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Claims Wise No. 27: Who Reads the Abstract? by Jack A. Innes, Q.C.

A recently reported claim has highlighted once again the importance of carefully reviewing, in advance of closing date, the abstract materials prepared by title searchers. Strange as it may seem, the failure to properly review delegated work is one of the categories of claim within the general heading, Real Property, where a large percentage of claims are placed. I say "strange" in view of the fact that lawyers either pay independent title searchers a separate fee for a search or pay the salaries of in-house searchers to produce this information. Having gone to such lengths, why would one then not bother to carefully peruse the information before acting upon it?

The case in point involved an insured receiving instructions to place a blanket mortgage on several properties owned by the mortgagor. The instructions indicated that the mortgage in question was to be, in addition to the others, a second charge on a specific property on a specific street in Halifax. The mortgagor also owned another property on the same street in Halifax although that additional property was not to form any part of the security in the specific blanket mortgage. Eventually the mortgagor in question defaulted on its obligations under the first mortgage and foreclosure proceedings were commenced. It was then learned that the insured's client's mortgage which was to be a second charge on the property was in fact a third charge subject not only to the known first mortgage but also a collateral second blanket mortgage held by the same mortgagee who was foreclosing the first mortgage.

It is clear from a review of the abstract produced prior to the closing of this transaction that the offending second collateral mortgage had been abstracted by the title searcher. The lawyer reviewing the abstract reports that, while he or she may have noted the document in question, he or she believed it applied to the mortgagor's other property on the same street. A preliminary certificate was prepared to the client mortgagee and no further reference to the abstract was made throughout the period of time when funds were disbursed on this mortgage.

The claim payment with costs exceeds $75,000.

It is interesting to note that more than one lawyer handled the file in question, although one of the two lawyers apparently relied on the preliminary certificate prepared by his or her partner. It is also interesting to note that apparently no inquiries were made of the title searcher to clarify whether or not the offending second mortgage was secured in part by the subject property.

The lessons to be learned from this file seem obvious; however, they bear repeating. As fewer lawyers search titles themselves and delegate this task to in-house or independent searchers, it becomes more and more imperative that the lawyer giving the certificate **carefully** review the contents of an abstract prior to closing. It is surprising indeed to note that often an offending mortgage, judgment or mechanics' lien which gives rise to a claim is noted in an abstract which has gone unnoticed by the insured lawyer.

Some tips:

I. In complicated matters, it is wise to have more than one solicitor review the abstract as a

backup and discuss the outcome of the review, particularly in relation to anything which may be ambiguous;

II. A complete review of the abstract should be carried out not only at the time a preliminary certificate is prepared to a lender but also prior to actually disbursing the proceeds. If there are several draws on the loan, prudence would indicate that the abstract should be looked at each time to confirm the results of subsearches;

III. If a file is handled by more than one lawyer, each should consider it his or her responsibility to carefully review the abstract and not assume the other has done so;

IV. Allow sufficient time for the completed abstract to be delivered for actual review by the responsible lawyer. Do not depend upon telephone advice from the searcher or executive summaries of encumbrances.

Claims Wise No. 28: Statutory Declarations re Judgments

By Thomas O. Boyne, Q.C.

Real estate practitioners are familiar with the practice of obtaining statutory declarations from vendors (or predecessors in title) disclaiming judgments which have been filed against persons with the same or similar name. Some seem to be of the view that such a declaration is protection in the event it is determined that the judgment debtor is in fact one and the same as the vendor (or predecessor in title). It is NOT.

Section 18 of the *Registry Act* provides in part that "a judgment, . . . shall, . . . be a charge upon any land . . . of any person against whom the judgment was recovered . . . "

A declaration is nothing more than a statement of fact. Each time a lawyer accepts a statutory declaration, he or she is accepting the risk that the attestations contained in the declaration are true. If they are not, the lawyer has little defence and is likely liable for the full amount of the judgment.

It is the practice among some practitioners to prepare a declaration based only on the particulars to be found in the certificate of judgment recorded at the Registry of Deeds and to have the vendor or vendor's predecessor in title disclaim whatever was on record. This is a poor practice and one which has recently given rise to possible claim. The declarant/vendor swore a false affidavit disclaiming the judgment when in fact the judgment was outstanding against him.

Each time a solicitor relies on such a declaration he or she is assuming risk. The risk ought to be kept to a minimum by making as many inquiries as possible with respect to the judgment debtor, in order to ensure that the declarant is not falsely completing the affidavit. In this regard not only should the Registry of Deeds records be reviewed, but also the court file to determine as many particulars as possible which can be included in the declaration.

I would also suggest that the solicitor taking the affidavit has a duty to inquire of the declarant in some detail to ensure the declarant fully understands the nature and effect of the judgment and to reasonably ensure that the declarant is not one and the same as the judgment debtor.

Obtaining full particulars of the debt and the judgment, and ensuring they are specifically disclaimed in the affidavit and that the declarant fully understands what he or she is disclaiming, does not absolve the lawyer in the event that the declarant falsely swears the affidavit. What such inquiries do however, is diminish the risk to acceptable limits.

Failure to make such inquiries and to take such care has an expensive price tag: the $5,000 deductible under your policy.

Clamis Wise No. 29: Certifying the Uncertifiable - Chattels

by Robert W. Wright, Q.C.

It has come to light from a couple of recent claims files that there are some practitioners who are certifying title to their purchaser clients upon the acquisition of a chattel. Worse still, in the two instances I have seen, the form and wording of the certificate of title is patterned after one which would normally be used to certify title to a piece of real property.

This practice, however widespread it may be, is a

minefield for claims. There simply is no adequate means of ascertaining or confirming title to chattels in Nova Scotia through public records. Transfer of ownership of chattels does not solely depend on the records maintained in the Bills of Sale registry in the Registry of Deeds office. It perhaps depends as much as anything else on delivery of the chattel to the buyer. As we all know, there are various rules set out in the *Bills of Sale Act* and *Sale of Goods Act* governing the transfer of title in personal property matters.

While it is appropriate for a lawyer to provide a report to the purchaser client that certain searches have been carried out at a Bills of Sale registry, with advice as to what was or was not found in the records there, to go beyond that and to certify title to the chattel(s) being acquired is to invite a claim. It is simply not possible to reliably trace the ownership of a chattel through the records of a Bills of Sale registry, nor is that even the purpose or intention behind maintaining such a registry. It follows that there is no basis upon which a certificate of title to a chattel can be given to a client. Any lawyer who does so will not be long in suffering the consequences and also exposing the Liability Claims Fund to an indefensible claim. ■