

BO BO THE SAINT BERNARD, LED ZEPPLIN AND VACANT POSSESSION

The problem which the organizers asked me to deal with can be summarized as follows:

I am sitting in my office and I receive a call from a distraught client who is parked outside of a home which she purchased just an hour or two before. It appears the vendor/tenant is still in the property. My purchaser client, her family and the moving van are all ready to move in, but everything is at a standstill until the property becomes vacant. What advice should I have for this client?

Likely, the best advice could be summed up in five seconds, "get a motel". However, the organizers asked me to deal with this problem for seven to ten minutes which is much like asking someone to lead a discussion on watching rhubarb grow. As everyone in real estate conveyancing knows, all of ones problems occur on Friday afternoon so I take you to a recent Friday afternoon.

It is a Friday afternoon and you are anticipating one of those rare romantic evenings alone with your spouse. It has been a long hard week and luckily the kids are away tonight. Your spouse has just called to say there is a bottle of Donini in the fridge, a presto log ready for the fireplace and your favourite Slim Whitman record on the stereo. All you have to do now is to drop in to Bargain Harolds to buy some aftershave, go over to IGA to pick up a McCains frozen dinner for two and you will soon be home gourmet dining and snuggling in front of the fire place.

Just then, the telephone rings and it is Mrs. MacPhee. It appears she is sitting in her compact car along with her husband, four children, a Saint Bernard dog, the kid's hamsters and the budgie outside the house you just bought for them. She says the vendors have not begun to move out of the house and likely won't be out for a day or so. I can see my fantasy evening changing to a nightmare with my den occupied by the MacPhee family. Their rotten kids have smashed my Slim Whitman collection and they are playing Led Zepplin. What's that their dog has done on my carpet? My wife - she is leaving me - for a litigator, has she no shame!! When I fade back into reality, I realize I have few options and they are:

- (a) Call Big Vito to see if he still has the tire iron and if he wouldn't mind dropping by the house;
- (b) Ask Mrs. MacPhee if her family owns a tent;
- (c) Have your receptionist break in on the call and say you have been taken to hospital with a heart attack;

(d) Start crying uncontrollably.

For some of you, the above four options may appear unwise and impractical. I would suggest, however, they are no more impractical to Mrs. MacPhee and her stranded family than a recitation of the law on a breach of contract, rescission, court procedures, etc. I doubt very much that the MacPhee family will get much comfort with the thought that in two years time a Court of Law might rule on this matter in their favour. The listing of your clients legal remedies at this time will be small comfort for your stranded purchaser. You should begin to pray that your client will not ask you a really difficult question which is:

"Should a reasonably competent lawyer have advised the purchaser to inspect the house before closing to make sure it is vacant?"

Returning to your clients dilemma, the very first step I would take in trying to solve the problem is to ascertain the scope of the problem. Experience teaches that there often is more to the story than your client knows or understands. Try to contact all interested parties immediately to see what the situation actually is. If you start firing from the hip without knowing all the facts, it can only make a bad situation worse. Hopefully, after checking into the situation, you will find out that the vendor or the tenant will be vacating by midnight or early tomorrow. If this is the situation, there is little to be gained by threatening the vendor and his/her solicitor. Remember, no matter how loud you yell, it still takes a reasonable amount of time to vacate a house and nastiness very seldom speeds up the process. You must acquaint your client with the reality of the situation that there is little you can do other than attempt to get some compensation from the vendor. Your client should get a motel and the moving van should be returned to its depot until tomorrow.

Before you allow your client to hang up the phone and go searching for a motel, point out in clear and unequivocal terms that you will be "attempting to get compensation". You should point out that there is no guarantee that the vendor will be reasonable, agreeable or even willing to entertain a discussion of compensation for motel costs, etc. Before your client books a suite at the Sheraton, make sure they fully understand you may have very limited success in obtaining any remuneration for them. If you fail to warn your client on this matter, they may misinterpret your remarks to mean that you will be able to cover all of their added expenses. Hopefully, a few calls to the vendor's lawyer will acquaint him or her with the urgency of the situation as you attempt to work out a financial deal to compensate your purchaser for the late charges for the van line, motel charges, etc. Most of the problems one has with finding the vendor still in possession after the closing relate to bad planning on the vendor's part, a mix-up over the

rental truck or a problem with the van line. Try not to turn this "tempest in a tea pot" into an all out war.

On the other hand, if the vendor or the vendor's tenant is still in the property and it is unclear when they will be out of the property, maybe you need a different approach. I recommend the van return to depot and your client go to a motel since nothing will be resolved today. As soon as you have ascertained that this is going to be a long term vacancy problem, see if you can stop the purchase monies from getting out of your control. You will have to be extremely careful in considering putting a stop payment on the purchase monies or when refusing to deliver the purchase monies. If you have already registered the vendor's deed, I believe your hands are tied and you must turn over the funds and cannot consider a stop payment. If you have already delivered the funds to the vendor's solicitor, you cannot consider a stop payment until you have made certain the vendor's solicitor has not released the funds or that the vendor's solicitor has not made a representation or an undertaking that they are in possession of the funds. A stop payment on the purchase funds, in these circumstances, would be to cause the vendor's trust account to be overdrawn and/or for the vendor's solicitor to breach an undertaking or representation to a third party. Stop payments should only be considered where you are absolutely certain, you, your law firm, the vendor's solicitor and the vendor's solicitor's law firm, will not be put in a compromising position.

In most circumstances, I would suggest that the vendor's solicitor, when being acquainted with the problem, will agree to return the funds or not process the funds until the matter has been resolved. If you are fortunate enough to have not registered the deed and to be able to retrieve the funds, then it is a fairly simple matter to deal with. Your client can now decide either to back out of the transaction and take their chances on retrieving their deposit or attempt to negotiate a compensation package to compensate them for their inconvenience. If the deed is already registered and the funds out of your control, you can still try to negotiate a compensation package and if you are not successful, then the courts will have to do it.

If there are tenants involved, proceed with great care. If possible, put the onus of getting the tenants out of the property on the vendor. If your purchaser wants to proceed with the closing and deal with the tenant himself, I would think it is extremely important that you check and re-check with the tenant all of the tenant information so you can be assured you have all of the correct information.

If the problem relates to the tenant in possession of the property and you have the option to proceed with the closing with the tenant in possession or delay the closing until the tenant is put out of possession, chose always to delay the closing. There may be

reasons why you cannot delay the closing and must complete with the tenant still in possession. Barring these, it is always wiser to hold on to your cash until the tenant has vacated. This way, the entire cost of putting the tenant out will be paid by the vendor, and if the tenant does not vacate, it is ultimately the vendor's problem and not the purchaser's. On the other hand, if your purchaser decides to close with the tenant in possession, it may turn out to be a far longer and more expensive process than originally thought.

No matter what advice you give your distraught purchaser, I do not believe they are ever going to be happy with either your advice or the outcome. In addition to being unhappy with your advice, sooner or later, they will come to the conclusion that this entire scenario was totally unnecessary. When a client makes this type of phone call, it indicates one of two items has happened. Firstly, that the lawyer failed to give their client good advice, or secondly, the client failed to follow the advice. Each and every purchaser's solicitor should, well in advance of the closing date, acquaint their clients with the importance of doing an inspection to make sure the house is in the proper state of repair and that the property is vacant. Clients should be expected only to inspect property once it is vacant. If I had given my client this advice, she would not be calling with this problem unless she chose to ignore my advice.

At the same time as the purchaser's lawyer is cautioning his or her client about vacant possession, the vendor's lawyer should be acquainting the vendor with the requirement to have the property vacant on closing date. When discussing vacancy with your vendor, bear in mind that a high percentage of our clients do not follow instructions nor do they always understand English. With this in mind, take time to quiz your clients about their plans on having the building vacant. Explain to them the difficulties involved if it is not vacated on the closing date. Try to encourage them to have it vacated the day before. Many of our clients regularly misinterpret the true meaning of the word "vacant" so it is always wise to refresh their memory on this matter. It would appear that a large percentage of our clients are under the impression that the word "vacant" means "partially vacant". This appears to give them, in their opinion, the right to leave car wrecks in the back yard, endless bags of garbage in the basement and an old broken deep freezer on the property, etc. I advise my clients that vacant means "broom cleaned". I explain to my clients that everything has to be removed from the premises except for the small particles of dirt that rough broom cleaning leave behind. It is obvious to me that based upon the facts of the MacPhee transaction, both the vendor's and purchaser's lawyer failed to properly advise their clients.

As a matter of course, do not transfer the purchase funds to the vendor's solicitor until your client has done the inspection and

has confirmed the house is vacant. On a number of occasions, I have had clients do their inspection and be either extremely tardy in calling me to advise the results or forget to call to indicate everything was satisfactory. Many clients, in the excitement of buying their first home, forget your instructions about calling the office until two or three days later. This puts the lawyer in a very bad position since you have likely indicated to your purchaser you will not release the funds until you have heard about the inspection. When your client forgets to call to report on the inspection, the vendor's solicitor becomes extremely agitated with the delay in getting the funds. I have overcome this problem by advising my clients that if I don't hear from them by a set hour, we agree that everything is satisfactory and I can release the funds. Thus, if they call back three or four hours late complaining about the house being occupied or extensive damage in the house, they have no one to blame but themselves. From time to time, I encounter vendor's solicitors suggesting that I am being a bit of a "pain", but I remind them that it is the vendor's responsibility to have the property vacant and if the property was vacant, they would have the money.

The vendor's lawyer's advice to his or her client about vacant possession should be given well in advance of the closing date. This will allow the vendor adequate time to make arrangements to have the property vacated well in advance of the time of closing. It is not much good to advise your vendor to have the house vacated by noon hour on the closing date if your advice is given the day before closing and the moving van has already been hired to attend at the property at 1:00 p.m. on the closing date. Give your advice early.

Most of the inspections are done with the real estate agent and you should instruct your purchaser to advise their agent that they do not wish to do the inspection until the property is vacant. I further instruct my purchasers that if they arrive at the property and the property is not vacant, they are not to do an inspection and to make another appointment to inspect the property once the property becomes vacant.

Another consideration to help avoid some of the problems relating to vacancy is to amend your standard agreement to specify the time of day the building must be vacant. If the contract called for vacancy by 11:00 a.m. on the closing day, the vendor is aware of his/her obligations from the first day and likely most vacancy problems would be avoided.