

## Publisher's Note

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Lamont

# Real Estate Conveyancing

This 2nd edition of Donald Lamont's classic work on real estate practice covers the various legal issues that arise in buying and selling real estate. It examines leading case law and relevant statutes for each stage of the real estate transaction including signing the listing agreement, negotiating the Agreement of Purchase and Sale, submitting Requisitions, closing the transaction and the document registration procedure under electronic registration.

This release features updates to the case law and commentary in the following Chapter 3 (Offer to Purchase ), Chapter 5 (Practical Description of Common Terms), Chapter 6 (Outline of Some Real Estate Statute), Chapter 7 (Registry System Procedures), Chapter 9 (The Planning Act), Chapter 12 (Land Titles Procedures), Chapter 15 (Closing the Transaction), Chapter 18 (Careful Conveyancing), Chapter 19 (Remedies When Vendor or Purchaser in Default), Chapter 22 (Mortgages), Chapter 23 (Remedies of Foreclosure and Sale), Chapter 24 (Power of Sale Pursuant to Mortgage Provisions), and Chapter 27 (Building Restrictions).

## Highlights

- **Representation by Vendor — Giving False Reason for Selling Home — Purchaser Entitled to Rescind Agreement** — Where the vendor represented that the reason for selling was that the vendor's daughter's child had changed schools was incomplete, and that the murder of her son-in-law near the property was a factor in her decision, the vendor's representation was false, and the purchaser was entitled to rescind the agreement, and to the return of her deposit. In this case, the parties entered into an agreement for sale of property, involving the payment of a deposit

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of \$300,000. Prior to signing the agreement, the purchaser wanted to know why the vendor was selling, to assist her in deciding whether to purchase the property. The vendor stated the reason for selling the home was that her daughter's child had changed schools. For the purchaser, the vendor's reason for selling was a factor she took into account, along with others, including price, her viewings of the property, and the property disclosure statement, in making the purchase decision. The purchaser subsequently learned that the vendor's son-in-law had been murdered at or near the front of the property, nearly two years earlier, when the son-in-law was an occupant of the property. The sale transaction collapsed, and the vendor brought an action for breach of contract. The purchaser counterclaimed, alleging in part that the omission to mention the violent death of the vendor's son-in-law as a reason for selling the home amounted to a fraudulent misrepresentation, which induced the purchaser to enter into the agreement. It was a material misrepresentation, on the ground that the vendor's son-in-law was a leading member of a gang and that his occupancy of the property, and subsequent unsolved murder rendered the property dangerous or potentially dangerous. The vendor's action was dismissed; the purchaser's counterclaim was allowed.

The representation made by the vendor concealed that the change of schools was the result of the son-in-law's death, and that the death was a factor in the decision to sell the property. On a balance of probabilities, representation was a false representation by omission. It was intended that any prospective purchaser would believe the truth of the statement, and accept that the vendor had no other reason for selling the property. The purchaser relied on the representation, as the vendor's reason for selling was one of the factors she took into account in deciding whether to make the purchase. Having put the question to the vendor through her agent, the purchaser was entitled to an accurate answer, rather than one calculated to conceal. The purchaser was entitled to rescission and the return of deposit with interest. The purchaser was also entitled to damages for her legal costs incurred for advice and representation relating to the collapsed sale, but not for the services related to the litigation, which could be claimed as "costs", but were not compensable as damages: *Wang v. Shao*, 2018 CarswellBC 524, 2018 BCSC 377, [2018] 7 W.W.R. 776, 46 C.C.L.T. (4th) 83, 89 R.P.R. (5th) 222 (B.C. S.C.).

- **Description of Property — Property Smaller than Described — Notice of Uncertain Dimensions in Agreement — Experienced Purchaser — Deposit not Returned —** Although the property was smaller than described in the agreement, as the agreement put the purchaser on notice as to uncertainties as to the lot dimensions, and as the purchaser was an experienced developer, he was not entitled to the return of his deposit. In this case, the vendor owned a two-story residential home on an irregular corner lot that he wished to sell. Due to the inability to determine the precise dimensions of the lot, the vendor's real estate agent listed the property measurements as "87.64 x 100 feet" but noted "Irreg Corner Lot - Depths To Be Verified" and the "Buyer/Buyer's Agent To Verify All Measurements & Taxes." The purchaser was a renovator and builder who unconditionally agreed to purchase the property at the price of \$1.2 million, and paid a deposit of \$100,000 after seeing the property on two occasions, and acknowledging that the dimensions were "To Be Verified." The purchaser subsequently refused to close without a reduction in the purchase price, so the vendor sold the property to someone else at

the price of \$1.28 million. The purchaser brought an action against the vendor for the return of his deposit. The vendor brought a motion for summary judgment, dismissing the action. The vendor's motion was granted. It was evident that the property was in fact significantly smaller than described in the agreement of purchase and sale. However, the purchaser had been specifically put on notice, both in discussions with the vendor's agent, and in the wording of the agreement itself, as to possible uncertainties regarding the lot dimensions. Moreover, the purchaser was an experienced buyer, and developer of residential real estate properties. The purchaser had chosen to make an unconditional offer despite having been put on notice as to concerns with the lot size. The purchaser was not entitled to refuse to close the transaction even accepting that the lot was smaller than described: *Hosseinzadeh v. Pringle*, 2018 CarswellOnt 5010, 2018 ONSC 1947 (Ont. S.C.J.).

- **Careful Conveyancing — Mortgage Guarantees — Solicitor not having Guarantees Cancelled on Transfer of Property — Client Claiming Contribution and Indemnity —** Where the guarantor used the services of a solicitor in obtaining refinancing of a property with he and his wife being personal guarantees on the mortgage, and later used the same solicitor in transferring the property with the expectation that the guarantees would be cancelled, but they were not, and when the mortgagee sold the property under power of sale, and sued the guarantors for the deficiency, the guarantors were entitled to claim contribution and indemnity against their solicitor, although their third party claim was brought more than two years after being served. In this case, the principal guarantor Y obtained refinancing for a property from a mortgagee, and he and his wife provided personal guarantees in 2003. Y used the same solicitor when transferring his interest in the property as part of a restructuring in 2006. Y purportedly expected the guarantees to be cancelled but they were not. In January 2010, the mortgagee ultimately sold the property under power of sale, and in December 2010, brought an action against the guarantors for the deficiency. More than two years after being served, the guarantors brought a third party claim in September 2015 against the solicitor and his law firm for contribution and indemnity. The solicitor and his law firm brought a motion for summary judgment dismissing the third party claim as statute barred. Their motion was granted. Section 18 of the *Limitations Act, 2002* established an absolute two-year limitation period with respect to claims for contribution and indemnity. Wording of s. 18 of the Act “deems” the limitation period for contribution and indemnity claims to be two years from the date the “first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought”. The opening words “For the purposes of subsection 5(2) and 15” in s. 18 separated s. 18 from ss. 5(2) and 15 of the Act rather than incorporating s. 18 into those sections. In other words, the two-year limitation period was deemed to apply, and there was no presumption and no ability to prove the contrary. The doctrine of fraudulent concealment was not applicable, and so did not operate to extend the limitation period. The guarantors appealed the dismissal of their third party claims, and their appeal was allowed.

The decision of the motion judge to grant summary judgment was undermined by his misinterpretation of the *Limitations Act, 2002*, s. 18. The motion judge erred when he stated that the guarantors' claims were barred by an absolute two-year limitation period that was triggered when the first guarantor was served. The

presumptive limitation period start date, could be rebutted by the discoverability principles prescribed in s. 5 of the *Limitations Act, 2002*. Simply put, that error clouded the motion judge's understanding of the nature and complexity of the case he was being asked to resolve on summary judgment. Had the motion judge appreciated the nature of the dispute before him, i.e., when the guarantors discovered that it was legally appropriate to commence a third party claim against their own lawyer, he may have found a genuine issue requiring a trial. In allowing the appeal, the summary judgment dismissing the third party claims for contribution and indemnity was set aside, and it was ordered that the matter proceed under the Rules: *Mega International Commercial Bank (Canada) v. Yung*, 2018 CarswellOnt 6978, 2018 ONCA 429 (Ont. C.A.), reversing (2017), 2017 ONSC 1005, 2017 CarswellOnt 7432 (Ont. S.C.J.).

- **Mortgages — Foreclosure Proceedings — Redemption Period not Extended — Ownership Claim Unrelated to Foreclosure** — Although the plaintiff had an ownership claim pending against the mortgagors, she was not entitled to extend the redemption period beyond the usual six-month period as the litigation was unrelated to the foreclosure proceedings, and there was no evidence that she was unable to refinance the mortgage loan. In this case, the mortgagors were in default of their agreement with the mortgagee from the outset. While the mortgagors made payments, they failed to produce financial statements as required, did not meet the debt service coverage ratio minimum, and failed to provide the mortgagee with copies of any new leases. The mortgage loan of \$2.3 million was predicated on the mortgagors leasing the property to a third party business, but they instead used it to operate a different business. The plaintiff claimed the mortgagors owned the property in trust for her, and she had provided the purchase monies of \$2.35 million, and the mortgage payments. The plaintiff brought an ownership action against the mortgagors that had been set down for trial. The mortgagee brought foreclosure proceedings against the mortgagors, during which the plaintiff requested a 13-month redemption period. The plaintiff did not provide any evidence that she was unable to refinance the bank mortgage or that she required the extended redemption period in order to do so. The chambers judge found the mortgagors committed various defaults, and the balance of equities favoured the standard six-month redemption period. The mortgagee was completely innocent of any wrongdoing, had nothing to do with arrangements between plaintiff and the mortgagors and was misled about the basis for the loan from the outset. The plaintiff brought an appeal from the order granting the six-month redemption period, and her appeal was dismissed.

The setting of the redemption period was discretionary, and was entitled to deference. Absent special circumstances, the redemption period was not ordinarily longer than six months. The plaintiff did not establish significant prejudice; she led no evidence that she was unable to redeem the property and, if the property was sold through a courts sale, she could make submissions on the distribution of the proceeds. That the mortgagee was well-secured was not a basis to extend the redemption period. The litigation between the plaintiff and the mortgagors was entirely unrelated to the foreclosure proceedings, and the mortgagee's remedies should not be suspended pending the outcome of the ownership claim. The chambers judge was aware of the underlying circumstances, and did not act on a

wrong principle or fail to give sufficient weight to any relevant consideration. The judge considered the circumstances and reasonably determined the mortgagee was under no legal or equitable obligation to postpone foreclosure until the litigation between the plaintiff and the mortgagors had been resolved: *Toronto-Dominion Bank v. Gao*, 2018 BCCA 268, 2018 CarswellBC 1666, [2018] B.C.J. No. 1249 (B.C. C.A.).