CLEARING TITLE OBJECTIONS QUICKLY

One of the frustrations of property practice is being faced with a pile of title objections - or even one - that you are convinced are without merit. The other lawyer raising the objections is, of course, equally convinced he or she is right and you are incredibly lax. Sometimes this is because you have facts in your possession that you cannot easily put on record, sometimes because you and the other lawyer differ on the probability a claim could arise, and sometimes because one of you is less prepared to take on the responsibility of exercising professional judgement.

Some lawyers faced with this situation offer to certify to the purchaser's lawyer. More often than not this offer is rejected. The purchaser's lawyer does not want to face the same problems on the sale in a few years. Sometimes there is a reasonably friendly *Vendors and Purchasers Act* application. I have even heard of them being uncontested or agreed, which does not provide the level of freedom from liability I would look for, but some lawyers accept the order. Actually, since the beneficiary of a serious title objection is not a party to a Vendor's & Purchaser's application, there may be some doubt how much protection anyone gets.

The *Land Registration Act* provides a way to get around this problem, more certainly and at lower cost, **IF** you as vendor's solicitor are professionally secure in your belief the title objection is essentially unreal. I am not referring to the adjudication provisions of the *Land Registration Act*, which are likely not going to come into effect immediately if at all. I am referring to the most fundamental of all the *Land Registration Act* provisions: Section 20.

Section 20 provides that
"the registered owner of a registered interest owns the interest defined in the register".
There are exclusions: discrepancies in location, boundaries or extent. The *Land Registration Act* does not provide any guarantee of <u>what</u> a registered owner owns. This is similar to the difference between a solicitor's certificate and a surveyor's certificate. Additionally, there are the overriding interests in Section 73: Crown interests, municipal liens, leases under three years (in possession), utility interests, easements in use, adverse possession or prescription gained prior to the coming into force of the *Land Registration Act*, certain statutory rights, Worker's Compensation liens or express statutory overrides (of which there are none at present).

The importance of Section 20 in debated title situations is simply that it can provide a title to which no one can take objection. Once the property is registered as clean under the *Land Registration Act*, title is near perfect, clear of virtually all of the warts it may have acquired over the years. Therefore, when you and the solicitor for the purchaser cannot agree on the validity of objections to title or their resolution, if you are absolutely convinced of the validity of your position, rather than a *Vendor's and Purchaser's Act* application simply register the parcel being sold. The purchaser then receives a (nearly) squeaky clean title. There is no fee and you ought to have all of the necessary information. Agreed objections that will be resolved, such as a mortgage, can be shown.

Before we get too far down this yellow brick road, let us consider what the "if" in the last paragraph means.

The first thing we think about is Section 37: subsections(4) and (10) require an affidavit of verification, and subsection (11) sets up liability for negligent errors or omissions. I do not think we have to consider fraud although the *Land Registration Act* does deal with it. The next thing is the requirement to follow practice standards, using professional judgement. If our judgement is not professional we are inviting action from the Bar Society on grounds of either competence or unprofessional activity or both. These are not actions I would willingly invite into my office. Also at risk, of course, is our standing in the community: personal and professional reputation. So we had better be absolutely convinced of our position. Perhaps moral certainty is the rule to apply.

I will refer you to the case study that anchors this conference, particularly Schedule C, the objections to title.

Some of these objections are dealt with specifically in the *Land Registration Act*. We may all of us want to keep a copy of Section 40 (as amended) glued to our desks, as the first resolution of many title objections. Here it is:

40 (1) For the purpose of this Act, an unreleased security interest that is more than forty years old and that has not been amended or supplemented by an instrument registered during the preceding forty years is not an interest in a parcel.

(2) For the purpose of this Act, an unreleased dower interest is not an interest in a parcel.

(3) For the purpose of this Act, an interest that has escheated to Her Majesty from any person other than the immediate predecessor in title of the applicant is not an interest in a parcel.

(3A) For the purpose of this Act, a conditional sales agreement or lease with respect to fixed appliances, furnaces or other heating devices dated more than ten years prior to the date of first registration is not an interest in a parcel.

(4) A person who has an interest referred to in this Section is entitled to compensation if the parcel in which the interest is held is registered pursuant to this Act free of that interest.

Consider the title objections in our case sample. The first used to be difficult, especially the marital status of A back in 1947. Now we can say "Re item 1, kindly refer to *Land Registration Act* subsection 40(2). Unfortunately, Section 40 does not apply to non-Land Registration Act transactions. But if Mrs. A is still alive her property interest (if it is still enforceable) is converted to a monetary interest and compensation comes from the government, not the Liability Claims Fund. In other words, it is a risk the government has determined it can absorb. Notice that in the case sample none of the missing spouses came from transactions after October 1, 1980.

The second objection is of the same kind. "Kindly refer to subsection 40(1)". Here we have to be sure there is nothing on record concerning this mortgage that suggests it is still alive and well, such as an amendment.

The third objection is considerably messier. If possession or the *Marketable Titles Act* have eliminated the interest, that is one thing. Remember the limitation period drops to twenty-five years. Otherwise it might be valid. When you have all of the necessary information you may be prepared to certify. If you are convinced but the other side is not, perhaps it is time for Section 20, and you put the property in the system. For audit and, if necessary, defence purposes it is essential that all of the information on which you based your professional opinion is available with the abstract, verified by affidavit where possible. Your abstract also ought to show exactly how title was established in your mind.

Objection 4 is another case of finding out whether possession will dispossess G or I. As against G there only needs to be twenty years since G was of the age of majority and there is no indication G is incompetent. Being out of the province is no longer considered a disability.

Note that that the changes to the *Limitation of Actions Act* apply to everyone in the Province, not just Colchester, once the *Land Registration Act* is proclaimed.

Next is another issue related to possession, and number 6 is the same problem. Both may be fatal objections, may be resolvable by a court application or may be overcome by Section 20 of the *Land Registration Act*.

The other objections have been dealt with by other speakers.

Some other issues that arise in the context of the Whiteacre sale:
the burner agreement is overruled by *Land Registration Act* ss. 40(3A);
given J was a widower and the last conveyance was to him before the *Matrimonial Property Act* came into effect October 1, 1980 there are no matrimonial property issues;
the lots appear to each date from a time prior to subdivision control, and at least before the last validation;
there is no evidence any vendor was a non-resident.

In pursuing how to deal with objections one has to consider the professional standards in a new light. A purchaser's solicitor in the case of Whiteacre has been cautious. As we have seen, there is an element of overcautiousness due to failure to completely absorb Section 40 of the *Land Registration Act* but most of the other objections have to be dealt with. The error is a failure to observe standard 1.1: Legislative Review.

If a lawyer determines to use Section 20, by registering the vendor's property as an answer to title objections, it is essential to follow all of the standards since, if you turn out to have been mistaken, that will be your only defence. On the other hand, that gives you the opportunity to actually exercise your professional judgement as in cases of possession or prescription, or otherwise as in instances of a near miss on a judgement, a 70 year old life lease to a parent

and other title issues - and make it stick. At the very least, we ought to eliminate most of the objections for form's sake: "I agree that this is not a real problem but the next lawyer may not be of the same opinion". The real advantage of the *Land Registration Act* is that there will never be "a next lawyer" searching this title.

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