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EDITOR'S NOTE
Should you have any questions, concerns or suggestions for future articles please contact Erik Bruveris by phone at 780-930-3639 or email at ebruveris@stillmanllp.com.

HEADS UP
Heads Up is a column which appears in each issue of the Stillman LLP LegalEye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

Parents And Children As Joint-Tenants
By John Hagg

When parents and children decide to buy properties together, it is very important that there is a clear understanding at the beginning as to who is supposed to get what in the end. Determining what respective interests the parents and children both receive at the end of the day will require the consideration of several legal questions if there is not a clear understanding in the beginning.

First, placing title in joint tenancy results in a statutory presumption of indefeasible title. This means that the title to the property cannot be separated and there is an equal share to ownership in any equity in the property if the property is sold. This is alternative to holding property as tenants-in-common – which means that you have separate and divisible interests that can be sold to third parties without right of interference by other shared owners (Mac v Mak, 2016 BCSC 1140).

Secondly, the presumption of indefeasible title can be rebutted by the presumption of a resulting trust. A resulting trust is where the title is placed into the child's name with the intention at the time of purchase that the title is held in trust for parent, or vice versa. In that situation, all relevant evidence would need to be reviewed in order to determine the intention at the time of purchase or transfer (Mac, supra at para 110).

Thirdly, there is also the presumption of joint tenancy, which provides that the joint tenants hold equal interests. This presumption of equal interest can also be rebutted by a party seeking an unequal distribution if they can show a great discrepancy between their contributions to the property and that of the other joint tenant. In that circumstance, the principal of unjust enrichment may apply (Wessa v Knight, 2014 ABQB 671).

A person can be unjustly enriched if they received an enrichment, which in this case would be joint ownership of a property, the other owner suffered a corresponding deprivation, and there is no juristic reason for the enrichment. Absence of juristic reason means that there is no contract or other obligation that required the enrichment\deprivation, and the receiver of title was not able to show why it should not be transferred back (Miller v Walker, 2006 ABWB 424 at para 37).

Lastly, and perhaps most importantly, the principal of gifting may apply and can trump all else. If it can be shown that the transfer of the interest in the property was intended to be a gift, then it will defeat any other claim pursuant to the legal principles set out above (Berdette v Berdette [1991, 3 O.R. (3d) 513 (Ont. C.A.)].

The three basic components of a valid gift were recently set out by Judge Skitsko, in the Provincial Court of Alberta:

a) There was an intention to create a gift;
b) There was delivery of the item that was to be gifted; and
c) There was acceptance of the gift (Sirois v Andrews, 2017 ABQB 263 at para 15).

Needless to say reconciliation of the above legal principles can become quite complicated. This was recently done by Master Wacowich in the Alberta Court of Queen's Bench decision of Sirois v Andrews. There, the father, John Sirois, purchased a residential property and paid for it in full

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but transferred ownership to joint tenancy with himself and his daughter, Shauna Andrews. The key issues were: "Did the father intend that the daughter's interest be a gift from him to her as an interest in land and, if so, was her interest subject to either the resulting or constructive trust in favour of the father." The decision was based on the father making Application to the Court to have the joint tenancy terminated and have the whole property transferred to the father, or alternatively, to have the property sold and to have an unequal distribution of the sale proceeds in favour of the father.

Master Wacowich stated that it was clear from the evidence that the intention was in fact to gift an immediate interest to his daughter at the time of the transfer. Unfortunately for the father, despite him changing his mind later, only the intention at the time of the purchase was relevant. On that point, Master Wachowich referred to a 1991 Ontario authority Berdette, supra, to confirm the following principle:

"The task of the Court is not to correct a possible mistake in a judgment on the [father], but to ascertain [his] intention at the time of the transactions. When the properties were purchased, the [father] intended [his daughter] to be a joint owner with [him]…. the failure of the donee to fulfill a donor's expectations does not vitiate a valid gift".

That is, once a gift is given, you cannot change your mind later. The key there was to ascertain the intention of the father from the circumstances leading up to and surrounding the transaction. When asked, the father explained that he wanted to pass the property to his daughter in the event of his death, and further that he "gave her half". Master Wacowich also took into consideration a Will which the father created after the transfer had taken place wherein he was granting one-half of the residue of his estate to his daughter and the other half to his son.

Master Wacowich went on to discuss the other relative legal questions which was the presumption of joint tenancy holding equal interest. As set out above, this can be rebutted if there is a great discrepancy between the contributions to the property by the joint owners based upon the principles of unjust enrichment, however, there is no unjust enrichment in this case. Master Wacowich clearly set out that the father intended the gift, he did not suffer a deprivation, and there was a juristic reason for the daughter to be enriched and receiving benefit from being placed on title.

In this case, Master Wacowich sets out that even if there was not a gift, the father would not have had the grounds to claim uneven distribution of sale proceeds based on unjust enrichment because there was consideration in the form of the daughter doing considerable renovations to the property.

Sirois v Andrews makes it clear that when purchasing a property in joint tenancy between a parent and child, having a written agreement in place which clearly sets out the intention of the parties at the time of the purchase is crucial. In the long run, it will also save you a great deal of time and money if there is a change in circumstances or a dispute in the future.

FIRM NOTES

Stillman LLP would like to celebrate another successful West Edmonton Business Association golf tournament on June 6, 2017. We are pleased to remain as a continued sponsor of the event, and look forward to future years building a strong business community in west Edmonton.

Our office is pleased to announce that Alexander Manolii will be continuing his employment with Stillman LLP as an Associate after being admitted as a member of the Law Society of Alberta this upcoming September. Alex has been with the firm since starting in the summer of 2014 as a research student, and we are pleased he has decided to stay on as a member of our team.

We are pleased to have Megan Reid take on a new role as Assistant Office Manager. Megan has been with Stillman LLP for a few years working in various areas and we know that her wealth of knowledge and experience will help her to succeed in her new role.

We are sad to say goodbye to Valaine Belton, Amanda Bentley, and Braden Nehring who have moved on to other opportunities. We wish them all the best in their future endeavors.

CAUSE CÉLÈBRES

The 2017 Changes to the Meaning of "Abandoned Goods" s. 31 of the *Residential Tenancies Act* in light of *Wilderdijk-Streutker v Zhao*, 2017 ABPC 24 and *Shearer v Shields*, 2017 ABPC 108
By Alexander Manolii

When in a dispute with a residential tenant, a landlord is often faced with the dilemma of choosing an appropriate and legal course of action to remedy the situation. This is true of circumstances where the tenant's belongings are still located on the premises which the tenant has either vacated or abandoned. It is likewise true of times when it is unclear to the landlord if the tenant has abandoned the leased premises. A third complication occurs when the landlord is looking to lease out the premises to a new tenant, with the old tenant's goods still present on the premises.

How long is a landlord expected to preserve the goods? Can the landlord sell or otherwise dispose of the property? Does the value of the goods matter? The analysis contained in the recent decisions of Wilderdijk-Streutker v Zhao, 2017 ABPC 24 ("Wilderdijk") and Shearer v Shields, 2017 ABPC 108 ("Shearer") will help inform landlords and tenants of their rights and obligations in the above context.

The term "abandoned goods" in the Alberta landlord and tenant context is addressed in the Residential Tenancies Act, SA 2004, c. R-17.1 ("RSA") and corresponding regulations. According to section 31 of the RSA, "abandoned goods" refers to any property left at the residential premises by a tenant who has either abandoned the premised or vacated them and whose tenancy is terminated or has expired. Currently, the landlord is entitled to dispose of the goods if they have a total market value of $2,000.00 or less. If the goods are worth over $2,000.00, the landlord must store them on behalf of the tenant for period of 30 days, unless such storage would be unsanitary, unsafe, the goods would rapidly depreciate in value, or if the costs of removing, storing or selling the goods would exceed the proceeds of the sale.

In Wilderdijk, the landlords and tenants entered into a written residential tenancy agreement for the period of June 2014 to May 2015. The tenants advised the landlords that they would be away in New Zealand for a period of up to 5 months. Nevertheless, the tenants provided postdated cheques for the duration of the lease. In November 2015, the landlords and tenants mutually agreed to terminate the lease agreement so that it would expire on December 31, 2015. In late November 2015, knowing that one of the tenants was due to give birth, the landlords notified the tenants through email that they consider the premises abandoned. Notwithstanding that the tenants paid the rent for December 2015,

without further notice to the tenants, the landlords entered the premises on December 5, 2017 and rented them out to new tenants. Most of the tenants' property, which was stored in the garage, was discarded upon the direction of the landlords. The disposed property included confidential work files, items of high sentimental value, electronics, and various household items.

The Court found in Wilderdijk that the landlords did not have any reasonable grounds to believe that the tenants terminated the residential tenancy agreement in November 2015 nor that they abandoned the leased premises. In fact, the tenants had provided rental payments up to the end of December 2015. Therefore, the premises could not have been considered abandoned nor the lease terminated. Therefore, section 31 of the RSA was inapplicable. The fact that the tenants were away did not constitute reasonable grounds to terminate the agreement. Ultimately, the landlords were found to have violated numerous requirements of the RSA, including the tenants' right to peaceful enjoyment of the premises. The Court also found that the landlords unlawfully destroyed, damaged and disposed of personal property belonging to the tenants. Although the goods did not carry a significant market value, the tenants were entitled to compensation and the landlord was obligated to preserve them in these circumstances.

The Court found the actions of the landlords in Wilderdijk to be so egregious that they warranted punitive damages in the amount of $2,900.00. Additionally, the tenants were awarded $1,000 for the return of their security deposit and $1,650.00 in costs – a total of $5,550.00.

In Shearer, the parties signed a written tenancy agreement for the period of July 2015 to September 2016. The premises were in good condition at the start of the lease, but a bedbug problem developed towards the end of the term. When the lease ended, the landlords allowed the tenant to stay at the premises until October 24, 2016. After the tenant failed to attend two separate scheduled walkthroughs, the landlords changed the locks and refused to return the tenant's belongings until she covered the cost of fumigation and cleanup of the apartment. It is noteworthy that throughout the duration of the lease, the tenant was problematic in her relationship with the landlords – failing on numerous occasions to follow the landlord's reasonable directions regarding the leased premises. As a result of the tenant's actions, the landlord incurred costs for changing the locks, fumigating the premises, and loss of rental revenue in the amount of $4,769.34.

While it was the tenant's responsibility to mitigate the damages associated with the bedbug infestation, the landlords were not entitled to keep the goods or to dispose of them in any way. In fact, the tenant made it very clear that she wished to recover her goods from the premises. Therefore, the landlords' position that they could retain the goods as security for the debts owed was inappropriate. The Court found that the landlords wrongly detained the tenant's goods in the value of $1,000.00. This amount was deducted from the rightfully incurred costs owed to the landlords by the tenant.

Based on the above cases, it is clear that landlords need to act carefully when dealing with the issue of abandoned premises or terminated leases. A landlord cannot retain abandoned goods as security for rent or any other debts, whether those are warranted or not. Moreover, the landlords cannot unilaterally terminate a lease nor can they deem the premises abandoned when the tenant is acting reasonably and when rent was collected. As noted in Wilderdijk, a failure to follow the terms of the RSA could result in significant costs against the landlord.

As can be seen, this type of landlord-tenant issue can quickly become complex and could result in significant risks for both landlords and tenants. Should you have any questions regarding this area of law, or should you wish to retain legal counsel for such a matter, please contact one of the Stillman LLP lawyers for assistance.

AS WE SEE IT

Condominium Corporations and Homeowner Associations and the Foreclosure Process Update: *Bank of Montreal v Bala.*

By Shannon Kinsella

Condominium Corporations ("Corporation") and Homeowner Associations ("HOA") are a different breed of corporation. Corporations are established and operate pursuant to the Condominium Property Act ("CPA") while HOA's are typically incorporated as a not-for-profit Company under the Companies Act or as a Society under the Societies Act. Both a Corporation and a HOA have foreclosure rights if an owner fails to pay the required contributions and assessments. The foreclosure rights emerge when a Corporation registers a Caveat on title (at the time of default) and a HOA registers a Homeowners Association Encumbrance (typically at the time the developer begins development).

The foreclosure process for a Corporation and a HOA are very similar, but differ in small aspects from a normal foreclosure process that a bank may take. The first step is to register a Certificate of Lis Pendens on title concurrent with the filing of the Statement of Claim. After the service of the Statement of Claim, the second step is to bring an application seeking a Redemption Order. This Order grants judgment on the debt owed and sets the Redemption Period, which is the period that the Owner has to bring the arrears current and thereby redeem the property and stop the foreclosure proceedings.

The Redemption Order stage is where the foreclosure process differs from that of a regular bank. A Corporation and HOA are not usually required to file an Affidavit of Value at this stage and the Redemption Order will not include the Judicial Listing Agreement. If the arrears are not paid and therefore the property is not redeemed, the Corporation or HOA has to bring an Application to set the Judicial Listing of the property. Once this Order is granted, the foreclosure process typically follows that of a bank.

The biggest difference between the foreclosure process for a Corporation or HOA and a bank is the priority. A Homeowners Association Encumbrance is typically registered before the mortgage and will therefore take priority. However, even though it is registered later, a Corporations Caveat gives the Corporation a "super priority" over the bank. This means that any contributions owing to the Corporation will take priority over the mortgage amount owing to the bank.

The case of Bank of Montreal v Bala, 2017 ABQB 38 has recently clarified what counts as a contribution and therefore receives the "super priority" status. If the debt owing to the Corporation is not a contribution, the debt is only a regular debt and will fall behind the mortgage amount owing. In Bala, Justice Feehan attempts to clean up the previous case law which had split into two distinct statutory interpretations. There are now 4 steps to evaluating the claim of a Corporation (paragraph 20):

1. Sections 39 and 41 of the CPA protect claims for typical assessments or overdue interest on such assessments and these are automatically considered contributions;

2. If the claim is for other expenses, the Corporation's bylaws must be examined. If the bylaws allow these expenses to be included as part of the assessment against that unit, then the expenses and interest on them will be considered a contribution;

3. Other claims may still be subject to a contractual charge pursuant to the Corporation's bylaws. If the bylaws are adequately worded and allow a charge against units to secure all amounts owed by that unit owner, then the contractual charge would cover things such as collection expenses, unpaid fines, unpaid rents, etc. These claims would be secured under the caveat but would rank behind the mortgage in terms of priority;

4. Any claims which do not fall under 1, 2 or 3 are unsecured.

Contributions are defined in the CPA as "creating a fund to cover administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligations of the corporation" (paragraph 34). Any disproportionate levy must be provided for in the bylaws and only become due and payable on the passing of a resolution to that effect. These expenses may include things like insurance deductibles,unit repairs and common property repairs attributable to a single Owner. At paragraph 38 Justice Feehan concludes that"

> … Manor Condo Corp can levy disproportionate contributions on the condominium owners within these parameters if:
> (a) Its bylaws authorize a disproportionate contribution; and
> (b) It has passed a resolution authorizing a contribution to be levied.

In this case, the issue was whether the Corporation could charge the Owner as a contribution for the insurance deductible when the Owner caused a flood in a different unit. Alternatively, the deductible would be a regular debt and not recoverable in priority to the mortgage.

It was found on examination that the bylaws did provide for a disproportionate assessment against an Owner and the Corporation properly passed a resolution as required by the CPA. Therefore, the amount owing was considered a contribution and they were able to file the caveat in "super priority" to the mortgage.

Sections 41 of the CPA allows any interest owing by the Owner to be recovered in the same manner as a contribution and those amounts were added to the caveat amount (paragraph 67). However, Justice Feehan found that reasonable costs and legal expenses do not become a contribution and are not awarded the "super priority" (paragraph 73). They are still recoverable as a regular debt action pursuant to the CPA. This is the same for those costs related to the caveatable interest (i.e. the costs of preparation, registration, enforcement and discharge of the caveat, paragraph 82).

Although the Bala case has given some clarity to the law surrounding the foreclosure process for Condominium Corporations and what may be recoverable, there are still many pitfalls out there for Corporations and HOAs. Bylaws should be reviewed by a legal professional to ensure that disproportionate contributions will be recoverable in "super priority". In addition, prior to commencing the foreclosure process, a lawyer should be contacted to ensure all of the proper steps are taken. Any of the lawyers at Stillman LLP would be happy to assist in this regard.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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