The Canadian Abridgment eDigests -- Real Property

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REA.I.3.d.ii.C

Subject Title: Real property

Classification Number: I.3.d.ii.C

Interests in real property -- Co-ownership -- Termination of co-tenancy -- Partition -- Court-ordered partition and sale

Petitioner was unsuccessful in obtaining relief for trust they sought after confirming existence of agreement and its terms -- There was no resulting trust but petitioners were entitled to buy out other party's interest for $36,000.00.

Godin v. Worsfold (2022), 2022 BCSC 162, 2022 CarswellBC 242, Caldwell J., In Chambers (B.C. S.C.) [British Columbia]

REA.I.3.d.ii.C

Subject Title: Real property

Classification Number: I.3.d.ii.C

Interests in real property -- Co-ownership -- Termination of co-tenancy -- Partition -- Court-ordered partition and sale

Respondents (resident and his aunt) were owners in joint tenancy since acquiring residential housing unit in stratified multiple unit residential building in 2006 -- Petitioner was registered owner of undivided one-third interest in subject property pursuant to Form A Freehold Transfer document dated October 13, 2011 in consideration for "$1.00 and other good and valuable consideration" -- Petitioner alleged he became co-owner in return for release of outstanding debt, and that parties agreed resident would pay mortgage and upkeep costs but not rent -- Respondents contended they did not remember transferring their interest to petitioner -- Following deterioration of petitioner's relationship with resident (his brother-in-law), petitioner unsuccessfully offered in October 2020 to sell his one-third interest to resident -- Petitioner brought petition for order of partition and sale -- Petition granted -- Pursuant to s. 23 of Land Title Act, petitioner's registered title was conclusive evidence of his undivided one-third interest -- Respondents did not dispute registration of petitioner's interest, and their lack of recollection of transfer could not overcome conclusive evidence of registered title -- Fact that petitioner did not contribute to mortgage or other costs did not assist respondents; there was no evidence that petitioner agreed to make such payments and he contended that parties agreed he would not do so -- Respondents did not provide undertaking to purchase petitioner's interest and there was no evidence that resident's medical condition would be adversely affected by move -- There was no good reason not to order sale.

Lashman v. Spencer (2022), 2022 BCSC 96, 2022 CarswellBC 129, Hinkson C.J.S.C. (B.C. S.C.) [British Columbia]

REA.I.3.d.ii.C

Subject Title: Real property

Classification Number: I.3.d.ii.C

Interests in real property -- Co-ownership -- Termination of co-tenancy -- Partition -- Court-ordered partition and sale

Plaintiff had owned interest in quarter section of rural land as joint tenant since 1997, first with parents, then with parents and wife and, following parents' deaths, with wife alone -- When plaintiff and wife divorced in 2015, land was transferred to plaintiff and defendants, plaintiff's daughter and her spouse, as joint tenants -- Defendants later moved their business and then their family onto land -- Although plaintiff later claimed transfer had been made only so that he would qualify for mortgage to buy wife's interest, defendants claimed transfer had been intended to convey real interest to them in exchange for which they had assumed financial risk, made significant contributions to farm operations and maintenance, and undertaken significant renovations to residence -- When relations between parties deteriorated, plaintiff brought application to sever joint tenancy and for declaration defendants held their interest in land and assets in trust for him or, alternatively, for order for sale with right of first refusal -- Defendants brought cross-application to sever joint tenancy and for order for sale with distribution of two-thirds of net proceeds to them -- Applications were directed to be heard in summary trial -- Order accordingly -- Although plaintiff had eventually resiled from position defendants had no beneficial interest in land, his resistance in doing so raised question whether he had tailored his evidence -- Although daughter was credible, her evidence was somewhat weakened by desire to advocate for position -- Whether daughter and spouse had become involved in order to help plaintiff, or to preserve potential inheritance, parties had intended joint tenancy on title to be true representation of agreement -- Their subsequent conduct corroborated that intention -- Each joint tenant was entitled to one-third interest -- There was no evidence of deprivation or unjust enrichment justifying unequal shares -- Land should be appraised and plaintiff be given opportunity to purchase defendants' interests -- If that did not occur within reasonable time, property should be sold with net proceeds distributed accordingly -- In absence of any statutory provision for partition and sale of assets such as farm equipment and livestock, best solution might be for parties to agree to have those assets follow land.

Steele v. Craig (2021), 2021 CarswellAlta 2820, 2021 ABQB 825, G.H. Poelman J. (Alta. Q.B.) [Alberta]

REA.II.5.f.i

Subject Title: Real property

Classification Number: II.5.f.i

Registration of real property -- Certificate of pending litigation (lis pendens) -- Vacating certificate -- General principles

Plaintiff brought action for damages for breach of contract and unjust enrichment giving rise to constructive trust in relation to its project management work on construction of residential property owned by defendant S -- It was granted leave to register and registered certificate of pending litigation (CPL) against title to property -- S and defendant C, his spouse, filed statement of defence and counterclaim joining plaintiff's principal, its alter ego, as party and seeking damages for breach of contract and negligence -- Defendants then sold residence to arms'-length purchaser who registered vendor take-back mortgage for $5.5 million to be paid once CPL was vacated -- Defendants brought motion to vacate CPL -- Motion dismissed -- Claim of constructive trust as remedy for unjust enrichment constituted interest in land capable of being protected by CPL -- Claim of unjust enrichment, based on plaintiff's or principal's advance of funds for construction of residence, was at least arguable -- If established, plaintiffs advance of funds had enriched defendants without any juristic reason -- It did not appear CPL had to be vacated in order to protect bona fide purchaser for value without notice -- It was apparent purchaser had notice of CPL and had already taken steps to protect itself -- Since there was reason to be concerned remedy of monetary damages was illusory in circumstances, it was appropriate to continue to protect claim to constructive trust with CPL.

1861067 Ontario Inc. v. Sang (2021), 2021 ONSC 7226, 2021 CarswellOnt 15702, Perell J. (Ont. S.C.J.) [Ontario]

REA.III.1.b.iii.A.1

Subject Title: Real property

Classification Number: III.1.b.iii.A.1

Sale of land -- Agreement of purchase and sale -- Interpretation of contract -- Conditions -- Conditions precedent -- Financing

Parties striking out condition to arrange financing, purchaser later refusing to close due to financing concerns, and purchaser held liable for difference between negotiated sale price and actual sale price on re-listing.

Masoomi v. Chen (2022), 2022 CarswellOnt 1057, 2022 ONSC 703, M.L. Edwards R.S.J. (Ont. S.C.J.) [Ontario]

REA.III.4.g.iii

Subject Title: Real property

Classification Number: III.4.g.iii

Sale of land -- Remedies -- Latent defects -- Miscellaneous

Defendant vendors owned residential property (Property) -- Second floor of property was occupied by tenants -- Property had second-floor back deck which was constructed with wood frame and concrete surface -- Deck abutted large rock face, approximately eight metres high -- In May 2017, six large rocks fell from rock face onto deck, resulting in large hole in deck surface and considerable damage to deck's under-structure -- Tenants were unable to use deck -- Vendors obtained report from geotechnical engineering firm which recommended scaling of rock face or installation of mesh protection system -- Vendors obtained quote for mesh protection

system but did not proceed with installation -- Vendors listed property for sale in November 2017 -- Listing information did not disclose existence of geotechnical report or its conclusions -- In December 2018, vendors sold Property to plaintiff purchasers for $660,000 -- Property was inspected by home inspector who found rear deck in need of replacement -- After close of transaction, purchasers found out from tenants about May 2017 rock fall -- By chance, purchasers contacted same geotechnical engineering firm and were informed of report -- Firm re-examined rock face and determined that hazard remained unchanged -- Purchasers contracted for scaling work -- Purchasers brought action against vendors for cost of remediation, compensation for restrictions on use of Property, and damages for stress and anxiety -- Action allowed -- Vendors knowingly told only part of what they knew when completing disclosure statement -- Disclosure form failed to mention the rock wedge or assessment by geotechnical engineering firm that it was unstable and hazardous -- Form also failed to mention quote for mesh protection system -- Form fixed reader's attention on deck and represented that remaining work to be done arising from rock-fall was repair of deck surface -- Vendors knowingly made false representations in relation to rock face and purchasers relied on those misrepresentations -- Purchasers would not have been interested in purchasing Property if vendors had told truth instead of floating half-truths about rock-fall and rock face -- Purchasers established cause of action in contract as disclosure form was incorporated into contract of purchase and sale -- Purchasers took steps to identify and remediate problem with deck -- Purchasers were awarded compensatory damages of $181,661 for costs of remediation and lost rent.

Karner v. Kuhnke (2021), 2021 BCSC 1942, 2021 CarswellBC 3136, Thompson J. (B.C. S.C.) [British Columbia]

REA.V.10.b.i

Subject Title: Real property

Classification Number: V.10.b.i

Landlord and tenant -- Rent -- Obligation to pay -- General principles

Tenant operated restaurant out of premises owned by landlord -- Landlord changed locks and retook possession of premises -- Tenant sought declaration that landlord's termination of lease was improper and breach of lease, order directing landlord to grant immediate possession of premises to tenant and damages -- Application dismissed -- Tenant breached lease by failing to pay full amount of rent when it was due -- There was no agreement to reduce rent or change due date from first of each month -- Landlord was entitled to demand full payment of rent arrears within 10 days; upon non-payment within 10 days, additional three months' rent became owing; and landlord was entitled to re-enter premises with option to terminate lease, which landlord exercised with written notice of termination -- Landlord lawfully terminated lease in accordance with its rights under lease -- Landlord did not waive tenant's breaches, and it was not prevented by promissory estoppel from relying on its remedies under lease -- Relief from forfeiture was not appropriate because tenant's conduct was unreasonable as it failed to pay rent on time, and failed to provide or provided inaccurate monthly sales information.

2189252 Alberta Inc (Tutti Fruitti Breakfast & Lunch) v. Harvard Developments Corporation (2021), 2021 ABQB 977, 2021 CarswellAlta 3100, G.S. Dunlop J. (Alta. Q.B.) [Alberta]

REA.V.14.c.i

Subject Title: Real property

Classification Number: V.14.c.i

Landlord and tenant -- Forfeiture and re-entry -- Practice and procedure -- Notice

Plaintiff landlords entered into five-year lease agreement signed by corporate defendant as tenant and personal defendants B and R as indemnifiers -- Tenant took possession of leased premises for use as pharmacy, it paid rent for first two years of lease, and it then went into default and vacated premises -- Landlords gave notice of default and took steps to re-let premises to new tenant -- Landlords brought this action seeking damages based on breach of lease agreement -- Tenant and B had not filed response to claim, and claim proceeded against R as indemnifier under lease -- Landlords applied for judgment by way of summary trial -- Application granted -- Landlords gave proper notice of intent to seek damages from all defendants, including prospective damages for loss of future rent under lease agreement -- Stated intention to mitigate losses by getting new tenant was significant, as getting new tenant could not mitigate past losses, and landlords were necessarily referring to mitigation of prospective losses for unpaid rent for balance of lease term -- Landlords communicated clear, unconditional intention to commence legal proceedings against all defendants to recover losses and damages sustained.

Asara Holdings Inc. v. 1041085 B.C. Ltd. (2021), 2021 BCSC 2350, 2021 CarswellBC 3783, Riley J. (B.C. S.C.) [British Columbia]

REA.V.14.h.iii

Subject Title: Real property

Classification Number: V.14.h.iii

Landlord and tenant -- Forfeiture and re-entry -- Relief against forfeiture -- Non-payment of rent

Tenant operated restaurant out of premises owned by landlord -- Landlord changed locks and retook possession of premises -- Tenant sought declaration that landlord's termination of lease was improper and breach of lease, order directing landlord to grant immediate possession of premises to tenant and damages -- Application dismissed -- Relief from forfeiture was not appropriate because tenant's conduct was unreasonable as it failed to pay rent on time, and failed to provide or provided inaccurate monthly sales information -- Tenant did not diligently attempt to pay rent on first of month, and it cavalierly ignored that requirement without landlord's agreement -- Tenant did not provide landlord with its monthly sales for any of 2021, which was breach of lease and was inherently unreasonable conduct -- Unreasonableness was exacerbated in context of tenant paying only half its rent at time while claiming that its sales were down, and landlord's specific request for sales information to assess tenant's situation -- Tenant significantly underreported its 2020 monthly sales to landlord, and its misrepresentation was unreasonable conduct -- Tenant's unreasonable conduct disentitled it to relief from forfeiture.

2189252 Alberta Inc (Tutti Fruitti Breakfast & Lunch) v. Harvard Developments Corporation (2021), 2021 ABQB 977, 2021 CarswellAlta 3100, G.S. Dunlop J. (Alta. Q.B.) [Alberta]

REA.V.14.j

Subject Title: Real property

Classification Number: V.14.j

Landlord and tenant -- Forfeiture and re-entry -- Damages

Plaintiff landlords entered into five-year lease agreement signed by corporate defendant as tenant and personal defendants B and R as indemnifiers -- Tenant took possession of leased premises for use as pharmacy, it paid rent for first two years of lease, and it then went into default and vacated premises -- Landlords gave notice of default and took steps to re-let premises to new tenant -- Landlords brought this action seeking damages based on breach of lease agreement -- Tenant and B had not filed response to claim, and claim proceeded against R as indemnifier under lease -- Landlords applied for judgment by way of summary trial -- Application granted -- Landlords were awarded damages of $119,129.85 consisting of loss of base rent for months that premises were vacant, as well as shortfall in base rent once units were re-let -- It was not possible to determine that landlords incurred legal expenses for which they were not otherwise compensated and made whole until proceedings were concluded and costs were addressed.

Asara Holdings Inc. v. 1041085 B.C. Ltd. (2021), 2021 BCSC 2350, 2021 CarswellBC 3783, Riley J. (B.C. S.C.) [British Columbia]

REA.V.20.k.vii.B

Subject Title: Real property

Classification Number: V.20.k.vii.B

Landlord and tenant -- Residential tenancies -- Termination of tenancy -- Practice and procedure -- Appeal or review

Respondent British Columbia House Management Commission (Commission) acted as landlord with respect to certain buildings owned by Provincial Rental Housing Corporation -- Petitioner tenant resided in one such building -- Tenant's rent was $368 per month, which was paid by provincial government directly to Commission as landlord -- Due to water ingress, building required full envelope remediation -- Exterior walls, windows and patio doors were being replaced, and items within rental units such as heaters and kitchen and bathroom fans were also being replaced -- On March 21, 2019, landlord issued notice of entry, requesting access to tenant's unit to conduct interior renovations -- Tenant refused access and changed locks to prevent unauthorized entry -- Landlord considered refusal of entry as breach of tenancy agreement and served notice of eviction -- Landlord applied to Residential Tenancy Branch (RTB) for order for entry to unit -- Tenant applied to RTB to cancel notice of eviction -- Tenant again changed locks on unit -- On May 15, 2019, arbitrator with RTB ordered tenant to permit entry by landlord -- On May 24, 2019, arbitrator dismissed tenant's application to cancel notice of eviction -- Arbitrator found that tenant violated tenancy agreement by failing to provide access to rental unit despite being given proper notice -- Arbitrator found there was breach oof material term justifying termination of tenancy -- At some juncture in time, tenant allowed entry into unit and renovations were completed -- Tenant brought application for judicial review of decision refusing to cancel notice of eviction -- Application granted -- Arbitrator's decision was patently unreasonable -- While arbitrator found breach of

material term of tenancy agreement, arbitrator failed to addresses question of whether tenant cured the breach within reasonable time -- Arbitrator noted two-day deadline imposed by landlord but did not assess whether time dictated by landlord was reasonable, given all circumstances, including tenant's specific circumstances such as advanced age, disability, and status as long-term resident -- In addition, notice of eviction was issued on same day as apparent material breach of tenancy agreement -- Tenant should have been given advance notice in writing that landlord considered tenant's conduct to be material breach -- Arbitrator also failed to address why landlord proceeded with eviction proceedings in regard to disabled and senior long-term tenant when order for entry was granted in first arbitration -- Tenant had changed locks back to original locks and landlord could have entered and completed renovations before second arbitration -- Arbitrator's decision was set aside and matter was remitted to RTB for reconsideration.

McLintock v. British Columbia Housing Commission (2021), 2021 BCSC 1972, 2021 CarswellBC 3180, Morellato J., In Chambers (B.C. S.C.) [British Columbia]

REA.VII.9.h.xv

Subject Title: Real property

Classification Number: VII.9.h.xv

Mortgages -- Foreclosure -- Practice and procedure -- Miscellaneous

Limitations -- Personal defendant purchased condominium which was later transferred to corporate defendant to allow corporate defendant to purchase certain property -- Promissory note was executed in favour of personal defendant -- Foreclosure proceedings on purchased property commenced -- Plaintiffs who held registered caveat brought action on mortgage, and funds were paid into court -- Action allowed -- Transfer of condominium and promissory note were bona fide transactions and not made for ulterior purpose or fraudulent preference -- Promissory note was enforceable, and unilaterally preparing promissory note did not render it invalid -- Personal defendant did not hold equitable mortgage by virtue of promissory note executed by corporate defendant in exchange for loan, as there was not evidence that personal defendant was informed of terms -- Plaintiff was not intended purchaser or transferee of lands at time it registered caveat and did not enter into lease with corporate defendant on basis that there were no previous encumbrances -- Caveat was intended merely to provide notice of leasehold interest to creditors and to potential purchasers -- Plaintiff's status as execution creditor and its purchase of lands was not made on faith of register -- However, personal defendant's judgment was out of time and had not been renewed -- Plaintiff's action did not seek remedial order in respect of claim based on judgment or order for payment of money -- No reason why personal defendant could not have made application under R. 9.21 of Alberta Rules of Court for renewal of judgment.

Sunridge Nissan Inc. v. Colony Homes Inc. (2021), 2021 CarswellAlta 3011, 2021 ABQB 928, O.P. Malik J. (Alta. Q.B.); additional reasons at *Sunridge Nissan Inc v. Colony Homes Inc* (2022), 2022 CarswellAlta 81, 2022 ABQB 15, O.P. Malik J. (Alta. Q.B.) [Alberta]
