial in January, the court released its decision in August declaring that the documents had been forged and the sale registration in favour of the Zettlers was null and void.

Although the mortgage in favour of the Royal Bank was held to be valid the Bank agreed not to enforce its rights against the Durranis until matters have been resolved with the Land Titles Compensation Fund. The Royal Bank was also given judgment against the Zettlers who had signed the Royal Bank mortgage for the full amount owing to the Bank.

The result was that the Durranis were awarded $100,000.00 in costs as well as $25,000.00 in punitive damages against Augier; the Durranis were also awarded costs against the Zettlers, and title and ownership was given back to the Durranis.

The Royal Bank will receive its money either from the Land Titles Compensation Fund or from the Zettlers.

Tragically, Mr. Durrani passed away approximately one week before the court's release of its reason and decision.

For more information or if you have any questions, please contact us.

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To Distrain or to Terminate ~ *That is the Question*

Distress and termination are two of the remedies available to a landlord when a tenant is in arrears of rent under a commercial lease.

When invoking the remedy of distress the landlord may impound the tenant's goods or chattels but cannot terminate or forfeit the lease either prior to, or at the same time as, the distress.

The exercise of the remedy of distress requires the existence of certain conditions precedent. There must be a landlord and tenant relationship. There must be arrears of rent and the arrears must be capable of being determined with certainty. The distress must take place between sunrise and sunset in an open manner. Usually a bailiff is retained to carry out the distress. After the goods have been distrained by the bailiff, two appraisals of the tenant's goods must be conducted five days after the distress. The goods can then be sold with the proceeds applied towards payment of rent. The landlord is under a duty to conduct a sale of distrained goods within a reasonable time period. The sale must be conducted in a prudent manner with the goods to be sold at the best price that can be obtained for them. Distress therefore is a rather technical remedy and the rules set out in the Commercial Tenancies Act should be followed.

A landlord also has the right to terminate the lease, retaining the right to sue for rent accrued due, and to claim damages for the unexpired term.

The remedies of termination and distress are mutually exclusive at law, and therefore, the landlord must choose between them. Where the landlord elects termination, a simultaneous distress is illegal and will result in the landlord being liable to the tenant for the full expense of the tenant's damages.

A distraint is illegal where the landlord has re-entered the premises and thereby terminated, or forfeited the lease. Ordinarily when a landlord elects to terminate the lease the re-entry is effected by the changing of the locks of the premises. In a case which we recently handled on behalf of a landlord, an issue was whether the act of changing the locks alone is determinative of a termination of a lease.

In this case, a landlord, following a distress, was sued by its former tenant for upwards of $300,000.00. The tenant brought the action against the landlord claiming illegal distress. The landlord counterclaimed against the tenant for damages.

The landlord had changed the locks to the premises, posted a Notice of Distress on the premises door claiming rental arrears of approximately $28,000.00 and, following the expiry of the five day statutory waiting period, sold the tenant's assets in partial satisfaction of the arrears of rent. Following the sale of the goods, the landlord terminated the lease by delivering a Notice of Termination.

The tenant alleged a number of improprieties with respect to the distress process. In changing the locks prior to the distress, the tenant alleged that the landlord had effected a termination of the lease thus rendering the entire distress illegal. Accordingly, the tenant argued, it was entitled to damages from the landlord on account of the significant value which it ascribed to its assets and for the loss of its business.

At trial, the judge confirmed that the landlord's right to effect a distress is lost if the landlord has terminated the lease and noted that a changing of the locks is a persuasive indicator that a termination has taken place. However, the judge added that more important than the changing of the locks was the effect of the changing of the locks. If the intended or actual effect of the changing of the locks was to exclude the tenant from the premises then any subsequent distress would be illegal. However, if that was not the effect, the changing of the locks in and of itself would not render the distress illegal.

The trial judge noted that the Notice of Distress which the landlord had posted specifically advised the tenant that the lease was not being terminated and that the tenant could re-enter the premises and continue to occupy the premises by contacting the landlord or the bailiff. The notice provided a telephone number by which the bailiff could be reached on an "around the clock" basis so that the tenant could have access at any time of the day or night. The tenant never availed itself of this opportunity. The judge noted that on a previous distress involving this tenant which had been carried out in a similar fashion, the tenant had requested access to the premises and the landlord had granted it. The judge therefore concluded that although the landlord had changed the locks, it had not terminated the lease. The court held that the landlord had not intended to exclude the tenant from the premises but rather that the changing of the locks was the only way to secure the goods for the distress. The distress, therefore, was legal.

The tenant's claim against the landlord for illegal distress was dismissed and the landlord was granted judgment against the tenant for unpaid rent.

The tenant appealed the trial judge's decision to the Court of Appeal. The Court of Appeal upheld the trial judge's decision and dismissed the appeal.

Although the landlord was successful in this case, the case nonetheless illustrates the pitfalls that a landlord can encounter in proceeding against a defaulting tenant. Landlords remain well advised to obtain legal counsel prior to exercising the various remedies available to them.

For more information or if you have any questions, please contact us.

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When is a Written Agreement the Entire Agreement?

The Ghermezian brothers are well-known real estate developers in Edmonton most famous for the development of the West Edmonton Mall. In the late 1980's, during the real estate boom in Ontario, the Ghermezians tried their hand at developing a subdivision in the Waterloo area.

Our client, Corey Development Limited entered into an agreement of purchase and sale for the purchase of 3.1 acres of land in Waterloo. The vendor limited company was controlled by Nader Ghermezian and his brothers. The purchase price was $2,015,000 with a deposit of $201,500. The real estate market was buoyant, commercial sites were hard to come by and it was a "seller's market". The Ghermezian brothers knew that Corey was essentially an assetless company and therefore asked Allan Brown, the principal of Corey, to guarantee personally Corey's obligations. The Ghermezians, on the other hand, were not prepared to hold the deposit moneys in trust so that these moneys could be used by their company to fund the costs of obtaining subdivision approval. Brown asked Nader to give his personal guarantee for the deposit.

Although Nader did not actually sign the guarantee at the time the deal was negotiated, he authorized his solicitor to sign an undertaking to the effect that Nader would deliver a signed guarantee. Nader never delivered a signed guarantee.

When the Ghermezian company was unable to comply with certain conditions in the agreement, the vendor company became liable to repay the deposit money. When the deposit was not repaid, civil proceedings were instituted and judgment obtained against the Ghermezian controlled company. When no payment was made to Corey, Corey decided to sue Nader Ghermezian personally on the undertaking to give a guarantee.

At trial, Nader argued that he had never agreed to give a guarantee. Nader took the position that the solicitor did not have the authority to sign the undertaking to give a guarantee. In addition, there was a powerful legal obstacle in the way of Corey succeeding on its claim based on the guarantee. A standard provision in the agreement of purchase and sale between Corey and the Ghermezians' company provided that the agreement recorded the entire understanding between the parties. This is a fairly common provision. Nothing said orally or even written outside the agreement would affect the legal obligations of the parties.

On the facts, the trial Judge found that Nader had agreed to give a guarantee. Nader's denial that he had agreed to give the guarantee and his argument that his solicitor signed the undertaking to give a guarantee in excess of the solicitor's authority were simply not believable. The interesting legal issue at trial was whether Nader could shelter behind the parole evidence rule to block the introduction of evidence that there was an agreement to give a guarantee, on the basis that the "entire agreement provision" in the agreement of purchase and sale barred the introduction of such evidence.

In Nader's favour were several binding authorities from the Supreme Court of Canada which appeared to affirm the proposition that any parole agreement inconsistent with the provisions of a written agreement are not to be given effect. Here it appeared that Corey's argument that Nader had agreed to give a guarantee was

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FIRM NEWS

We are pleased to welcome to the firm

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When is a Written Agreement the Entire Agreement? *(continued from page 5)*

inconsistent with the provision of the agreement of purchase and sale to the effect that there were no other understandings between the parties except those recorded in the agreement itself.

Other trial courts in Canada have struggled with the parole evidence rule and the decisions of the Supreme Court of Canada before Corey's case came to be tried. In the interest of justice, trial courts have found a way to distinguish the higher authorities and allow justice to be done. A trial court is not often willing to apply the parole evidence mechanically so as to allow apparent injustice to be done. The Court quoted with approval a statement from the British Columbia Court of Appeal to the effect that the Supreme Court of Canada authorities are not a "tool for the unscrupulous to dupe the unwary". The parole evidence rule ought not to be treated as an absolute inflexible rule. The provisions in a written contract create a strong presumption that the written contract sets out the entire agreement between the parties. In exceptional circumstances, however, the Court can be persuaded that the written agreement is not the entire agreement between the parties, even in situations where there is a conflict between the written agreement and the alleged parole agreement. While it is very difficult to say what these exceptional circumstances are, it is submitted that the simplest guide is this:

> If it will shock the conscience of the Court that a party to an agreement be allowed to shelter behind the parole evidence rule, the Court will not allow the parole evidence rule to block evidence of the real agreement between the parties.

Judgment was therefore given against Nader personally for $201,500 plus interest and costs.

Nader Ghermezian appealed the trial decision to the Court of Appeal. The Court of Appeal affirmed the trial judgment.

At the present time, Corey is still trying to collect the amount of the judgment from Nader Ghermezian.

For more information or if you have any questions, please contact us.

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PROFESSIONAL NOTES

Timothy R. Dunn spoke to national credit managers for the Electronic Industry Group of Equifax Creditel on the topic of "The Collection of Debt: Creditor Strategies".

Catherine Francis presented a paper entitled "Proficient Tools and Winning Strategies for Successful Debt Recovery" at a Canadian Institute conference on Banking Litigation.

David M. Kutner was co-chair at a Canadian Bar Association Continuing Legal Education seminar on the topic of "Options and Rights of First Refusal in Real Estate Transactions".

Stephen Nadler gave a presentation at the Marriott Airport Hotel to credit managers of custom brokerage firms on the topic of the legal considerations that arise in lawsuits against foreign defendants.

A. Irvin Schein spoke at a Canadian Institute conference on Banking Litigation. Irvin participated in a panel discussion on the topic of "Breaching Duties of Confidentiality and Good Faith: New Consequences Affecting Banks".

David Ullmann spoke at a Wireless Internet Conference put on by the International Quality & Productivity Centre. David spoke on the legal implications of delivering content via wireless networks to automobiles. In October, David was interviewed by the CBC Television about Internet law with respect to the liability of Napster for facilitation of copyright infringement.

Monty Warsh spoke at a Law Society of Upper Canada Continuing Legal Education program entitled "Return of the Six-Minute Commercial Leasing Lawyer". Monty presented a landlord's perspective on "Telecommunications: A landlord and tenant perspective on negotiating the fibre optic agreement, the antenna and equipment agreement and the licence vs. the lease".