

Real Estate

Fraud, fiction and the Land Titles Act

By **Ray Mikkola**



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(June 6, 2018, 9:00 AM EDT) -- When it comes to title and identity fraud and real property, the issue typically involves the conflict between the entitlement of a person to rely on the parcel register and a perhaps equally innocent person whose property rights have been compromised due to a fraud.

The 2007 amendments to the *Land Titles Act* (LTA) significantly affected the entitlement of a person dealing with land to rely on the register in the case of the registration of a "fraudulent instrument" (see sections 78(4) and 78(4.1) of the LTA). "Fraudulent instrument" is defined as including one which is registered by a "fictitious person" (see section 1 of the LTA). The LTA does not define "fictitious person."

In *1168760 Ontario Inc. c/o R&R Realty, Peter Clark & J.G. Rivard Limited v. 67006037 Canada Inc. & Denis Bertrand* 2017 ONSC 5149, the court considered whether the transferor was a fictitious person under the LTA.

Title was held by Bertrand as a trustee for himself and others.

On closing, he swore an affidavit that he was not one and the same as another Bertrand against whom executions totalling over \$350,000 had been filed. After closing it became clear that the affidavit was false. Bertrand also kept all of the sale proceeds, paying nothing to the other non-titled beneficial owners. After closing, those other beneficial owners sued the purchaser for, among other relief, an order that the purchaser held title to the property on a constructive trust in favour of the non-titled beneficial owners.

The judge accepted the argument that, as Bertrand had delivered a document in which he swore that he was not one and the same person as the identically named judgment debtor, he was therefore a "fictitious person" under the LTA. He found that the transfer to the new purchaser was therefore a fraudulent instrument and was void. The court ordered title to be vested in Bertrand and all other previously non-titled beneficial owners each as to their undivided beneficial ownership interests. The decision is under appeal.

Importantly, the decision stands as authority for the following:

- A person can be a fictitious person even if he is an actual person, based on a decision of the Supreme Court of Canada (see *Fok Cheong Shing Investments Co. Ltd. v. Bank of Nova Scotia* [1982] 2 S.C.R. 488), made in the context of the *Bills of Exchange Act (Canada)*;
- Even where the person is actually the owner of land and actually executes the transfer, he may be a fictitious person under the *Land Titles Act* if he swears an affidavit regarding executions in which "... he purported to transfer the property under a pretense of being someone other than the Denis Bertrand that was subject to the executions. He signed the transfer as the Denis Bertrand that was not subject to the executions, who was a different from himself [sic]"; and

- An executed and registered transfer can be held to be a forgery even if it is actually signed by the registered owner. Bertrand signed the affidavit swearing that he is not the judgment debtor, intending thereby to "make the transfer look genuine and with the intent to deceive the Land Registrar and the purchaser". The court held that "the affidavit is a false document and also the transfer document itself is a false document". The intention of the legislature to protect homeowners from fraud would be fulfilled "if the definition of a person who forges an instrument is interpreted to mean a person who executes or purports to execute an instrument if a person falsified the instrument". Bertrand can be considered to have forged the document (see paragraph 73).

The court noted several suspicious aspects of the transaction that suggest that the purchaser had actual notice of the terms of the trust, including the fact that the purchase price was well below market value, 50 per cent of the purchase price was paid as a deposit directly to the vendor (and not held in trust) and the purchaser and vendor used the same solicitor to act on their behalf (which the court held to mean that "each are deemed to have knowledge of each other's communications with their jointly retained lawyer."

In the end, the court held that the purchaser had "knowledge of sufficient circumstances to put a reasonable person on inquiry and as a result in the circumstances was not a bona fide purchaser without notice."

With respect, the case produces surprising results. The purchaser is deprived of its title despite having paid the purchase price to the person actually shown as the owner on title. Title is returned to Bertrand as to his share, and to the other co-owners as to their shares, despite Bertrand already having been paid once for the sale, and despite his having failed to share the sale proceeds with his co-owners.

Presumably, the same unhappy result for the purchaser would have been reached if the affidavit had been falsely sworn in respect of an outstanding execution for a very small amount.

The court dismissed the argument that Bertrand the trustee was a person different person from Bertrand the beneficial owner (because they "are the same person"), but would not conclude that Bertrand the vendor was the same person as Bertrand who swore the false affidavit (instead, throwing up as the transferor a second, fictitious Bertrand).

Although the finding that the purchaser had actual knowledge of the trust presumably could on its own support the result that the purchaser was not entitled to ignore the non-titled beneficial owners, it is the finding that Bertrand was a "fictitious person" that is attracting most of the attention to this case among real estate lawyers.

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