

## Real Estate

## Appeal decision shows eligibility for new housing rebate is relative

By Ray Mikkola



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(April 25, 2018, 8:58 AM EDT) -- Experienced real estate lending lawyers know that some lenders require a person who might otherwise be a guarantor of a mortgage to go on title to become a mortgagor, even where the person acquires a very small ownership interest in the property. The reasons for this requirement are internal to the lender, and may be driven by credit policies, income requirements on owners, or the unwillingness of a lender to rely on their own guarantee documents despite their typically very broad terms.

These title requirements in turn tend to drive who is shown as purchasers on the agreement of purchase and sale. But in the case of the purchase of a new home, this can cause serious problems.

In *Cheema v. Canada* [2018] F.C.J. No. 199, Mohammad Cheema arranged for a friend, Dr. Din Mohammed Akbari, to execute the purchase agreement with the developer for a new home. On closing, title was directed to Cheema and his spouse as to a 99 per cent interest, and to Akbari as to the remaining one per cent interest. Akbari signed the mortgage documents and the closing documents, but also executed a trust agreement setting out that he was holding his one per cent interest as a trustee only for the Cheemas. It is unclear if the trust agreement was actually delivered to the seller or to the mortgagee.

The issue to be resolved was the availability of the \$24,000 HST new housing rebate. The minister disallowed the rebate, but the Tax Court allowed the appeal and held that the rebate was payable in full to the Cheemas.

The Federal Court of Appeal allowed the minister's appeal, holding that the rebate was not available because of the clear language of s. 254(2) (b) of the *Excise Tax Act* and s. 40 of the *New Harmonized Value-added Tax System Regulations, No. 2, SOR/2010-151*, (see s. 256.21 of the *Excise Tax Act*), which require that all purchasers, in order for any of them to qualify for the rebate, must intend, at the time of execution of the purchase agreement, to use the property as the primary place of residence of the purchaser or the purchaser's relatives.

The court held that as Akbari had no such intention and was not a relative of the Cheemas, none of the purchasers qualified for the \$24,000 rebate. It did not matter that Akbari was a bare trustee or that he was acquiring only a one per cent interest (and only as trustee), because the relevant condition for the purpose of qualifying for the rebate was the relationship of the purchaser to the builder, and not the relationship between the co-purchasers.

In any event, at the relevant time (that is when the purchase agreement was executed) there was no trust agreement in effect. However, the case makes it clear that the existence of the trust agreement in this case even at the time of executing the purchase agreement would not have changed the result.

The case is good authority for the proposition that if a non-relative agrees to execute a purchase agreement for the purpose only of ultimately going on title with the purchaser in order to obtain purchase financing, the new housing rebate will be denied to all of the purchasers.

The court held that the *Excise Tax Act* is principally a revenue generation statute, and that where, as in this case, the Act sets out clear requirements for a rebate, it is not necessary to undertake a “circuitous, serpentine and roundabout tour of various other provisions in the Act” to find out when the rebate is available.

The prospect of a purchaser not qualifying for the new housing rebate poses a risk to developers and purchasers, of course, because the developer may be crediting a purchaser with the full amount of the rebate, and taking an assignment of the rebate on the assumption that the rebate will be paid or credited to the developer in consideration for the payment of the HST by the developer in the usual course of the sale. The developer may later find that the rebate is unavailable.

To avoid this problem, purchasers should insist that a non-relative not be included as a purchaser unless he or she is intending also to occupy the newly constructed property as a primary residence. This may require a non-relative who is kind enough to assist a purchaser to obtain financing to limit his or her involvement in the mortgage transaction to that of a guarantor rather than as a co-owner so as not to imperil the availability of the new housing rebate.

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