FROM OUR SOLICITOR

Your Search Responsibilities

The Question

"B undertakes a survey in 1966 under the Registry system and prepares a plan of survey. In the course of searching the property, he obtains copies of the current deed to the property and that of adjacent lands and copies of prior deeds to the property in question. No discrepancies appear on the deeds in question with respect to the description and the survey is completed and delivered to the owner of the property for whom the survey was commissioned. A year later, it is discovered that there exists a right-of-way over the property which was surveyed, which right-of-way was created 42 years ago, but never mentioned in any subsequent documentation on title. Is the surveyor liable to the client in damages for failing to indicate the right-of-way on the plan of survey which he signed?

The Answer

The operative sections of the Registry Act are Sections 111, 112 and 113. The general rule in Section 111 of the aforesaid Act is that a person dealing with land shall not be required to show that he is lawfully entitled to the land as owner thereof through a good and sufficient chain of title during a period greater than the 40 years immediately preceeding the date of such dealing. That is to say that if there is 40 years' good root of title, then the subsequent owner takes in fee simple and any problems prior to that are of no concern to the subsequent owner. However there are exceptions to this basic 40 rule with respect to root of title and it is with these exceptions that this particular problem must confront itself.

For example, in Section 112 of the statute, it states that a claim that has been in existence for longer than 40 years, (and in this case we are dealing with a right-of-way which is 42 years old) does not effect land to which this act applies unless the claim has been acknowledged or specifically referred to or contained in an instrument or a notice registered against the land within the 40 year period which is referred to in Section 111 of the statute. However, Section 112 does not apply to a claim of the Crown reserved by Letters Patent, a claim of any municipality in respect of any public highway, a claim of a corporation authorized to construct a railway, a wife's claim to dower, a claim to an unregistered right-of-way or other easement or right that a person is openly enjoying and using, or a claim to a freehold state in the land or an equity or redemption by a person shown by the abstract for the land as being so entitled, prior to any 40 year period and continuously shown by the abstract index for the land during the 40 year period and thereafter as being so entitled.

It is submitted that the following propositions appear to be in order with respect to Sections 111, 112 and in addition Section 113:

(a) By Section 112 (1) a claim that has been in existence longer than 40 years does not affect the land unless registered within the 40 year period as prescribed in Section 111.

(b) By Section 112 (2) (f) this does not apply to a claim of freehold which arose prior to the 40 year period as mentioned in Section 111, and is continuously shown as such during the 40 year period, or as in Section 112 (2) (e) a claim to an unregistered right-of-way or other easement or right that a person is openly enjoying and using.

(c) By Section 113 (2) a claim which has expired under Section 112 (1) can be registered anyway if no intermediate registered dealings during the 40 year period have been made by a competing holder. (Therefore the situation is as follows: If in fact the root of title is exactly 40 years old, and that is to say a deed exists which was made in 1936 which does not mention the right-of-way and no subsequent deed mentions the aforesaid right-of-way, then provided no one has registered any notice of claim, that the right-of-way exists subsequent to 1976, Section 111 comes into operation and the title is clear and the surveyor is not liable).

It is also submitted that the same situation applies even if a good root of title requires that one go back beyond the 40 year period as outlined in Section 111, by virtue of the fact that there is no deed registered exactly 40 years prior to the transaction, thus requiring a further search prior to that time to establish the requisite good root. If this is the case, then the point is that if there has been no reference to the right-of-way in the preceding 40 years from the date of the transaction or survey, and the right-of-way is not an exception under Section 112 (2) as being openly used and enjoyed, then if nothing has been done to register a notice of the right-of-way in the intervening period since it was last referred to, then once 40 years has expired and the reference to the right-of-way has not yet been referred to, the claim of right-of-way under Section 112 (1) loses its validity.

If either of these exceptions to which I have referred exists i.e. if the right-of-way is being openly used and enjoyed, or if a notice of the right-of-way has been placed on title subsequent to the 42 year old deed, then the surveyor would have had to indicate the same on his survey and could be found liable to his client for failing to indicate the right-of-way claim, and would thereby be in the position of having negligently omitted to acknowledge the existence of this cloud on the plan of survey and therefore on the title.

In conclusion, the overriding factor in this type of situation where a surveyor's responsibility is being questioned, relates to the instructions which he has received from his client and the care with which he (the surveyor) carries out those instructions. In the particular fact situation at hand, the surveyor, if he searches prior deeds, should be aware of the fact that he will rarely find a deed that is exactly 40 years prior to the impending transaction and will often have to go behind the 40 years to find a good unclouded root of title, and if that is the case any cloud subsequent to that time must be acknowledged by him on any plan of survey. The final resolution as to whether a surveyor would be liable, civilly, for situations of this sort would depend as I have indicated on the instructions which he has received, and therefore to protect yourself as surveyors from exposure to civil actions for mistakes which could possibly arise, it is always wise to obtain in writing the specifics of your instructions from your client so that if there is a conflict further down the road, then you will be in a position to know exactly what your responsibilities at the time were and not be exposed to liability for responsibilities which you did not initially incur.