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Claims Wise No. 20: Conveyancing - Legal Descriptions by Thomas O. Boyne, Q.C.

Real estate practice continues to be the single area of practice giving rise to the largest number of insurance claims. This is, of course, not surprising when one considers that real estate practice is the largest area of practice and an area in which the practitioner is required to "certify" his or her work.

Some recent claims indicate problem areas which, to a large extent, arise out of poor conveyancing practices. Some examples are as follows:

(a) Two claims have been made in which the same property was conveyed twice. In one case, the same legal description was used and one might conclude that this error was simply an error arising out of a mistake made during title searching. The second case, however, involved two different legal descriptions for the same property. It has always been a practice in conveyancing to re-use the same description and consequently, when searching, one can too quickly review a legal description without determining whether it contains the property under search or, as in this case, is for the same lands;

(b) The practice of photocopying legal descriptions and re-using them lessens the opportunity for errors but it also means that, once an error has occurred, it is often not identified and can continue through several conveyances. These errors are usually of a typographical nature but can include the missing of the whole of a course. Claims are made from time to time in this area and are usually remediable through obtaining a Quit Claim Deed from a predecessor in title but they are, however, a nuisance and an expense to remedy. Care should be taken in reviewing legal descriptions and in comparing them to the approved plan of subdivision;

(c) Another source of problem arises from the practice in Nova Scotia of using the description page of the Deed to reserve, restrict or except the grant of the fee simple. It is a common practice to create rights-of-way, easements, restrictions and life interests by adding a paragraph to that effect in the legal description. Claims are now being managed with respect to the reservation of a life interest, the conveyance of an undivided half interest in property, and the reservation of a right-of-way. Although it is this writer's opinion that this is a poor conveyancing practice, it is the most common one. It is not uncommon to see such a reservation made in one conveyance and then to find that such reservation is not included in the description used in the next conveyance. Extreme care should be taken with legal descriptions and each legal description in the chain of title should be reviewed.

Although real estate claims continue to form the greatest number of claims, they are, in some respects, the easiest to deal with since there is an identifiable problem and, in most instances, a solution. Our Program has been successful over the years because of the encouragement of, and the willingness by, members to report claims early. At the same time the Fund has been willing to assist solicitors in remedying title defects from coincident title reviews, directing members to authorities, giving of Indemnity Agreements and undertakings, and paying the cost of a Quieting Titles application.

Of late, there appears to be some reluctance or indifference by members in reporting claims or in working to try to resolve them. Two claims were received by us in late May, the day before intended transactions. In both cases, the solicitors who

originally certified were notified in March of the potential problem but did little to resolve it and never reported it to us until the day before the closing. Claims are made from time to time with respect to minor items such as unrecorded Releases of Mortgage. These sorts of claims tend to arise because the solicitor who had undertaken to obtain the Release has not done it and does not respond to the new solicitor. As irritating as that may be to the new solicitor, the solution may often be much more quickly and cheaply obtained by contacting the mortgage company directly to obtain a new Release of Mortgage.

Some solicitors (very few) have a tendency to report a claim and then to ignore it thereafter. Although there are practical reasons, such as the limitation on repair costs and the $5,000 deductible, why a solicitor should assist the Fund in remedying the defect, a solicitor has a responsibility to his or her client and to the profession to act in a responsible manner when an error has occurred. A few members have also been quite unreasonable with respect to title objections which they have raised. From time to time, the certification of title requires the exercise of some judgment and reasonableness. Members should remind themselves that an objection which is unfounded and not supportable may leave that member liable to a client should the transaction not close because of it.

All members are urged to report early and to work with the adjuster and the claims review officers to resolve claims. It is in your own interest and the interest of the Fund and the clients to do so.

Claims Wise No. 21: Scope of the Retainer by Robert W. Wright, Q.C.

How often does it happen that we as lawyers, sometimes hurried and harried in the run of a day, fail to clearly define with a client the scope of the legal services we have been asked to provide? It can happen all too easily that we pay insufficient attention to this fundamental concern which will inevitably lead to an insurance claim when the disagreement or misunderstanding comes to light.

A retainer may, of course, be verbal or written; or it may be inferred from the conduct of the parties. If not in proper written form, at the very least a lawyer would be wise to make careful notes at the initial client interview of the duties he or she has been retained to perform. Where an issue later arises as to the scope of the retainer and it has not been reduced to writing, the onus of proof generally lies upon the lawyer to establish that the responsibility is limited.

We have seen a few recent examples of this pitfall. In one instance, a lawyer was asked by a client to simply prepare a Deed of conveyance of a family cottage property in favour of one of her daughters. He was provided with an earlier Deed to the property for reference purposes but was not asked to search the title or make any other usual checks such as compliance with subdivision regulations. On verbal instructions, the lawyer simply prepared and recorded the Deed as asked, using the same legal description as found in the earlier Deed that had been provided to him.

Subsequent to the conveyance, and after the Grantor had died, it was discovered by the Grantee that the cottage property had consisted of two consolidated lots, only one of which was described in her Deed. The conveyance is now said to be void and the lawyer is left to face the allegations that he had a duty to ensure that the Deed he prepared would be effective for its intended purpose even in the absence of a request for an actual title search.

Two other recent examples are to be found in the situation where the lawyers, having acted on commercial transactions, are later alleged to have failed to warn the clients against possible adverse tax consequences. In each case, the lawyer maintains that he was not retained to give tax advice but simply to ensure that the transaction was properly carried out according to the terms of the written commercial contract which had been presented to him. Not surprisingly, the clients now assert that they expected their interests to be fully protected in all respects of the transaction including a warning against possible adverse tax consequences.

Client expectations of the scope of legal services to be provided often have a way of widening once a problem later comes to light after the retainer is thought to be concluded. Unless the lawyer can

produce a written record in some form of the intended scope of his or her retainer, the discharge of the burden of proof then facing the lawyer will undoubtedly be a difficult task.

Claims Wise No. 22: Assessment Act - Collector's Right to Allocate by Jack A. Innes, Q.C.

A recent claim brought to light a potential trap for real property and commercial practitioners arising from, of all places, the *Assessment Act*, R.S.N.S., c. 23.

The facts are very straight forward. The solicitor representing the purchaser of a commercial building adjusts for real property taxes outstanding to the date of closing which total several thousand dollars. He then forwards a cheque in this amount to the Municipality in question with a letter which references the real property tax account number in the heading of the letter and a one-sentence statement as follows:

> Enclosed is our trust cheque in the amount of $_____ representing the amount required to bring the above-noted account up to date.

Upon receipt of this letter, the Municipality in question cashes the cheque and then responds three days later with a letter advising the solicitor that the funds received have been allocated among the following accounts and thereafter lists three business occupancy accounts with outstanding balances owed by the Vendor. This gobbled up two-thirds of the funds sent and the balance was applied to the real property tax account which should have been paid in full. The tax collector then made the following statement:

> This allocation is authorized under section 130 of the Provincial Assessment Act. A photocopy of Section 130 is enclosed.

Section 130(1) of the *Assessment Act* reads as follows:

"The treasurer shall, upon the written request of any person rated for rates and taxes, or assessed an occupancy assessment, who pays only a portion of the rates and taxes due by him, apply and credit the amount to such rates and taxes as that person may select, but when a person is assessed and rated in any taxation year in respect of personal property or occupancy assessment, as well as in respect of real property, *the treasurer shall apply* all sums of money *paid by or on behalf* of the person on account of rates and taxes for the taxation year, first, to the payment of the rates and taxes rated upon the person in respect of personal property and assessments and lastly, to the payments of the rates and taxes in respect to real property, and no person, so rated, shall be entitled to appropriate any payment in a manner inconsistent with this Section."

In effect, the Municipality in question assumed that the monies received were sent on behalf of the assessed owner according to their records and, therefore, Section 130 authorized the allocation to pay out overdue business occupancy taxes in priority to the realty taxes.

Without conceding the point that the Municipality was within its rights to do what it did under the circumstances, the reaction by the municipal unit based on Section 130 of the *Assessment Act* leads one to conclude that extreme caution must be used when paying realty taxes under circumstances where business occupancy taxes are also assessed and outstanding in the name of the Vendor in a transaction. In addition to designating the property account by number as was done in this case, it is suggested that the solicitor forwarding the cheque also point out in the letter that he or she is representing the new owner of the property, naming the person or company, the date it was acquired and pointing out as well that the enclosed funds are paid by and on behalf of the new owner and are to be applied to the specific tax account which is set out in the heading of the letter.

The suggestion made in the preceding paragraph is put forward notwithstanding the fact that the procedure and methodology used by the solicitor in question was consistent with the standard and usual practice followed by real property practitioners; however, knowing that at least one Municipality has sought to take advantage of this particular Section of the *Assessment Act*, one must assume that there are others which will attempt to do likewise.

Claims Wise No. 23: Legal Descriptions/Surveys by Thomas O. Boyne, Q.C.

Although I have practised long enough to recall older lawyers who retyped legal descriptions in every case, I can't ever claim to have actually practised law that way. A photocopier allows us to whip off unlimited copies of descriptions and it is now standard practice in conveyancing to simply photocopy the description as contained in the previous deed. That practice is quite safe, when dealing with an approved building lot in a subdivision, but can be quite risky otherwise.

Claims have arisen with respect to:

(a) using the wrong description;

(b) using a description which contains more or less land than was intended to be conveyed;

(c) a description which is so vague that it is impossible to determine the exact location of the lands where the vendor, the purchaser and their respective lawyers all had their own view as to where the land was located; and

(d) leaving out one page of a multi-page description.

The legal description is at the core of any property transaction and should be reviewed with some care at the time of the conducting of the title search and also at the time of the closing. The legal description is of little use in most cases unless there is a survey plan to which reference can be made.

It is highly risky to ever proceed with the purchasing or mortgaging of a property without a survey plan to which reference can be made. This is a separate issue from location certificates. A solicitor ought to review the legal description and the survey plan with the client to determine that the client is not only familiar with but recognizes the land which they are purchasing.

Several claims are outstanding where lawyers have not recommended a survey to their client and where the lands are mis-sized or mis-located. There are, as well, claims where lawyers have maintained that they did caution the client about the need for a survey but the client cannot recall any such representation. There is even one claim where a lawyer prudently had the client acknowledge in writing that the lawyer had advised them to obtain a survey and that they had declined. It is good practice to advise the client in writing of the need for a survey and, should the client decline for whatever reason, to have them acknowledge that decision in writing.