CLIA

CANADIAN LAWYERS INSURANCE ASSOCIATION

ASSOCIATION D'ASSURANCE DES JURISTES CANADIENS

AAJC

C B E L A
THE CANADIAN BAR EXCESS LIABILITY ASSOCIATION

ASSOCIATION D'ASSURANCE RÉSPONSABILITÉ EXCÉDENTAIRE DU BARREAU CANADIEN

AAREBC

Editor: Tana P. Christianson

600, 919 - 11th Avenue S.W.
Calgary, Alberta, Canada
T2R 1P3
Tel: (403) 229-4714
Fax: (403) 228-1728

LOSS PREVENTION BULLETIN

ISSUE NO. 34 JANUARY 2003

All Loss Prevention Bulletins are on line.
Go to www.clia.ca, click on "Site Map". You'll find the Bulletins under "Documents".

FAREWELL TO BARRY

For the first time since 1991, CLIA's Loss Prevention Bulletin has been produced without the supervision and guidance of Barry Vogel, Q.C., long time chair of CLIA's Loss Prevention Committee and the Law Society of Alberta Practice Advisor. Barry, who recently resigned as CLIA's Loss Prevention Chair, has announced that he will be retiring from his position as Law Society of Alberta Practice Advisor in the Spring of 2003. Barry has worked tirelessly and, at times, single-handedly to make lawyers' professional liability insurance unnecessary, by urging us all to adopt safe and effective practice principles to prevent losses and resulting claims. We wish him well in his upcoming retirement.

■ Bulletin #146

Standard Caveats:

From time to time, real estate practitioners debate whether they really need to order and review with their clients the seemingly standard caveats, by-laws and other orders frequently endorsed on title. We understand that there might be a temptation to not bother getting copies of those kinds of registrations, because they're generally

- old (which means the Land Titles Office or Land Registry Office needs a lot of time to find and copy them)
- lengthy (which translates into bigger costs both in copying fees and in lawyer's time for reviewing them)
- standard (that is to say, "I can predict what the Agreement says just from who the Caveator was and when it was filed") and
- inevitable ("municipalities and utilities have overriding rights to everyone's property, and there's not much clients can do about it").

If you take that approach, you do so at your peril. The Courts have affirmed this. In a case against a law firm, while the client couldn't prove damages flowing from the solicitor's conduct, the Court clearly found that the lawyer was in breach of his duty in not obtaining and reviewing with the purchaser two encumbrances on title. One was an Order for closing a government road allowance. The second was the Crown's caveat regarding "pipes", which the solicitor believed pertained to the installation of town water pipes. In opining to the purchaser that neither encumbrance would affect the marketability of the purchaser's property, the lawyer was making "nothing more than a calculated guess", the Judgment indicates, since the instruments had not been investigated. The Court had the following comments:

> "It is true to argue that in the final analysis the encumbrances could have been removed as not affecting the title. The entitlement to remove these encumbrances in and of itself is information of importance to a purchaser. It is also true that the encumbrances did not affect the marketability of the property, but the mere failure to investigate and/or seek direction after advising of their likely effect was, in my view, a breach of duty. How would a solicitor have known with certainty the encumbrances did not affect the marketability unless the documents were reviewed?"

■ Bulletin #147

Ensure you're not the Insurer

We all take comfort from the law's acknowledgement that the lawyer is not the client's insurer and is not responsible for the natural consequences of the client's contracts. Sadly, though, that doesn't mean that you won't be the target of a claim any time the client's deal goes sideways or has unpleasant and unforeseen consequences. Human nature discourages clients from seeing themselves as the authors of their own misfortune; it's often more gratifying – and rewarding – to find a lawyer to blame.

As always, the best defence to that sort of claim is written evidence of the scope of your retainer. A formal retainer agreement may not be appropriate on every file, but regular letters to the client, which confirm what you'll be doing for the client and, more importantly, those aspects you will not be looking after, make for both good client relations and a safer practice.

Two recent claim scenarios illustrate the risks of proceeding simply on the basis of oral discussions or, worse yet, the lawyer's inference of the scope of his retainer.

1. With his lawyer's help, the client submits an Offer to Purchase a quarter-section of farmland. The owner counters the offer by deleting the purchaser's condition for early possession. The lawyer explains to the client that there is disagreement on that fundamental term, and advises the client to call the owner directly to discuss resolution of the issue. As far as the lawyer is concerned, his retainer is then "on hold" pending notification from the client that a deal has been reached or that some other services are required. Unbeknownst to the lawyer, the client decides that he can live with the terms the owner has proposed. He assumes that his lawyer is sorting through the legal wrinkles. Not appreciating that the owner's terms constitute a counter-offer which must be accepted to be contractually binding, the client happily turns his attention to other closing matters. By the time the lawyer and client discover the misunderstanding, the owner has withdrawn his counter offer and sold the land to a third party.

2. The second scenario is common to every Lawyers Professional Liability Insurer, and arises from the commercial transaction which has unexpected and unpleasant tax consequences to the client. Frequently, an accountant has been consulted about some aspects of the deal. Although the lawyer has no direct dealings with the accountant and, in fact, the client is never questioned about the extent of the accountant's retainer, the lawyer takes comfort from his assumption that someone else is worrying about "the numbers". When the transaction triggers massive and avoidable tax liability, who's at fault? Unless the lawyer can produce some evidence that the income tax ramifications of the transaction were not his responsibility but were that of the client or other professional advisors, there is every possibility that the court will find the lawyer liable, on the basis that tax matters do regularly fall within the standard retainer of solicitors acting on such transactions.

Remember too that, once the scope of a non-written retainer becomes an issue, the lawyer cannot sit back and wait for the client to prove that the lawyer had a duty to attend to the matter. In fact, there is a reverse onus here. Where an issue arises as to the scope of a solicitor's retainer and the retainer has not been reduced to writing, the onus of proof lies upon the solicitor; if there is doubt at the end of the hearing, that doubt will be resolved against the solicitor.

■ Bulletin #148

Beware the Zebra

The medical profession has a maxim: "if you hear hoofbeats, expect horses not zebras"; direct the diagnosis first towards the symptoms of the common ailment, rather than searching for signs of the obscure and exotic disease. Lawyers tend to focus their thinking in the same way. Experience in a practice area leads to settled expectations of how the file will proceed. The risk is that expectations can lead to complacency or reduced vigilance. In the context of real estate or commercial transactions, lawyers must guard against the tendency to assume that searches will yield the usual results or the mindset that, since the vendor and his mortgagee have acquiesced in a certain title registration, it must not pose a material threat to the purchaser's interests. In other words, if it sounds like a horse, it must be a horse.

A recent review of an insured lawyer's file on a residential purchase evidenced this kind of thinking. The lawyer's standard instructions to his support staff included this direction:

> "Land Titles Office/Registry Office -
>
> 1. Order any encumbrance that is not a utility or city caveat, or mortgage. (Order anything unusual)."

The lawyer who elects not to review copies of encumbrances, whether "standard" utility caveats or any others, on the naïve reasoning that they are usual and therefore harmless, does so at her own risk. The standard of care and skill expected of a lawyer calls for due diligence and thoroughness. To meet that standard of care, the lawyer must take all reasonable and prudent precautions against known risks. When it is ultimately discovered that that harmless utility caveat gives the caveator special rights to excavate directly under the purchaser's garage, it will be no defence to say that the caveat did not look "unusual".

Failure to review copies of title encumbrances had catastrophic consequences for one client. The lawyer was retained to act on the purchase of a large tract of vacant rural land on which the client intended to construct a home. Registered against title was a 1964 caveat filed by the gas company. The lawyer did not order and review a copy of the caveat, reasoning that:

- as far as he knew, it was not the practice of his local colleagues to order copies of utility caveats;
- the Land Titles Office often had difficulty producing copies of old registrations, and sometimes it cost the client an extra $10 or so to have them located;
- the Builder would ensure that the location of the buildings would not interfere with any underground lines.

In fact, the Builder did arrange to meet on-site with a field representative of the gas company, in the course of which the gas company's pipeline was identified. The advice of the gas company representative was that the home should not be built within five feet of the pipeline, and the builder complied.

Ultimately the house was constructed and the client moved his family into the home. Imagine the homeowner's horror when he was later notified by the gas company that the home was constructed on the right-of-way granted to the gas company for the installation and operation of a high pressure gas transmission line servicing a substantial portion of the province. The right-of-way designated a fifty foot strip within which no structure could be located. As the location of the house created a situation of extreme danger to the client's family and property, the client was required to relocate the entire home at significant cost.

The take-home lesson is obvious. The lawyer who does not order and review any encumbrance on title may be failing to take reasonable and prudent precautions against known risks, which is the duty of care required of him. For the sake of saving a little time and a few dollars, that lawyer is effectively insuring the client against any loss or damage which ultimately flows from the exercise of the caveator's rights. He's just bought himself a zebra.

■ Bulletin #149

Mobility – Practising Law across Provincial Borders

Over the last several years, the ability of Canadian lawyers to move from province to province and to take on cases in other jurisdictions has been greatly expanded. Lawyers can take on files which span provincial borders, act for clients on transactions closing in other provinces, and carry on as counsel in litigation outside of the jurisdiction, all without obtaining a call to the Bar or even an occasional call certificate in many of the other jurisdictions.

Before targetting those extra-provincial markets, ask yourself this: just because you can take on work in another jurisdiction, should you?

While there are similarities between the laws of all Canadian provinces, there are also fundamental differences. Legislation certainly differs, although it is easier now to review other provinces' legislation on-line (but check to see that the on-line version you are reviewing is the current version). There are huge discrepancies between provincial limitation periods. Other significant differences exist in court procedures. Some procedures are clearly prescribed in the Court Rules of the various jurisdictions. However, the way procedures are applied can vary from jurisdiction to jurisdiction. For instance, in some Courts, missing a deadline for filing a Statement of Defence or serving pleadings can be easily remedied by motion. In other jurisdictions, missing such a deadline can be absolutely fatal to the action. Outside of the courthouse, the process, procedures and protocols of local practise may differ radically from those in your home jurisdiction or, and this may be worse, may be similar in all but some respects, lulling you into a false sense of security.

Before you take a file in another jurisdiction, assess whether it's worth your time (and your client's money) to familiarize yourself with the legislation, processes and case law of the jurisdiction, or whether it might be more effective to simply retain counsel in the appropriate province.