

A Commentary on Practice Issues of Relevance to Real Estate Lawyers

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Practicing as a real estate lawyer remained essentially unchanged from the early 1800s until I started practicing in the mid- 1980s. It was somewhat of a coincidence that since then we have experienced some significant changes in the substance and form of real estate practice first with the *Land Registration Reform Act* which gave us the standard form of Transfer, Charge etc. Then we had the introduction of electronic registration which started in my home County of Middlesex. Finally, the introduction of title insurance into the real estate transaction which although available in Ontario as far back as the 1930s suddenly became mainstream in the early 1990s.

I have been invited by our friends at The Stewart Title Guaranty Company to comment on three other areas of real estate practice which while not as dramatic as those mentioned above do deserve some attention and hopefully will be of interest to the reader: Those topics are as follows:

1. What can real estate lawyers expect from the recent “unbundling” of real estate services usually provided by realtors.
2. Has the introduction of the Seller’s Property Information Sheet (SPIS) impacted on the principle of caveat emptor.
3. Adverse possession and the “inconsistent use test” with a postscript on prescriptive easements.

So, without further ado here are the topics and my comments.

“Unbundling” of Real Estate services

Section 5(1) (g) of the *Real Estate and Business Brokers Act, 2002, S.O. 2002, c.30, Sched. C* provides that registration as a real estate broker or salesperson is not required where:

“a solicitor of the Superior Court of Justice who is providing legal services if the trade in real estate is itself a legal service or is incidental to and directly arising out of the legal services”

It is probably fair to say that most real estate lawyers have not taken advantage of that provision and have restricted practice to delivering legal services to a client after conclusion of negotiations and execution of the Agreement of Purchase and Sale by the client usually with the assistance and guidance of a realtor. There are of course exceptions and I would single out PropertyShop.ca as an organization which has embraced the role of a lawyer becoming involved at the very outset of a client's path in selling or purchasing real property. The concept is not new; it has been standard practice in Scotland for some years for lawyers to effectively be engaged by a client at the beginning of a sale or purchase and to take on many of the duties which here in Ontario are usually undertaken by realtors.

It has to be acknowledged that lawyers in Ontario have been fortunate, in most cases, to have escaped professional responsibility for problems arising out of poorly drafted Agreements of Purchase and Sale because the realtors usually drafted them without any input from lawyers. However, that may be about to change!

On October 24th 2010 the Competition Bureau Canada announced that an Agreement reached with the Canadian Real Estate Association (CREA) and ratified by CREA's members would allow Canadians to choose which services they wanted from a real estate agent. The Agreement was prompted by action which the Bureau had initiated against CREA for essentially forcing clients to agree to pay a commission at a fixed rate for a full slate of services in order to access the Multiple Listing Service available to registered realtors. Failure to agree to such terms meant exclusion from the MLS system and the Bureau's position was that these rules were anti-competitive and discriminatory. So, the Agreement now allows individuals to select the services they require of a realtor and which may be as minimal as having the property listed for sale and nothing further. The intention being that the seller and prospective purchaser are free to negotiate and draw their own agreement.

There is no doubt that there was already a need and demand for a less restrictive environment for the sale and purchase of real estate as is evidenced in recent years by the sprouting of private websites facilitating the advertisement of property for sale, “do it yourself” packages and kits and so on. So, we cannot say that the Bureau’s interest in this issue was generated in a vacuum. What we can say, in my opinion, is that the agreement reached with CREA may very well become a nightmare not only for the public at large but for lawyers. And this is where I suggest real estate lawyers will be well advised to have a lifeboat ready for the ensuing flood of problems!

It seems to me that if and when the public at large decides to circumvent the services of realtors they will likely turn to lawyers for assistance in negotiating and preparing Agreements of Purchase and Sale. Clients may very well then also rely upon lawyers to ensure that the background information available is accurate. So, we should first focus on what a lawyer might be retained to do and I would suggest that we have four possibilities:

1. Confirm information, negotiate an agreement and then prepare the document.
2. Negotiate an agreement and then prepare it.
3. Prepare an Agreement only based upon the information provided by the client
- 4 Proceed with a transaction based upon a “homemade” agreement put together by the parties.

Lawyers who are expected to protect the client’s interest completely throughout the process will be put in the same position as a realtor who is guiding the client through the sale or purchase process. I have no doubt that the Courts, if and when they are asked to judge a lawyer’s obligations in this regard, will expect a higher standard from lawyers than realtors so it is worth taking time to see what the Courts have said about realtor obligations.

In *Adshade v. Auld*, 2010 NSSC 77 Justice Suzanne Hood of the Nova Scotia Supreme Court was adjudicating a case which involved a purchaser’s complaint that the realtor had failed in her duties to enquire about parking and a right of way serving the property being purchased by Adshade. The realtor had reviewed the listing agreement, called the listing realtor, visited and inspected the property, reviewed a plot plan and although had not inserted any provision in the Agreement of Purchase and Sale about parking had made it subject to lawyer review. The Court eventually held that the realtor had met

the duty of care which in essence, applied to the hypothetical “reasonable person” which is:

“to exercise such reasonable care as the circumstances require”

That of course is hardly earth shattering news to any reader but what was worth noting in this case is that the lawyer had also been sued for failing to follow instructions to “check the parking”. Fortunately, the action against the lawyer was dismissed on the basis of a non-suit motion made at trial. However, the lawyer was subpoenaed by the plaintiff to testify. Unfortunately, the lawyer’s notes were not detailed; one conversation was recorded as “please review agreement” and the other was just a phone number. The Court found that the lawyer had received no such instructions to check the parking.

A 31 page decision followed a 6 day trial in *Manarin v. Stemaschuk Doucette Realty Ltd and Leckie, 2010 BCPC0081*. This was a Provincial Court matter which resulted in damages being awarded to the aggrieved purchaser in the grand sum of \$574.00! There are only two quotes of interest for our purposes in looking at the duties of a realtor. The Court summarized the submissions of the purchaser/plaintiff one of which was:

“The Real Estate Licensing Manual provides many warnings to realtors that negligence may be found if they fail to verify information in a Listing Agreement and that realtors should take all reasonable steps to obtain accurate information and that failure to do so may amount to negligence”

The other quote, of particular relevance to lawyers, is that in commenting on the duty of care the Court said:

In order to establish the duty of care [the plaintiff] must show that [the realtor] was a person possessed with special skill or knowledge and that a reasonable person would conclude that [the plaintiff] was relying upon such skill or judgment.”

Even where a lawyer has no involvement in the negotiations and is faced with a firm Agreement of Purchase and Sale he or she can be subjected to litigation. In *Kotowich v. Petursson* [1994] M.J. No 60 The Manitoba Court of Queen's Bench dealt with an action for damages for negligence alleged against both the realtor and lawyer. The realtor had the purchaser sign a waiver with respect to a condition that the zoning for the subject property would allow a rooming house. Unfortunately, the City of Winnipeg issued an incorrect zoning report (thank goodness we have title insurance in Ontario!) and the purchaser signed the waiver. Notwithstanding that the lawyer received a firm Agreement after the waiver was signed the purchaser client argued that he should still have checked the zoning. The Court held otherwise and the action against the lawyer was dismissed. Although the realtor was aware of the importance of the zoning the realtor did not make sure that the client had satisfied herself that the issue was resolved and simply pressured her to sign the waiver.

In dealing with the obligations of the realtor, which in my opinion and by extension will apply to lawyers in a similar situation, the Court cited a passage in *Hawryluk et ux v. Korsakoff & Associated Realty Agencies Ltd* [1956] 20 W.W.R. 394 (Man C.A.) which was dealing with a carelessly drawn offer to purchaser. The Court of Appeal said:

"It must be remembered that offers to purchase are frequently made by and submitted to individuals with little or no knowledge of real estate transactions"

That very situation, I am going to suggest to you, is where we may very well be heading in Ontario. In any event the Court went on to say:

"Of necessity and with propriety, such individuals rely on the professional knowledge and skill of the real estate agents... The vendor and purchaser are surely entitled to expect that such agents will carry out their duties without the likelihood of either vendor or purchaser having to meet the expenses and the uncertainties of a law suit"

Clearly, the above decisions and comments will relate to situations where lawyers might find themselves assuming realtor type duties and responsibilities. Even when the lawyer only assumes the responsibility for drafting an Agreement of Purchase and Sale there are obviously responsibilities to the client. In *Brian McFarlane Enterprises Ltd v. Goodman and Carr and Gordon Fox* 1994 CanLII 1391 (ON C.A.) the lawyer was found, at trial to have been in breach of contract and negligent for failing to meet the duty of care in drafting an Agreement. Essentially, the finding of liability hinged on the finding that the lawyer failed to clearly tell the client the document was a draft and for discussion purposes only. Fortunately, the Court of Appeal held that the lawyer had

been retained to draft an agreement, which he did, in accordance with the instructions of the client. The happy outcome was that the judgment was set aside and the action dismissed. Two things which are important about this short Appeal judgment is that the Court focused on the scope of the retainer and secondly the Court had noted the lawyer's "*inadequate note-keeping [which] impaired somewhat his ability to defend the action*". Obviously the lesson here is to make sure the retainer is clear and if possible in writing (a formal retainer agreement, letter or even an email could suffice). Secondly, keep adequate notes to protect oneself from claims of negligence or failing to follow instructions.

By way of reinforcement of some of the foregoing comments it is useful to head back to the Court of Appeal of British Columbia and its decision in *Shiokawa v. Pacific Coast Savings Credit Union and Woods Adair* 2005 BCCA 95 (CanLII). That matter dealt with a fraudulent mortgage transaction enabled by the use of a fraudulent Power of Attorney. The Credit Union was appealing the dismissal of its claim against the lawyers retained in the transaction. Fortunately, the lawyers successfully resisted the appeal but it is of importance to see what the Court said.

First, it cited *Midland Bank Trust Co. Ltd v. Hett, Stubbs & Kamp (a firm)*, [1978] 3 All E.R. 571 (Ch. D.) for the proposition that:

The retainer defines the extent of a lawyer's duties, and any implied duty of care must be related to what he or she is instructed to do."

The Court also went on to say:

"However, the lawyer is also under a duty in tort to exercise reasonable skill and care in undertaking the work to which the retainer relates. This may, depending on the specifics of the retainer, require the lawyer to make enquiries in order to protect a client's interests, and require a lawyer to report to and receive further instructions from a client as reasonably necessary"

The Credit Union had argued that there were special circumstances, as detailed in the trial, which placed a duty on the lawyers to check the validity of the Power of Attorney used in the transaction. The Court found otherwise, holding that the Credit Union had reviewed the Power of Attorney itself and decided to proceed with the mortgage

transaction. The instructions to the lawyers simply required them to “ensure power of attorney is satisfactory for this transaction”. The Court found that this required the lawyers to ensure the document was acceptable to the Land Titles Office but not to ascertain the authenticity of same. In any event the Court found that the trial judge had erred because the circumstances, known with the benefit of hindsight, should have been reviewed in the context of the client’s instructions and from the reasonable lawyer’s point of view.

In addressing the alleged breach of fiduciary duty to the Credit Union and the lawyer’s failure to report certain information to the client the Court noted:

“Where a lawyer with no personal interest in the matter does not alert a sophisticated client about information outside the scope of the retainer (my emphasis) and nothing else indicates that the client is relying on the lawyer for that information, the lawyer will not be in breach of fiduciary duty”

Finally, I wanted to comment on yet another decision from British Columbia not because of any personal attachment to that jurisdiction but because it simply set out a checklist for a lawyer’s obligations when accepting a retainer! The facts In *Lau and Aptex Canada Corporation v. Oglilvie* 2010 BCSC 1589 were particularly sad in some respects as you will see. Almost twenty years before the litigation the lawyer had prepared an Agreement of Purchase and Sale for a prospective purchaser of land ripe for development. The agreement was conditional upon the municipality approving the subdivision for the lands which was in fact granted. However, because certain conditions attached to the consent were not met in time the closing did not take place. The action for specific performance was lost because the condition was a true condition precedent and as it was not fulfilled the agreement was null and void. However, the vendor also defended the action on the basis that the agreement was vague and uncertain and therefore void for uncertainty. The purchaser lost the action. The purchaser (through its assignee) then proceeded to sue the lawyer for:

“breach of contract or breach of duty for failure to exercise the due care, skill or diligence required of a solicitor in advising the potential purchasers and in negotiating, drafting, revising and settling the Agreement”

First, in reflecting the same comments in other cases noted above, Justice Masuhara said:

The retainer defines the extent of a lawyer's duties, and any implied duty of care must be related to what the lawyer is instructed to do ... A lawyer is also under a duty in tort to exercise reasonable skill and care in undertaking the work to which the retainer relates"

The obligations of a lawyer were then set out as defined in *Tiffin Holdings Ltd v. Millican* (1964) 49 D.L.R. (2d) 216 (and said to have been adopted in many other decisions) as follows:

1. *To be skillful and careful*
2. *To advise the client on all matters relevant to the retainer, so far as may be reasonably necessary*
3. *To protect the interest of the client*
4. *To carry out the client's instructions by all proper means*
5. *To consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer*
6. *To keep the client informed to such an extent as reasonably necessary, according to the same criteria.*

By way of balance, the Court proceeded to cite a comment set out in another case, *Midland Mortgage Corp. v. Jawl & Bundon*, 1999, BCCA 183:

"While the nature of the solicitor's obligation is to take reasonable care and skill in the management of the business entrusted to him, he is not an insurer of his client's commercial success."

Unfortunately, during the intervening years the lawyer had suffered a stroke and had significant mental issues. His evidence at trial was less than useful in establishing the scope of the retainer. There was little in the lawyer's file which could assist the Court. There was no written retainer although the account for services rendered did include a description of some the work done. On the other hand there was also nothing in the file to support the plaintiff's allegation that the retainer extended beyond the drafting of the Agreement. In any event, it was noted that some of the provisions of the Agreement were drafted by the vendor's lawyer and that negotiations had been hard. There are

many other useful comments in that case but in the end result the case against the lawyer was dismissed.

Suffice to say that all of the above demonstrates the care with which real estate lawyers should embrace instructions and retainers from clients to fill the void left by the lack of a realtor in the transaction. Clear instructions as to what is expected from the lawyer are obviously paramount. However, there is one other issue which must be addressed and that is the issue of liability insurance. I am certainly not well versed in insurance issues however I can provide the following.

As you know every practicing lawyer in Ontario is obliged to carry errors and omissions insurance through LawPro. However, the policy limits coverage to the provision of legal services and so there is obviously a question as to what services we provide to clients in terms of a real estate transaction which may be outside of "legal services". While it is clear that negotiating and preparing contracts is within our normal function as lawyers perhaps attending an open house would not be. Written submissions were made by the Law Society to the Ministry of Consumer and Business Services in 2001 to provide comments about what was then only a draft of the *Real Estate Business and Business Brokers Act, 2001*. The submissions were directed at ensuring that the revised Act continue to provide lawyers with an exemption from registration and to continue to provide the services which they provided at that time. Those services were said to be as follows:

- Receiving instructions from the client advising that a property is to be offered for sale
- Assembling relevant information about the property, including information on the title, zoning, appraised value, taxes, tenancies and the state of the market
- Drafting information or marketing materials on the property and advising on same, including advising the clients as to the legal state of the property and any disclosure obligations
- Where necessary working with bailiffs, the Sheriff's office or others to obtain possession of the property
- Offering the property for sale by tender, public auction, advertisements or informal notice to other clients or contacts
- Making arrangements for viewing of the property, for example, through liason with the vendor-client
- Drafting the form of the agreement of purchase and sale or advising the client on an offer received from a third party
- Negotiating the agreement of purchase and sale
- Holding deposits

- Undertaking the necessary legal tasks to complete the transaction, including the receipt and disbursement of funds.

So, while the above are only submissions made at that time and do not appear to be official confirmation from the Law Society that these services are all “legal services” I would suggest that they certainly provide us with reasonable guidelines as to what would be included under “legal services” for Law Society and LawPro purposes. Any reader who intends to develop his or her practice in that direction should clearly obtain confirmation from both these organizations that the services he or she intends to provide are in fact “legal services”.

In 2002 the Law Society published a text entitled “*Special Lectures 2002: Real Property Law*” which it declared in its Preface was the first Special Lectures devoted to real estate in over thirty years! An excellent article by Andrew Sanfilippo entitled “*The Real Estate Lawyer’s Duties*” contains a great review of the scope of the lawyer’s retainer, limitation of retainer, standard of care and the scope of the lawyer’s potential fiduciary duty. I recommend that article to the reader who wishes to expand on an understanding in this area.

Seller Property Information Statement (SPIS)

Historically S.P.I.S. documents were not part of the real estate landscape in Canada. They seem to have been imported, as is often the case, from our neighbours in the United States. It has been said that they were introduced to assist lazy realtors who could not be bothered to ask questions about the condition of a property and essentially made it a “do it yourself” exercise for vendors. However, it is also my suspicion that they were introduced to protect realtors from unscrupulous vendors who would deliberately keep information from a realtor so that a misrepresentation might be made regarding damp basements, roof leaks and so on. A vendor could then deflect liability from themselves onto a realtor by arguing they had been truthful and the realtor had lied. In any event, we now have these documents to contend with.

It is to be noted that an SPIS is a voluntary document. The website for the Real Estate Council of Ontario (www.reco.on.ca) points out that The Code of Ethics enacted in regulations under the *Real Estate and Business Brokers Act, 2002* contains provisions regarding the Seller Property Information Statement but goes on to say “*It does not require a seller to complete one.*” However, once an SPIS has been completed the same code requires any broker or salesperson who is aware of its existence to disclose that to every buyer and to make it available to the buyer unless they have instructions from the seller not to do so. Given the onslaught of litigation dealing with SPIS disclosure or lack thereof one has to wonder if it is in fact a breach of the realtor’s duty to a seller to even suggest one be signed! The problem is that if a vendor refuses to complete and sign an SPIS suspicion is immediately aroused that there is something to hide.

A review of the website for the Real Estate Board of Greater Vancouver (www.rebgv.org) is even more revealing. It tells us that the PDS, as the SPIS is called in British Columbia, was introduced into that Province in 1991. It acknowledges that the PDS goes beyond the current legal disclosure obligations of a seller and that it is not required by law. It also mentions that it is not a “legally-binding warranty” of the property’s condition and is not a substitute for a professional home inspection. Interesting statements because they do seem to be statements reflected in judgments across Canada as you will see. Where the Board seems to go astray is its statement that:

“By choosing to create the PDSC the Realtors of BC sought to provide the public with an additional level of certainty when they purchase a home”

What it failed to mention is that the vendors, who generally pay their commissions, were subjected to a potential for increased liability to purchasers beyond what the law already

called for. Perhaps my theory that the SPIS/PDS was promoted to protect realtors and not purchasers has some validity! In any event, what do the Courts have to say about the SPIS and how are we, as real estate lawyers, to make sense of the relationship of the SPIS to other areas of real estate practice particularly the doctrine of *caveat emptor*.

It is interesting to note that at the outset of the appeal of the *Alevzos v. Nirula* decision referred to below the Manitoba Court of Appeal noted:

“The PCS is a document recently initiated by the Manitoba Real Estate Association. While not mandatory, it is in fairly common use. Its purpose, we were informed (it would seem with caveat emptor in mind) is for vendors to advise purchasers in a simple way about the state and condition of the property.”

The question is of course; what do Courts say about the significance and effect of these disclosure documents. Let me start with a review of a decision which happened to come out of my hometown of London, Ontario and from a Judge who I had the good fortune to spend some time with during my student days at Western’s Law School. In my humble opinion Justice Gordon Killeen always gave focused decisions and one in particular warrants our attention. In *Kaufmann v. Gibson & Pettigrew* 2007 Can LII 26609 (ON S.C.) he stated the following:

“It seems that, in the past 10 years or so, similar voluntary disclosure statements to the one employed here, have been adopted by real estate boards across Canada. Almost inevitably, they have given rise to litigation over their meaning and reach”

How right he was! I have been able to find decisions across almost every Province in profusion dealing with the attempt by Purchasers to have Vendors found liable for all kinds of defects or problems because they had not been disclosed in an SPIS or as they are sometimes referred to elsewhere a PDS or PCS. In any event, while the decision did not go well for the Kaufmanns based on the specific facts of that case Justice Killeen did provide us with a reference to a leading decision written by Chief Justice Scott of the Manitoba Court of Appeal. In *Alevzos v. Nirula* [2002] M.J. No 433, 2003 MBCA 148 (Man. C.A.) the Court set out five rules which should be considered where such voluntary disclosure statements are made namely (and I paraphrase):

1. Declarations in a PCS are representations as opposed to terms of the contract

2. Statements in a PCS are not warranties. The purpose of the PCS is to put a purchaser on notice with respect to known problems and raise questions rather than provide detailed answers.
3. If a problem or defect is obvious then a purchaser cannot argue that he or she has been misled by answers to questions in a PCS and the vendor will not be liable
4. If answers are made honestly and not deliberately misleading then no liability attaches if the representation turns out to be inaccurate.
5. As these forms are voluntary lawyers and real estate agents should think twice about using them. The Court said:

“Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation. Doubtless this is due in no small measure to the problems inherent in an informal “fill in the blank” form which can have such serious legal consequences when problems subsequently develop in a real estate transaction. The wisdom of maintaining in use a form fraught with such inherent difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike”.

In addition to citing these rules with approval Justice Killeen appears to have added three “rules” of his own as follows:

1. The fact that the SPIS (because we are now dealing with an Ontario action) was incorporated into the Agreement of Purchase and Sale strengthens the position of the [party relying on it] because it is not a document outside the contract but rather a specific contractual term
2. Once a vendor” breaks his or her silence” by signing an SPIS the doctrine of *caveat emptor* falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the questions.

3. The fact that a purchaser has obtained a home inspection does not affect the vendors liability to answer for representations made in the SPIS

Chief Justice Scott in *Alevizos* effectively said that caveat emptor still applies to patent defects and had this to say in his analysis:

“There can be no doubt that caveat emptor is alive and well in Manitoba despite its well-publicized deficiencies”

and this principle was further restated by the British Columbia Supreme Court in *McIntosh v. Papoutsis* 175 A.C.W.S. (3d) 608. In that action, at the trial level, the vendor was found liable to the purchaser for alleged negligent misrepresentation by failing to disclose water issues in the crawl space of a property. However, upon appeal it was held that had the purchaser carried out a reasonable inspection the existence of a sump pump would have put the purchaser on notice of possible water issues. The Court made three points:

1. The doctrine of *caveat emptor* strictly applies in the case of patent defects
2. There is no duty on the part of the seller to disclose patent defects
3. There is a high onus a purchaser to inspect and discover patent defects by making a reasonable inspection and making enquiries into qualities of the property.

The *McIntosh* decision is mirrored in yet another B.C. case, *Miller v. Jamieson*, 2007 BCSC 1064 which was also appealed from a decision of the Provincial Court. Again, the Court held that any analysis of disclosure statements and liability for answers given must take into account the doctrine of *caveat emptor* and the distinction between patent and latent defects. In that case the vendor was taken to task by a purchaser for not pointing out in her answers that the roof needed repair even though she answered truthfully to the question are you aware of any roof leakage or unrepaired roof damage. The Court pointed out that there is a fairly high onus on a purchaser to inspect and discover patent defects.

At the other end of the Country we find a decision from the Small Claims Court of Nova Scotia, *Moffat and Barling v. Finlay et al*, 2007 NSSM 64 where the disclosure statements are referred to as a PCDS. That case involved a water line which froze in Winter (who would expect that in Nova Scotia!). In any event the Court observed that a PCDS is:

“at most a modest exception to the principle of caveat emptor or buyer beware which is alive and well in this jurisdiction”

The Court then proceeded to quote from a decision of Associate Chief Justice Smith of Nova Scotia in *Gesner v. Ernst*, 2007 NSSC 146:

“ As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she finds it unless the purchaser protects him or herself by contractual terms. Caveat Emptor.”

This quote itself came from *McGrath v. Maclean et al* (1979), 95 D.L.R. (3d) 144 which came forth from our own Ontario Court of Appeal.

In *Moffatt* the Court also went on to quote Associate Chief Justice Smith again from the *Gesner* decision:

“ A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor’s knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property.”

And finally, the Court made the observation that the PCDS is only a statement of the seller’s belief and understanding and so the purchaser’s only cause of action is for negligent or intentional misrepresentation. The case against the seller was dismissed.

It seems to me that in the final analysis the SPIS is only a problem for a vendor in two situations; if it has been contractually included as a warranty or representation in the Agreement or if “active concealment” can be argued because of untruthful , incomplete or misleading answers. In *Alevizos* the Court noted:

“Of course, as we have already seen, silence itself can constitute active concealment or tacit confirmation of an assertion that the false information is true.”

Contractual warranties and active concealment are already exceptions to any application of *caveat emptor* so, in my view, the law as it is developing with respect to SPIS and similar documents is consistent with existing law and allows *caveat emptor* to remain supreme in Canadian real estate jurisprudence.

In the “*Special Lectures 2002: Real Property Law*” which I referred to above is a section entitled “*Caveat Emptor – The Complexities of the Life and the Death of Buyer Beware*”. One of the papers in that section was written by Harry Herskowitz (with assistance from Richard Wong) and was dramatically entitled “*The Death of Caveat Emptor: Mandatory Warranties and Disclosure in New Home Purchases*” and focused only upon statutory protections provided by the *Ontario New Home Warranties Plan Act* and the *Condominium Act, 1998* and implied, if not expressly suggesting, that *caveat emptor* no longer had a place in the sale of new homes. That would appear to be exactly the case but when it comes to resale homes and the sale of other forms of real property it is my view that the SPIS controversy has not added one nail to the coffin of *caveat emptor*. It is today, as the Courts have confirmed, alive and well.

By way of a footnote, I was surprised that in the *Kaufmann (supra)* decision the Court did not address the realtor’s responsibility for the poor advice which she gave to her clients. Partly because of that advice the Kaufmann’s failed to disclose the complete history of roof problems and were unsuccessful in their action against the Purchasers in the aborted transaction. However, the Ontario Court of Appeal recently handed down a 66 page decision in *Krawchuk and Scherbak, 2011 ONCA 352 (CanLII)*. The action related to a property with such significant structural problems that after closing the City of Sudbury required the whole house to be removed and new foundations to be reconstructed. Although the appeal involved various issues the Court said in paragraph [1]:

“ the issue of primary importance raised in this appeal is the duty of a real estate agent to verify information provided by the vendor about the property that is the subject of the transaction.”

The Court's review of this issue (paragraphs 161 through 171) essentially endorsed the view that a realtor has three obligations with respect to completion of an SPIS:

1. Duty to warn sellers that they may be providing information that they are not legally obliged to provide.
2. Duty to advise that if they choose to complete an SPIS the information provided must be complete and accurate
3. The realtor must exercise reasonable care and skill in ensuring such accuracy.

The disposition of the appeal apportioned 50% of the fault to the realtor and 50% to the sellers. One telling comment in the decision was the Court's finding that the realtor treated the foundation information in a cavalier manner; an attitude which I would suggest is probably commonplace. So, perhaps we should add "realtor beware" to any discussion of the effect of SPIS and caveat emptor.

As an aside I should mention that this was a situation where Stewart Title paid a claim under the "forced removal" coverage contained in the Purchaser's title insurance policy. However, the claim exceeded the coverage limit and hence the action.

Adverse Possession: The inconsistent use factor

It may seem at first glance that the incidence of new claims for adverse possession should become less common as time goes by due to conversion of almost all real property in Ontario to the Land Titles system. This is because the *Land Titles Act*, R.S.O. 1990, c L5 Section 51 provides as follows:

“No title by adverse possession, etc.

51. (1) *Despite any provision of this Act, the Real Property Limitations Act or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription. R.S.O. 1990, c. L.5, s. 51 (1); 2002, c. 24, Sched. B, s. 40 (2).*

Operation of section

(2) *This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place. R.S.O. 1990, c. L.5, s. 51 (2).”*

However, much of the “digitalization” of title records within the system have been automated under the authority of Section 32(1) of the Act and are called Land Titles Conversion Qualified (LTCQ) properties. Claims such as adverse possession are not investigated during this process and the titles do not have the same protections applicable when the property is converted pursuant to a First Application. *Bulletin 2008-05 LTCQ Procedures* states:

“A First Application is not undertaken during this administrative conversion process. There is no survey of the property; no notice is served on interested parties and some issues that can be dealt with in a First Application such as adverse possession, cannot be dealt with. As a result, the land registration system brings the land into Land Titles with additional qualifiers to those listed in Section 44 of the Land Titles Act added to the parcel.”

This is echoed in the 2001 Client Guide for parties who wish to “upgrade” the title from LTCQ. In the background introduction to the Guide it says:

*“Accordingly, all titles for properties converted under this administrative procedure are given qualifiers that differ from the normal land titles qualifiers. A parcel register issued pursuant to the administrative conversion will show **LTCQ (Land Titles Conversion Qualified)** in the *_Estate/Qualifier_* field. These qualified titles are subject to any pre-existing claims based on possession (paragraph 44 (1) 3 of the **Land Titles Act**) and other qualifiers.”*

and continues:

*“The **Limitations Act** requirements respecting acquisition, the right to use through prescription or to bar the registered owner from commencing an action to recover an interest in land, must have been completely met before title conversion. Time stops running when lands are converted to the land titles system.”*

So the reality is that, just like caveat emptor, the threat of claims for adverse possession which might have existed at the time of conversion could still affect the title to many properties converted under the LTCQ process. That justifies a review of the requirements for adverse possession and in particular the problem of applying the “inconsistent use test”.

Section 5 of *The Real Property Limitations Act* R.S.O. 1990 c. L 15 requires ten years actual possession or in the case of a tenant at will under subsection (7) ten years plus one year from the commencement of the tenancy to establish possessory title.

Justice Wood in *MacKinnon v. MacKinnon*, 2009 CanLII 18226 (ON S.C.) said:

“The test to be applied [to a claim for adverse possession] is well known and has been applied many times. Our Court of Appeal has set it out and thoroughly discussed it in the very thorough and useful decision of Blair J.A. in Masidon Investments v Ham (1984) 45 O.R. (2d) 563 (C.A.).”

The Court then summarized the test in a quotation from *Keever v. Arillotta* which I review later in the paper.

In *Bradford Investments (1963) Ltd v. Fama*, 257 D.L.R. (4th) 347 Justice Cullity of the Ontario Superior Court of Justice dealt with a dispute between two parties over ownership of two strips of land located at the rear of residential properties in Toronto. His analysis of the law applicable to the situation started with the following reference to the requirements which must be met to establish adverse possession:

It is clear that a claimant to a possessory title throughout the statutory period must have:

- (1) Had actual possession*
- (2) Had the intention of excluding the true owner from possession*
- (3) Effectively excluded the true owner from possession*

The Court went on to list the other well established requirements to be satisfied in order to establish a claim namely,

“possession must be open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner”

The Court then focused on the requirements for legal possession and cited the words of Lord Browne-Wilkinson in *J.A.Pye (Oxford) Ltd v. Graham [2003] A.,C. 419 (H.L.)* that there are two elements necessary for legal possession:

- “1. A sufficient degree of physical custody and control (“factual possession”)*
- 2. An intention to exercise such custody in control on one’s own behalf and for one’s own benefit (“intention to possess”)*

The problem which the Court then grappled with was the second part of the test, the “intention to possess” and how that related to the doctrine of inconsistent use which has been accepted and applied by the Ontario Court of Appeal in earlier decisions. The Court noted that the doctrine had lost its sting in a persuasive manner in England thanks to the *Pye* decision but that none the less it was still applicable in this jurisdiction. In any event, the Court then went on to review comments made in *Keefe v. Arillotta (1976), 13 O.R. (2d) 722* by the Ontario Court of Appeal that there seems to be two different approaches to application of the inconsistent use test. First, if the acts of a claimant are not inconsistent with the true owner’s intended use of the land then they will not be sufficient to demonstrate an intention to exclude the owner. The other approach is to ask if the true owner has actually been excluded from possession. If the use to which the claimant has put the land is not inconsistent then the true owner cannot be said to have been excluded. So, in that case the Court held that the claimant’s use of the land did not interfere with the true owner’s intention to hold the land as an investment with a view to selling it at some future time.

In *Wood v. Gateway of Uxbridge Properties Inc et al* (1990), 75 O.R. (2d) 769 (G.D.) the Ontario Court of Appeal recognized the two different approaches to application of the inconsistent use test but unfortunately found that it was unnecessary to choose which approach to use because the test does not apply in cases of mutual mistake.

A similar result occurred in *Marotta v. Creative Investments Limited*, 2008 CanLII 15772 (ON S.C.) which was an appeal by Marotta from a decision of the Deputy Registrar of Land Titles to dismiss an objection by Marotta to an Application for registration as owner with absolute title by Creative. The objection was made on the basis of adverse possession to part of the lands subjected to the application. Marotta had used the land in many ways including: children playing there, planting trees, erecting a swing, constructing a deck, installing a sprinkler system, extended a fence, built a flower bed, cut and maintained grass on the lands, cleared snow and held social activities on the land for more than 30 years. Nevertheless, the Deputy Director applied the inconsistent use test and held that all those activities were not inconsistent with Creative's intention to hold the land in inventory until it could be developed along with other lands. The Court upheld the decision of the Deputy Director and cites with approval the earlier jurisprudence applicable to the inconsistent use test.

We have some useful insights into the application of the inconsistent use test in the appeal of the trial judgment in *Elliott v. Woodstock Agricultural Society* 2008 Carswell 5625, 2008 ONCA 648. The facts were that during a period 23 years the Elliotts had fenced off lands owned by the Society, cleaned away dead trees and other acts which they then claimed established adverse possession. The Application Judge concluded that the Elliotts had established open, notorious, peaceful, adverse, exclusive, actual and continuous possession of the lands with the intention of excluding the Society and finally that the Society had discontinued its possession thereof. The Elliotts were therefore declared to be the lawful owners of the disputed lands. The Court considered the inconsistent use test but held the Society could not rely upon some intended future use but the intended use applicable during the running of the limitation period. On the Appeal it was noted that the very cases cited in the decision, *Masidon Investments Ltd v. Ham* (1984), 45 O.R. (2d) 563 (Ont. C.A.) and *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (Ont. C.A.) made it clear that the Society could indeed rely on holding the lands for future development.

There are useful comments in the Appeal decision which provide some insight as to why the test still has vitality. For example:

“The same act or acts of trespass may be highly significant to the owner of a house or garden, yet utterly trivial to a property developer or an industrialist who has no immediate use for the land affected”

The Court acknowledged that it may very well be that possessory title cannot be obtained against “development land” which is in the holding stage. However, the Court also noted that the *Limitations Act* was not enacted to promote the obtaining of possessory title. In the end result the Court of Appeal held that the Society could indeed rely on its position that it was holding the lands for future development and its appeal allowed.

It may be that the inconsistent use test is in essence a test to establish if the true owner is or should have been on notice of another’s attempt to assert possession and control and that title may be in jeopardy. Indeed, in *Hanchiruk v. Oliveira et al.*, 2010 ONSC 4675 the Court considered the inconsistent use test but also noted:

“ the activities on the portion that was visible were readily apparent and certainly sufficient to put the owner on notice that the Oliveiras were treating that property as their own”.

However, the Court did find that possession was based upon mutual mistake in that the Oliveiros believed they owned the land and the Plaintiff did not appreciate that the land was actually hers.

In the end, we are left with the inconsistent use doctrine as a consideration along with all the other usual factors when attempting to advance claims for adverse possession.

A useful review of what constitutes possession can be found in *Mueller v. Lee*, 2007 CanLII 23914 (ON S.C.) yet another case of neighbours warring over strips of land. Justice Perell prior to embarking on a review of the subject said:

“The notion of possession is a profound and important concept to the law”

Prescriptive Easements

I should perhaps add a few comments about prescriptive easements. While not claiming possession of land it is asserting a right to use another's land without the benefit of consent or an express easement by establishing a long period of user.

In order to establish a prescriptive easement a claimant must establish continuous, open, uninterrupted and peaceful use without the consent of the true owner. In *Piekarczyk v. Zebrowski*, 2010 ONSC 5423 two neighbours found themselves embroiled in a dispute when one of them built a new fence and thereby restricted the other's ability to access a garage in the rear of the property. The applicant in the action claimed adverse possession of a small area of land together with a prescriptive easement and/or an easement of necessity.

In the first instance, the Court pointed out that acquisition of proprietary right by adverse possession is unavailable under the Ontario Land Titles system. Accordingly, any claim to adverse possession or a prescriptive easement must have occurred (i.e. manifested itself) prior to the date of conversion.

The claim for adverse possession of a small triangular parcel was not made out because the applicant could not show exclusion of the registered owner.

The claim for an easement of necessity was also to no avail because there was no issue of access to the applicant's property.

Finally, with respect to the claim for a prescriptive easement the Court stated:

"To establish an prescriptive easement, the applicant has the onus to establish that for a period of at least 20 years prior to first registration in the Land Titles system there was continuous, open, uninterrupted and peaceful use by the occupiers and that use was without permission by the owners."

The Court found that the evidence did not support continuous uninterrupted use of the driveway and so the claim failed on all counts.

Perhaps a more unsettling case was unraveled in *Kaminskas v. Storm*, 2009 Ont. C.A. 318 (CanLII). In that matter the Kaminskas and Storm families lived next door to each other in what was described as modest homes in Niagara Falls, Ontario. The homes were separated by a single paved driveway which encroached upon the Storm property

by 3 feet. The driveway was not wide enough for vehicles to drive or park between the properties but nonetheless was used by Kaminskis for more than 56 years. The user was acknowledged at trial as being with the consent of the predecessors to the Storms but, as is often the case, the situation changed when the Storms purchased in 2006. A dispute soon erupted between the neighbours about the use of the Storm property and so, in an effort to resolve the problem, the Storms erected a fence and concrete curb down the middle of the driveway. Mr. Kaminskis was not pleased with this development and applied, successfully, for a declaration that he was entitled to a prescriptive easement. The Storms appealed.

The Court of Appeal said that in law there are three ways in which an easement may be acquired by prescription:

“a) prescription at common law

b) prescription by the doctrine of lost modern grant and

c) prescription by statute (Real Property Limitations Act)

The Court went on to mention that a prescription at common law is no longer relevant because:

“It requires use of the disputed right since “time immemorial”. Time immemorial, for purposes of the period of legal memory is defined as the year 1189, the beginning of the reign of King Richard I. It is said that prescription by common law cannot exist here because there is no legal memory on which to found it.”

The analysis went on to point out that the doctrine of lost modern grant is alive and

“if not well, is at least surviving in the province of Ontario”

and further stated:

“ the courts will presume that there must have been a grant made sometime, but that the grant had been lost. Uninterrupted user as of right at any point in time will create the prescriptive easement under this doctrine, provided it was for at least 20 years.”

It was also pointed out that the *Real Property Limitations Act* allows for recognition of a prescriptive easement provided it has been enjoyed for a period of at least forty years and the Court did go on to mention that the statutory provisions in Sections 31 and 32 of the Act do not displace the right to establish a a prescriptive easement based upon the doctrine of lost modern grant.

So, we than have to look at what characteristics are essential to establish a prescriptive easement irrespective of whether we use the statutory framework or the doctrine of lost modern grant. The Court in *Kaminskas* set out those characteristics as follows:

- “a) there must be a dominant and servient tenement*
- b) an easement must accommodate the dominant tenement*
- c) the dominant and servient owners must be different persons and*
- d) a right must be capable of forming the subject matter of a grant*

In addition to meeting these requirements the Court indicated that the right must be shown to have two other qualities:

- “ i) continuous*
- ii) “as of right”*

There was no doubt from the evidence that Mr. Kaminskas had used the right continuously for many years. The appeal then hinged on whether or not the user was “as of right”. The Court said that user “as of right” means that the use has to be uninterrupted, open, peaceful and without permission for the relevant period of time.

The evidence of the predecessors to the Storms was clear that they had given permission to Mr. Kaminskis to use the driveway not that they had acquiesced to such use. Accordingly, as user was with the consent of the adjoining owner any claim for a prescriptive easement is defeated.

The reasons given in this appeal also discusses, although not relevant to this discussion, some of the nuances in the application of statute or lost modern grant not only as to the length of user but the manner in which permission is given; oral or in writing.

I am sure many readers have shared my experience that the existence of mutual driveways, user of single driveways and other types of access, shared or otherwise, can present post-closing difficulties in the real estate transaction just as in the *Kaminskas* scenario. It is obviously helpful to discuss driveways and access with clients if such issues are evident from a copy of the listing agreement, a reference in the Agreement of Purchase and Sale or title shows a formal easement or right of way.

Conclusion

Jurisprudence dealing with creation of real estate contracts, the continued prominence of the doctrine of *caveat emptor*, and the continued threat to ownership posed by claims of adverse possession are as relevant today as they were a century ago. Continuing to look for developments in these areas and to be on guard for the implications for our role as real estate lawyers is the challenge we faced yesterday, today and will continue to face in the future. I trust that my modest contribution will be useful to the reader.

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