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COMMERCIAL REAL ESTATE

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Real Estate Law Update

Drafting Options to Renew Leases

A recent mediation that I conducted involved the rights of a tenant to renew under an option that provided that the renewal or extension was to be on the same terms as the original lease excluding a right of further renewal and "rent was to be negotiated and agreed on." The tenant claimed that there was a history of past dealings under earlier leases that required the landlord to negotiate in good faith to establish a renewal rent. Other arguments were made based on some real estate cases that once a contract is made, there is a requirement to act in good faith to conclude finality to the transaction. The landlord wanted to demolish the property and there was no demolition clause in the lease. The Landlord took the position that an agreement to agree is no agreement at all and good faith does not come into it at all.

The landlord provided case law that holds that the language as above does not create an enforceable obligation to bargain in good faith. The case law indicates that to avoid the problem of enforceability, there needs to be some parameters or criteria for determination of the renewal rent and preferably as well, a process for resolving disagreement. The cases seems to say that for enforceability, the lease must include a formula or benchmark for determining the rent. Even stating that the parties will negotiate in good faith without a benchmark is not good enough since the parties may believe they are each acting in good faith but still be miles apart on the amount of the rent. The leading case is *EdperBrascan Corp. v. 117373 Canada Ltd.* (2000) 50 O.R. (3d) 425, the headnote of which states that the law does not recognize the duty to negotiate in good faith where the negotiation is to take place within an existing contract. The case contains a good summary of the law.

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Sidney H. Troister, LSM
Partner, Commercial Real Estate

PHONE
416 777 5432

EMAIL
stroister@torkinmanes.com

Sid is a partner at Torkin Manes LLP. He is the founding and continuing Chair of the Law Society's Annual Real Estate Law Summit and the author of The Law of Subdivision Control in Ontario. He is a noted real estate trouble shooter and problem solver and routinely advises lawyers about the tricks and traps of practising real estate law.

Acquiring Additional Land and Adding it to a Mortgage

I have had several cases recently where an owner owns a parcel of land (parcel A). He mortgages it to a bank. He then acquires additional land, be it as a small lot addition or in one case, filled land that was used for part of a marina. We will call this lot addition parcel B. In each case, the lawyer registered a mortgage identical to the existing mortgage on the recently acquired parcel B. In each case, the loan went into default and the lender sought to realize on his mortgages. Of course, each of the lot addition mortgages breached the *Planning Act* since at the time the mortgage was given, the owner owned abutting land. The intention was clear but the execution of the intention was in error. Instead of a new mortgage on the lot addition, the lender needed a whole new mortgage on all of the land then owned by the owner i.e. both parcels A and B. In lot addition cases in particular, where the lot addition may be transferred to the owner with a consent, it is likely that the consent will be stipulated under subsection 50(12) of the *Planning Act* such that the consent applies to the transfer of the land to the owner but is not available for the mortgage on the lot addition parcel. Just because parcel B was transferred with consent does not mean it is a separate parcel for all time. If B is intended to merge with the main parcel A, then mortgage on the lot addition alone will breach the *Planning Act*.

The Duty to Advise About Possible Mergers

A few cases recently have given rise to this problem. Lawyer acts for a buyer, and searches title including abutting land. Client advises how title is to be taken. Lawyer does not realze or notice that the client owns abutting land in the same name. The deal closes, the titles merge and then, later, the client wants to sell either the new parcel or the old one separately. Had the lawyer advised the client of the merger, each property would have remained separately transferable or mortgaged. As merged, neither can be without the other and a consent to sever obtained. There are no cases on a lawyer's liability on the duty to advise to prevent merger but my suspicion is that a court would find that a lawyer doing a search of abutting lands and knowing who owns the abutting parcels and being told of the manner in which title on the purchase is to be taken would be held to have a duty to advise the client that taking title as instructed would result in a merger of title with the obvious consequences. Be mindful of the possible issue when doing your searches and taking client instructions.