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How Good is the Other Solicitor's Undertaking?

It is customary in this area for lawyers to accept the undertaking of another solicitor in connection with the closing of a property transaction.

Such undertakings are often to the effect that the solicitor for the vendor, having been placed in funds, will pay out and obtain a release of outstanding mortgages. Other undertakings may relate to payment of taxes, obtaining confirmatory deeds, or any other documents required to tidy up the title. It is not unusual for one solicitor to hand over the total purchase price in return for such an undertaking. It is good practice to obtain such undertakings in writing but such is the reliability of the Bar in general that this has not been deemed necessary in a large percentage of closings.

Recent Cases

Several recent cases raise serious questions regarding this practice and may give cautious solicitors cause to reconsider their traditional way of doing business.

McFadden v. *Pye*, 6 R.P.R. 198, was a case for specific performance. On the closing date, the solicitor for the vendor tendered all documents necessary for closing together with his written undertaking to discharge a registered mortgage. The Court dismissed the plaintiff's action, holding that failure of the vendor to provide the discharges of mortgage which had been requested by the purchaser, disentitled him to specific performance. Griffiths, J. stated as follows:

> "Two decisions of this Court, *Fong v. Wienper*, [1973] 2 O.R. 760, 35 D.L.R. (3d) 244, and *Garfreed Const. Co.* v. *Blue Orchid Holdings Ltd.* (1967), 15 O.R. (2d) 22, 1 R.P.R. 79, recognized that in the normal course many transactions of purchase and sale are closed on an undertaking to discharge a mortgage. Those decisions held, however, that where the parties are standing on the strict terms of their agreement, as they were here, then the purchaser is entitled to insist that the vendor comply with the agreement by producing and registering discharges of all mortgages on or before the date of closing. The failure to produce the required discharge disentitles the vendor to a decree of specific performance.
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> In the *Fong* v. *Weinper* case, supra, Pennell J. observed that the insistence on production of the actual discharges of mortgages as a condition to the right of the vendor to enforce the agreement of purchase and sale, may appear to create "a mechanical or even a harsh result". In this case the equities are all in favour of the purchasers; the result is not harsh and I have no hesitation in giving effect to their technical defence."

The Ontario case of *Cain* v. *Genereux* 21 R.P.R. 156 indicates that the Court is prepared to take drastic action to enforce an undertaking by a solicitor. In that case, the solicitor acted for the vendor and gave a personal undertaking to discharge all encumbrances. After he failed to do so, an application was made to the court and he was ordered to carry out his undertaking. Upon failure to do this and even although he had not converted any of the money to his own use, he was held in contempt and fined $1,000 or three months in jail in default.

Reliance on Undertaking

But what of the lawyer who relies upon an undertaking from another solicitor? In the case of *Polischuk* v. *Hagarty* (1983) 149 D.L.R. (3d) 65, the solicitor in question was acting for a purchaser. Without consulting his client, he accepted an undertaking from the vendor's solicitor to obtain and register a discharge of a mortgage on the property. The vendor's solicitor was a reputable laywer of many years standing and all previous undertakings by him had been duly honoured. The purchaser's

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solicitor advised his clients what he had done and they did not object.

Evidence given at the trial indicated that what was done was in compliance with normal conveyancing practices in the area.

Unfortunately, the solicitor for the vendor had severe financial problems and died shortly thereafter and the mortgage was not paid by him.

The Court held the purchaser's solicitor was liable for the loss. Henry J. stated as follows:

> "Accepting that the defendant solicitor acted on the closing of the transaction in accordance with the general practice of ordinarily competent solicitors, that does not end the matter. He was retained to carry out the terms of the clients' agreement of purchase and sale and not to substitute other terms for it. In my opinion, there is no principle of law or professional dealing that justified him in failing to enforce the contract, as written by his clients, unless he received instructions to do so, or the matter was clearly left to his discretion, after he had given advice on it.
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> While solicitors in London had adopted the practice followed by the defendant, as a practical way of closing transactions, where a discharge of mortgage was not readily available to carry out a vendor's obligation, I cannot accept that the profession was justified in imposing such a practice upon the lay public, their clients, without their knowledge and consent. The plaintiffs in this case were not at any time before closing made aware of the general practice and not only did not authorize the defendant to depart from the terms of their bargain in this way, but had no opportunity to receive advice about it or even to authorize the defendant to use his own discretion and judgment, in overcoming practical problems, by accepting other than the discharge, to which they were entitled, upon payment of their money to the vendor's solicitor.
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> In *Major* v. *Buchanan et al.* (1975), 9 O.R. (2d) 491, 61 D.L.R. (3d) 46, Goodman J., in a characteristically thoughtful and carefully reasoned judgment, set out the principles that govern the relations between solicitor and client in such circumstances and cited the authorities upon which I need not further elaborate, except to say that I find his judgment most helpful in this case.
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> When the defendant decided to accept the undertaking to discharge the mortgage, instead of requiring a title free of all existing encumbrances, he embarked upon a course of action that his clients had not authorized. That was not the exercise of professional skill and judgment; he simply exceeded his authority in that he paid his clients' money in full to the vendor's solicitor and did not receive what they had purchased. In so doing, he personally assumed any risk inherent in his unilateral course of action.
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> His duty to his clients was, however, to inform them that a departure from the contract of purchase and sale was being contemplated and to advise them as to the course that they should instruct him to pursue. It is at this point that the exercise of his professional skill and judgment comes into play—he must then inform them of the implication of the proposed course, apprise them of the risk inherent in it, and once having advised them in accordance with the standard of a reasonable, competent solicitor, and being satisfied that they appreciated the risk, take and act upon their instructions. It is ony when the clients have appreciated the risk, in accordance with competent advice, and have nevertheless, decided to proceed with the proposed course, that they can be said to have assumed the risk of loss themselves. The defendant did not discharge this duty to his client and so was in breach of his retainer; and he cannot now look to them to assume the risk of loss that they had no opportunity to appreciate and to accept."

In assessing damages the Court took the view that the clients probably would have gone along with the arrangement if they had received the proper advice they should have and awarded nominal damages of $500.

This outcome, as to damages however, cannot be relied upon as setting a standard with respect to damages and the purchaser's solicitor's liability appears to be clearly spelled out.

It may well be that the total impact of these cases will change the present practice in this area so as to avoid liability. The present system has worked well for generations and such a consequence would be unfortunate, but it may be inevitable given the alternatives.

Charles W. MacIntosh