

## 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 5 (Practical Description of Common Terms), Chapter 6 (Outline of Some Real Estate Statutes), Chapter 8 (Cottage and Rural Conveyancing), Chapter 12 (Land Titles Procedures), Chapter 19 (Remedies When Vendor or Purchaser in Default), Chapter 21 (Liens, Charges and Potential Claims), Chapter 22 (Mortgages), Chapter 26 (Condominium) and Chapter 27 (Building Restrictions).

## Highlights

- **Right of Way — Use by Adjoining Owner's Tenants — Whether Owner Acquiring Possessory Title — Whether Abandonment of Right of Way** — and an adjoining owner's tenants obstructed access to the right of way, the adjoining owner was unable to establish possessory title to the land as the plaintiff and its predecessors had not abandoned the right of way, and the tenants' use of the right of way amounted to trespassing. In this case, the plaintiff, which was a development corporation, acquired the subject property in 2013 that had a long history. In the late 19th century, predecessors of the defendant granted a right of way over an L-shaped land to the plaintiff's predecessors. There were numerous conveyances since

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the right of way was granted, and the right of way was subsequently included in successive conveyances of the respective properties. The defendant had acquired its property in the 1970's, and at the time, the property already had a wire fence with a steel gate that enclosed most of the easement, and in the 1980's one of the defendant's tenants had built a deck. Up until at least 2016, there was no dispute about the use being made by the defendant's tenants of the L-shaped land. The plaintiff submitted a development application to the city to permit a condominium project, and, as was the case with prior owners, incorporated into the project the easement as a mean of access. The plaintiff advised the defendant that the deck patio was encroaching on the plaintiff's right of way, and should be removed, but the defendant refused. The L-shaped land was owned by the descendants of a deceased third party who died in 1908. The plaintiff brought an application for a declaration that the defendant was encroaching on the plaintiff's right of way; the defendant brought an application for a declaration that it had obtained possessory title over the right of way. The plaintiff's application was granted; the defendant's application was dismissed.

The defendant failed to establish that before 2003, when the properties were transferred into Land Titles, that its tenants, who were trespassers, acquired a possessory title over the L-shaped Land, that the tenants' possessory title inured to the defendant's benefit as the holder of a reversionary, non-possessory ownership interest and that the plaintiff's predecessors abandoned the right of way. The defendant's tenants were trespassers on the L-shaped land, and there was nothing inadvertent about their conduct. The plaintiff was correct that the tenants' use of the right of way did not as a matter of fact establish adverse possession or a prescriptive possessory claim over those lands. The defendant's claim for a possessory title thus failed as a matter of factual proof. Because the defendant's claim for a possessory title failed, it did not have the standing to assert that the plaintiff or its predecessors in title had abandoned the right of way. Even if the defendant had have been successful in its claim for a possessory title, its possessory title would still have been subject to the right of way as the defendant did not prove that the right of way had been abandoned. All of the successive owners, some of whom were savvy business persons, did not abandon the easement. Rather, it was found that, based on the evidence, there was nothing other than an explainable non-use of the right of way, and the evidence was insufficient to conclude that there was abandonment of the right of way as successive owners did not abandon the easement. It appeared that, although successive grantees were not using the right of way, they all regarded it as an important right to be preserved and not to be abandoned: *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 CarswellOnt 13140, 2018 ONSC 4607, 94 R.P.R. (5th) 236, [2018] O.J. No. 4124 (Ont. S.C.J.).

- **Joint Tenancy — Mother Adding Son as Joint Tenant for Estate Planning Purposes — Creditor of Son Registering Judgment — Creditor Entitled to Rely on Registration of Son's Interest** — Where the mother added her son as a joint tenant of her property for estate planning purposes, and also executed a will confirming the joint tenancy with the property to belong to him on her death, a creditor of the son was entitled to register its judgment against the son's interest. In this case, the mother purchased a house in 1999. In 2015, the mother added her son as joint tenant on the

title to the property. The mother did so based on estate planning advice she received at the time, and in order to avoid payment of inheritance tax on her death. At the same time, the mother executed a will confirming her intention to name her son as the joint owner of the property to belong to him upon her death. The mother did not advise her son that he had been added as joint tenant on title to the property, and the son in no way contributed to the purchase or upkeep of the property. In August 2017, the son and his software company consented to a judgment in favour of a creditor in the amount of \$800,000. At the time the son consented to the judgment, he did not know that he was on title to the property. The creditor registered a certificate of judgment upon the son's undivided half interest in the property. In November 2017, the mother executed a new will which disinherited her son because of his many personal debts. The mother brought an application for a declaration that her son held his interest in the property on a resulting trust in her favour, for an order that her son cause his legal title in the property to be transferred to her, for a declaration that she was the sole beneficial owner of the property, and for an order that the certificate of judgment held by the creditor be vacated from the title to the property. The mother's application was dismissed.

It was the mother's intention, as described in her 2015 will, to give her son an interest in the property when the joint tenancy was registered, and as such the son did not hold the property on a resulting trust in favour of his mother. Registration of the son's interest on title placed the son in possession of a gift. The joint tenancy in favour of her son was properly registered in the land titles registry, and the creditor was entitled to rely on that registration. The mother took a risk in registering her son as joint tenant on the property. Once the mother registered the interest in the property in the son's name, the son's creditors became entitled to register its judgments against the son's interest in the property. The creditor advised the court that it would not execute against the property while the mother was living in the house: *Gully v. Gully*, 2018 CarswellBC 2485, 2018 BCSC 1590, 40 E.T.R. (4th) 297, 94 R.P.R. (5th) 68 (B.C. S.C.).

- **Condominiums — Purchase of Units — Delays in Construction and Closing Transactions — Receiver of Vendor Selling Units to Creditor — Purchasers Entitled to Return of Deposits** — Where the closing of the purchase of condominium units was delayed by the vendor overreaching in claiming occupancy fees, and where the vendor went into receivership resulting in a court-authorized sale of the units, the purchasers were entitled to the return of their deposits. In this case, in June 2005, the purchasers J and L Ltd. agreed to buy one commercial unit in the vendor's condominium development (Trump Tower) for the purchase price of \$724,000, and paid a deposit of \$144,800. This unit was to be rented out as a hotel suite. In August 2005, the purchaser agreed to buy a second commercial unit for the purchase price \$810,000 with a deposit of \$162,000. In addition, in November 2006, J agreed to buy one residential unit in the development for \$1.392 million, and paid a deposit of \$278,400. The three deposits were paid to the vendor's solicitor in trust. There were lengthy delays in the construction, and the closing dates were not met for any of the units. In February 2012, occupancy agreements were entered into in respect of the two commercial units, which were rented out. However, no rental

payments were received after September 2012. Based on new disclosure statements in May 2012, the purchasers sought rescission of the agreements due to material changes in the disclosure, but, in a court application in April 2013, the judge found there was no material change. In August 2014, a dispute arose between the parties concerning the statements of adjustments for the commercial units, and further court proceedings were commenced. In November 2016, the vendor went into receivership. A creditor acquired the purchasers' and others' units in a court authorized sale, and the creditor became the vested owner of the units. The purchasers then brought actions against the vendor for return of their deposits with interest. The purchasers brought motions for summary judgment, and their motions were granted.

The vendor was overreaching in including in the statement of adjustments charges for occupancy fees totaling \$445,000, which included the entire period that the rescission matter was being litigated. Moreover, the vendor did not treat the commercial units as occupied after September 2012 in that it ceased to request post-dated cheques for occupancy fees. The purchasers acted in good faith in their attempts to negotiate fair and reasonable statements of adjustments with a view to closing the transactions. Following the receivership, the vendor was not in a position to close the transactions. The purchasers demonstrated their entitlement to the return of their deposits with interest, and without deductions, in accordance with the terms of the agreements of purchase and sale. Nothing the purchasers had done in the disputes amounted to a breach of contract or an anticipatory breach. The agreements were terminated as a consequence of the receivership through no fault of the purchasers. The receiver had repudiated the agreements when it sold the units to the creditor, and the purchasers had accepted the repudiation: In *Jung v. Talon International*, 2018 CarswellOnt 16464, 2018 ONSC 4245, 94 R.P.R. (5th) 217 (Ont. S.C.J.).