

Publisher's Note

2017 — Release 3

Previous release was 2017-2

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McDermott

Canadian Commercial Real Estate Manual

The *Canadian Commercial Real Estate Manual* addresses the unique requirements of the commercial real estate industry. It covers the critical stages of development from acquisition through property management. The primary tabs are: Financing, Taxation and Investment Analysis, Development and Conveyancing, Agreements, Precedents and Checklists.

This release features updates to case law and commentary in Chapters 6 (The Law of Mortgages), 8 (Remedies), 14 (Condominium Mortgages), 36 (Construction and Development), 38 (Acquisitions and Dispositions), 39 (Environmental Considerations), and 40 (Special Agreements).

Highlights

The Law of Mortgages — Priorities — Distinction Between Land Titles and Registry System — Where there was no wording restricting the use of the easement, the dominant tenement effectively had an unfettered use of the easement, whether by foot, horseback, horse and carriage, automobile or bicycle. In *Grant v. Lowres* (2016), 75 R.P.R. (5th) 224, 2016 BCSC 1654, 2016 CarswellBC 2507, additional reasons 2017 BCSC 301, 2017

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CarswellBC 493, the subject easement was registered against a portion of the common property of a strata plan, and the easternmost 12 feet of strata lot 1. The defendant owned this property. The plaintiffs owned two adjacent lots, which had the right of way over the easement. The easement, which was created in 1940, granted to the grantees and their successors a right of way over the subject strip of land, to hold “forever as appurtenant to” the grantee’s lands, so that “full and complete and uninterrupted use” of the right of way was to run with the lands forever. There was a garage on one of the plaintiff’s lots. On occasion, the plaintiffs rented out the garage to a tire business, and the garage was used to store tires, which involved regular vehicular access over the easement. The defendant aggressively and repeatedly attempted to restrict the use of the easement by the plaintiffs and their tenants by erecting structures and placing plants and trees on and around the easement. The plaintiffs brought an action for a declaration of entitlement to the easement by an express grant over the defendant’s lands. The plaintiffs’ action was allowed. The plaintiffs were entitled to a declaration that they were entitled to an easement over the lands, and that the defendant wrongfully interfered with the plaintiffs’ right. An injunction was granted restraining the defendant from interfering with the uninterrupted use of the easement to the plaintiffs’ property. The defendant unlawfully interfered with the plaintiff’s easement.

Environmental Considerations — Tort — Negligence — Where the owner of lands leased commercial premises to a business which was alleged to have contaminated the neighbouring property, the owner was not responsible when there was no evidence of “inherently dangerous, unsafe and illegal conduct” by the tenant over an extended period of time such as would amount to the foreseeability of harm allegedly suffered by the neighbour. In *Sorbam Investments Ltd. v. Litwack Estate* (2017), 77 R.P.R. (5th) 148, 2017 ONSC 706, 2017 CarswellOnt 2673, 7 C.E.L.R. (4th) 332 (S.C.J.), additional reasons 2017 ONSC 3265, 2017 CarswellOnt 7821 (S.C.J.), the defendant L family owned lands (“L lands”) that abutted the land belonging to the plaintiff S Ltd. (“S lands”). L family rented or leased the commercial premises on L lands to dry cleaners in the early- to mid-1990s. In 2007, during the course of the purchase of L lands by another company, an environmental site assessment was undertaken. Contaminants (PCE) exceeding the Ministry of the Environment’s guideline limits were found in a groundwater monitoring well drilled on L lands. In 2010, an environmental testing conducted of S lands revealed contamination. S Ltd. brought an action for damages for the contamination of S lands. S Ltd. claimed that its lands had been contaminated by certain chemicals which were used in or were related to the dry cleaning operations. S Ltd. sought both the cost of remediation, and the diminution in S lands’ value by the “stigma” of contamination. L family brought a

motion for summary judgment dismissing the claim. L family's motion was granted.

Special Agreements — An Analysis of Ground Lease Provisions — Drafting Considerations — Events of Default and Rights of the Leasehold Mortgages — Right to a New Lease — Although the tenant did not provide notice of exercising its right to renew within the time specified in the lease, the tenant was granted relief from forfeiture of the lease due to misstatement by the landlord as to the remaining term of the lease, and the significant amount of money spent on repairs and improvements to the premises. In *Velouté Catering Inc. v. Bernardo*, 2016 ONSC 7281, 2016 CarswellOnt 18695, 135 O.R. (3d) 32 (S.C.J.), additional reasons (2017), 2016 ONSC 7868, 2017 CarswellOnt 28 (S.C.J.), the tenant operated a restaurant in the leased premises. The lease was for a five-year term with the right to renew for a further five years. The lease required that the right to renew be exercised in writing no later than six months prior to the end of the first term, which was by October 20, 2015. The tenant's principal attempted numerous times to discuss the renewal of the lease with the male landlord, who incorrectly told him on two occasions that the lease did not expire until April 2017, rather than April 2016. The tenant provided written notice that it wanted to exercise its right to renew the lease on January 18, 2017, which was three months after the deadline. The tenant brought an application for an order declaring that the lease had been renewed or, in the alternative, an order granting relief from forfeiture. The tenant's application was allowed. The landlords did not waive strict compliance with the condition that written notice of the lease renewal be delivered by October 20, 2015. However, the Court had the authority to grant relief for failure to properly renew a lease. The tenant was led to believe the lease was only in its fourth year, and that written notice of renewal was not required for another year, so tenant's failure to provide written notice of renewal by the deadline was the result of the male landlord's misstatements. The subsequent steps taken by tenant were reasonable and diligent given the long, trusting, and informal relationship with the landlords. The tenant was at risk of losing a significant investment in improvements and repairs to the premises. This was an appropriate case in which to grant relief from forfeiture.

